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OKLAHOMA COUNTY
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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA FARM BUREAU LEGAL FOUNDATION, et al.,	)	
Petitioners,	)	
v.	)	**Case No. CV-2013-2414**
OKLAHOMA WATER RESOURCES BOARD,	)	
Respondent,	)	**District Judge Barbara Swinton**
v.	)	
TISHOMINGO NATIONAL FISH HATCHERY,et al.,	)	
Other Parties of Record.	)	

OBJECTION AND RESPONSE TO PETITIONERS' MOTION TO SUPPLEMENT ADMINISTRATIVE RECORD WITH SEPTEMBER 14, 2012 ATTORNEY MEMORANDUM

Robert Singletary, General Counsel, OBA #19220
E-Mail: Robert.Singletary@owrb.ok.gov

Sara D. Gibson, OBA #20214
E-Mail: Sara.Gibson@owrb.ok.gov

Jonathan Allen, OBA #22048
E-Mail: Jonathan.Allen@owrb.ok.gov

OKLAHOMA WATER RESOURCES BOARD
3800 North Classen Boulevard
Oklahoma City, Oklahoma 73118
Telephone: (405) 530-8800
Facsimile: (405) 530-8900

ATTORNEYS FOR RESPONDENT
OKLAHOMA WATER RESOURCES BOARD

AFFIDAVIT

STATE OF NORTH CAROLINA)
)
COUNTY OF Forsyth)

I, Emily Hammond Meazell, being first duly sworn, upon my oath state:

1. I am currently employed as a Professor of Law at the Wake Forest University School of Law in Winston-Salem, North Carolina. Prior to the current 2012-2013 academic year, I was employed as Associate Dean for Academic Affairs, Associate Director of the Law Center, and Associate Professor at the University of Oklahoma College of Law in Norman, Oklahoma.

2. Beginning in March 2012 I served as a Hearing Examiner on a contractual basis for the Oklahoma Water Resources Board ("OWRB") in an administrative proceeding to determine the maximum annual yield ("MAY") of the Arbuckle-Simpson Groundwater Basin located in south central Oklahoma. I will refer to that proceeding as the "A-S MAY Proceeding."

3. In the course of my work as Hearing Examiner in the A-S MAY Proceeding:
   a. I conducted a pre-hearing conference on May 9, 2012, in Ada, Oklahoma, during which I granted in part and denied in part certain Protestants' Motion in Limine;
   b. I conducted a hearing on the record on May 15 and May 16, 2012 in Sulphur, Oklahoma;
   c. Following the hearing, I gave participants the opportunity to file post-hearing briefs and took the matter under advisement. Because the parties may have needed additional time to assess the expert evidence that was presented for the first time at the hearing, I also stated that I would permit motions to admit additional evidence. Only one party sought to do so on a matter unrelated to the MAY; this motion and its disposition are addressed in the Proposed Findings of Fact, Conclusions of Law, and Board Order ("Proposed Order"), which is attached hereto as Exhibit 1 and speaks for itself;
   d. Although entirely hypothetical, had a party moved to submit additional evidence relevant to the MAY itself, I would have considered such motion and, had I granted such motion, I would have re-opened the record to permit full adversarial consideration of the evidence;
   e. In July 2012, I began drafting the Proposed Order for recommendation to the OWRB members;
   f. In drafting the Proposed Order, I considered the evidence admitted into the record, and the briefs and other materials filed after the hearing by the parties;
   g. In August 2012, I communicated by telephone with Dean Couch, who was OWRB's General Counsel at the time, to inquire about obtaining

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 Meazell

The foregoing was acknowledged before me this 6th day of February, 2013 by Emily Hammond Meazell.

Sonya Casstevens Jones
Notary Public

My Commission Expires: 10-7-2015

(SEAL)

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

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Other Parties of Record.	)	

AFFIDAVIT OF HEARING EXAMINER

COUNTY OF _____)
DISTRICT OF COLUMBIA: SS) SS
STATE OF _____)

Emily Hammond, the undersigned affiant, being of lawful age and duly sworn, states as follows:

1. I am Professor of Law at the George Washington University Law School, and I have previously taught at University of Oklahoma College of Law, and Wake Forest University School of Law.

2. During my time at the University of Oklahoma College of Law and for some months thereafter, I also served as a part-time hearing examiner for the Oklahoma Water Resources Board (Board) from 2007-2013.

3. In May of 2012, I presided over the prehearing conference and two-day hearing for the determination of the Maximum Annual Yield for the Arbuckle-Simpson Groundwater Basin underlying parts of Murray, Pontotoc, Johnston, Garvin, Coal, and Carter Counties in Oklahoma ("A-S MAY Proceeding").

4. At the conclusion of the A-S MAY Proceeding, I issued an order setting forth a timeframe during which the parties had the opportunity to file post-hearing briefs,

responses, and comments. All the named parties submitted post-hearing materials, as did many other individuals.

5. Thereafter, I began drafting a Proposed Findings of Fact, Conclusions of Law, and Board Order ("Proposed Order") for consideration by the nine-member Board at one of its regular meetings.

6. In the process of preparing the Proposed Order, I sought assistance from the legal staff of the Board in locating testimony or other evidentiary materials on certain issues in the extensive record taken during and after the hearing. The Board's legal staff also provided input and reference to other portions of the record that they thought might assist me regarding those same issues.

7. A redacted memorandum from the Board's legal staff is attached hereto as "Exhibit 1."

8. Based on my recollection of the memorandum in question, and my recent review of the unredacted memorandum to refresh my memory, I can confirm that the redacted portions of the memorandum contained no new evidence, data, or technical information.

9. Likewise, the redacted portions of the memorandum contained no new arguments or comments that had not already appeared in the record.

10. In accordance with the mandate of the Oklahoma Supreme Court in Arbuckle Simpson Aquifer Protection Federation of Oklahoma, Inc. v. Oklahoma Water Resources Board, 2013 OK 29, I disclosed certain communications to all interested parties, and received responses from said parties to the record.

11. The Proposed Order was provided to all parties before being considered by the Board.

12. 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.

Emily Hammond

DISTRICT OF COLUMBIA: SS

Subscribed and sworn to before me this 4th day of September, 2014.

Veronica Sevier

Notary Public, DC

My commission expires:

FEBRUARY 14, 2017

VERONICA SEVIER NOTARY PUBLIC DISTRICT OF COLUMBIA Exp. 2/14/2017

My commission number is:

NONE

Evidence to answer inquiries by Professor Meazell: 9/14/2012

1. Amount of water in storage: 9,408,461 AF vs. "about 11,000,000" AF

The latter figure is in OWRB Exhibit 5 (the March 13, 2012 Tentative Order approved and signed by the Board) at page 3, Tentative Finding paragraph no. 6. It is based in part on an average saturated thickness of 3,400 feet (id.).

The former figure is in OWRB Exhibit 4 (the PowerPoint presentation made by Julie Cunningham at the February 13, 2012 Board meeting). It is based in part on an average saturated thickness of 3,000 feet (id.).

Staff's evaluation is that this difference is immaterial for the reasons stated in OWRB Exhibit 5 at page 6 and following, particularly the last sentences of Tentative Conclusions paragraphs nos. 3 and 4 and paragraph no. 5.

2. "Why Scott Christenson used the model he did rather than the model used by Dr. Poeter"

OWRB Exhibit 10, Slides 30 and 31;
Testimony of Scott Christenson, Hearing Recording Part 6, 1:00 through 4:30 and following; and
OWRB Exhibit 1:
Abstract, page 1 first paragraph and page 2 third paragraph and following; and
Pages 80-89

Staff points out that Dr. Poeter did not develop a different model of her own; she used the model used by Christenson and USGS, and asserted that the parameter for the storage coefficient should be changed. Aside from this different input, she did not recalibrate the model and did not run it to see what the result would be. See the testimony of Dr. Poeter, Hearing Recording Part 9, 10:40 through 12:42:

> "…I believe that the other issues will also make a difference, but I did not take the time to start working on those and recalibrate the model. I mean, even with my addition of unconfined storage coefficient I'm not saying that's the right number, or that it gives us the right answer. It was just that I said, whoa, this is an issue; I wonder how much difference including the unconfined zone can make. And so I made a very simple run to find that out. Now if someone decides that they're going to change the model and put that in and they really need to consider the whole calibration over again, because now it may not match the streams any more and so those values might need to be adjusted. Not just storage coefficient but recharge – I mean, there's a lot of work to be done.
>
> "[By Mr. Aamodt] Q: Sure. Well, when you were testifying on direct earlier, I wrote down a piece of your testimony –
>
> "A: Um-hum.

"Q: - and I, word for word, and I want to make sure –

"A: Okay.

"Q: - you'll stand behind that. And you stated that you don't know how much difference any of your conclusions would make. Do you stand behind that statement? Fair enough?

"A: Yes, I have not made the runs to find out how much difference. They could be very large. They could not be so large. You have to find out.

"Q: Or there could be no difference at all.

"A: Unlikely. When you change something in the model, usually something changes. In the second [inaudible] important, but something changes."

* * *

Testimony of Dr. Poeter, Hearing Recording Part 9, 18:06 and following:

"[By Mr. Aamodt:] Q: Well after you went to that higher level did you bring yourself back and analyze other, any other issues?

"A: No because this is not, this is not my job to get this model right. All I wanted to know is does it make a difference if I have an unconfined aquifer. And I said, well, it does. Now maybe the numbers are different. But, you know, that, that's a six-year, 6 1/2 million dollar study. I worked on this for two weeks.

"Q: Sure. That, that's, that's my point exactly."

3. Why the eastern portion of the aquifer was primarily studied

OWRB Exhibit 1 (the USGS Study Report) page 5, second column, second full paragraph:

"The hydrogeologic study and groundwater-flow model were focused on the eastern Arbuckle-Simpson aquifer because (1) the data needed to build the model are sparse in the western and central Arbuckle-Simpson aquifer, (2) the eastern Arbuckle-Simpson aquifer is the largest part of the aquifer by area and volume, (3) most of the current (2011) groundwater withdrawals from the aquifer are from the eastern Arbuckle-Simpson aquifer, and (4) the largest (by flow) streams and springs sourced from the aquifer are on the eastern Arbuckle-Simpson aquifer. Although the study emphasized the eastern Arbuckle-Simpson aquifer, understanding of the eastern part of the aquifer requires studying the entire aquifer, especially with respect to the geology."

For evidence of the scope and depth of the other studying and work done leading up to the Tentative Order (i.e., much work was done besides the work and modeling pertaining to the eastern portion of the aquifer), see:

> Exhibit 18 of CPASA et al. Joint Exhibits Presented at Prehearing Conference ("Arbuckle-Simpson Hydrology Study/Final Report to the U.S. Bureau of Reclamation", or "Final Report to BuRec"); Executive Summary at Bates MAY-00636 through MAY-00638; pages 13-15 at Bates MAY-00648 through MAY-650; and Appendix A at Bates MAY-00675 through MAY-00677; and
>
> Testimony of Noel Osborn, Hearing Recording Part 13, 42:45 through 49:30.

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OWRB'S AIDE TO THE COURT – IN CAMERA REVIEW

To assist the Court in its review of the Unredacted Attorney Memorandum, Respondent Oklahoma Water Resources Board submits the following citations to the Administrative Record.

I. Paragraph 1, Titled "Amount of water in storage: 9,408,461 AF vs. "about 11,000,00" AF

Unredacted Portions: Vol I, Tab 8 at 66-85; Vol. 5, Tab 61 at 1470-1490.

Redacted Portions: Vol. I, Tab 7 at 51-52 (Senate Bill 288's impact on the study).

II. Paragraph 2, Titled "Why Scott Christenson used the model he did [. . .]"

Unredacted Portions: Vol. 2, Tab 27 at 658-659; Vol. 6, Tab 101 at 1810; and Vol. 5, Tab 58 at 237-38, 316-325.

Redacted Portions: Vol. 6, Tab 101 at 1810.

III. Paragraph 3, Titled "Why the eastern portion of the aquifer was primarily studied"

Unredacted Portions: Vol. 5, Tab 58 at 241.

Redacted Portions: Vol. 2, Tab 31 at 745-790, specifically 749-51, 761-63, 788-90; Vol. 6, Tab 101 at 1810.

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	))))

ORDER ON EVIDENTIARY MATTERS FOLLOWING REMAND

This proceeding concerns the Oklahoma Water Resources Board's (OWRB or "the Agency" or "the Board") administrative proceeding to determine the maximum annual yield (MAY) of fresh groundwater that may be used from, and allocated to each acre of land over, the Arbuckle-Simpson Groundwater Basin. A full statement of the procedural background for this matter is set forth in the Proposed Findings of Fact, Conclusions of Law, and Board Order issued contemporaneously herewith. However, it should be noted that a pre-hearing conference (the Pre-Hearing Conference) took place on May 9, 2012, and a full evidentiary hearing (the Hearing) took place on May 15-16, 2012.

During the time that the Hearing Examiner had the MAY determination under consideration, she received, unsolicited, a memorandum drafted by one of the witnesses in the matter, Scott Christensen that had been provided to Board staff. The Hearing Examiner disregarded the Christensen memorandum in preparing a proposed order.

A proposed order was provided to the parties on December 27, 2012. Thereafter, various Protestants challenged, among other things, the Christensen memorandum and sought a Writ of Mandamus in the Supreme Court of Oklahoma. Pursuant to the Court's mandate in *Arbuckle-Simpson Aquifer Protection Fed'n of Okla. v. OWRB*, 2013 OK 29, the Hearing Examiner placed the Christensen memorandum in the record and issued an order providing the parties an opportunity to file responses to the material in the memorandum.

Various Protestants, as well as Citizens for the Protection of the Arbuckle-Simpson Aquifer ("CPASA"), filed responses. The parties also filed several motions following the Court's remand. This Order considers the parties' responses to the Christensen memorandum and sets forth the Hearing Examiner's rulings on the parties' motions.

The Christensen memorandum essentially directs the reader to the record concerning (a) natural flow; (b) model calibration to streamflow; (c) streamflow depletion; (d) storage coefficient; and (e) data availability and review. In their response, Protestants challenge only one matter addressed in the Christensen memorandum: that Scott Christenson et al., *Hydrogeology and simulation of groundwater flow in the Arbuckle-Simpson aquifer, south-central Oklahoma*, Sci. Invs. Report 2011-5029

[hereinafter USGS Report], was "subjected to rigorous report and technical review processes before being approved." (Christensen Mem. at 2) Protestants' arguments are as follow. First, they suggest that the fact of peer review was not raised at the Hearing, i.e., that it was new evidence presented for the first time in the Christensen memorandum. Petitioners are factually incorrect. At the Hearing, Mr. Christensen himself testified that the USGS peer review process did not identify any issues with his methodology. (Christenson Test. (6) at 00:21:50 – 22:46.)

Protestants dedicate the majority of their Response to (a) raising questions about the robustness of the USGS peer review process; and (b) providing argument in support of their position that the USGS model was not properly developed. As to the robustness of the peer review process, Protestants should have used their opportunity for cross-examination at the Hearing itself to explore the issue once it was raised. Protestants may not rectify their failure to do so at the Hearing by attempting to raise such questions in their Response.

Second, Protestants attempt to introduce new evidence, in the form of an Affidavit by Dr. Poeter (who was a witness at the Hearing), to support their argument that the USGS Report was based on flawed modeling. CPASA has moved to strike the Affidavit. Protestants make no showing why this Affidavit should be admitted into the record; their only arguments are that their witness was surprised by (a) Mr. Christensen's testimony at the hearing and (b) the assertion regarding peer review in the Christensen memorandum. That their witness was surprised is an insufficient reason to re-open the record, particularly given the wealth of evidence Protestants already submitted during the Hearing itself.[1] Nor is the fact of peer review sufficient to justify additional evidence, given that peer review was raised at the Hearing and could have been explored there. In sum, Protestants have failed to make any showing to support re-opening the record to add yet more evidence; thus, the Hearing Examiner hereby GRANTS CPASA's Motion to Strike Exhibit B (the Poeter Affidavit) from the record.[2]

Protestants also filed two motions following the remand. In their Motion to Strike or for Reconsideration, they argue that certain post-Hearing evidence on which CPASA purported to rely should not be made part of the record. With respect to footnotes 1-5 of CPASA's Response in Opp'n to CSIG's Br. In Opp'n of the Tentative Maximum Annual Yield Determination ("CPASA's Post-Hearing Brief"), Protestants are correct that this

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[1] In the weeks immediately following the Hearing, the Hearing Examiner also gave the parties the opportunity to file for leave to submit additional evidence before closing the Record. Protestants filed no such motion for leave.

[2] Elsewhere in their filings, Protestants mention that material they sought to be stricken from the record remains on the OWRB website. Because this is an administrative record that may under proper circumstances be appealed to the courts, materials for which a motion to strike is granted are not removed from the record, but rather are disregarded for decisionmaking purposes. Should any of the parties ultimately appeal, notations are made in the index to the record to specify which materials were not stricken and therefore not considered.

information should have been explored during the Hearing itself; as CPASA explains, those footnotes were included to demonstrate bias and motive during the Hearing. CPASA makes no showing why it was unable to present such evidence at the Hearing itself. Thus, the Motion to Strike is hereby GRANTED IN PART with respect to these footnotes.

Protestants challenge references to Mr. Smith's testimony not in the record from the Hearing, but CPASA has agreed that those portions of its brief may be removed. Thus, the Motion to Strike is hereby DENIED AS MOOT as to Mr. Smith's evidence.

Protestants also challenge CPASA's proposed findings of fact and conclusions of law, which CPASA submitted in its response briefing rather than its initial briefing following the Hearing. CPASA clearly submitted those materials in response to Protestants' own proposed findings of fact. Even if CPASA might have been better advised to develop these materials for an initial brief, Protestants fail to demonstrate how they are prejudiced by those materials remaining in the record. Thus, the Motion to Strike is hereby DENIED IN PART as to the proposed findings of fact and conclusions of law that CPASA submitted with its Post-Hearing Brief.

Finally, Protestants submitted a Motion for Production of Post-Hearing Communications Between the Hearing Examiner and OWRB Staff. Specifically, Protestant seeks disclosure of an attachment to an email communication between OWRB Counsel Jerry Barnett and the undersigned. In support of its Motion, Protestants rely on 75 O.S. § 310(4). That section of the Oklahoma Administrative Procedures Act provides that an agency may rely on the staff's technical expertise in connection with individual proceedings. Indeed, it was upon this portion of the APA that the Oklahoma Supreme Court relied in holding that the Hearing Examiner's post-Hearing communications with Board staff were permissible.

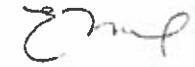
Protestants argue that an additional clause of § 310(4), which provides that where notice is taken of technical or scientific facts within the agency's expertise, the parties must be notified of the material noticed and be provided an opportunity to contest those materials. This argument, however, is misplaced for two reasons. First, it is true that the Board must notify the parties when it takes judicial notice of facts within its specialized knowledge. *See Arbuckle-Simpson*, 2013 OK 29, para. 8. Here, the Hearing Examiner has already entertained motions relating to judicial notice; the record speaks for itself in this regard, and Protestants do not challenge any of the materials the Hearing Examiner has already taken notice of.

Second, Protestants conflate staff assistance in interpreting the record with "notice" as contemplated by § 310(4). As emphasized by the Supreme Court of Oklahoma, the agency is not considered a party to this proceeding, nor are communications with agency staff within the ex parte prohibition of 75 O.S. § 313. *See Arbuckle-Simpson*, 2013 OK 29, paras. 6-7. There is good reason for this approach: the agency itself is responsible for holding the proceeding. *Id.* Logically, the agency's efforts in doing so are distinguishable from judicially noticeable facts. Moreover, the

legislature has recognized that agency deliberations are distinct from judicially noticeable facts by providing for the confidentiality of such materials as work product and personally created materials developed prior to taking action on a matter. *See* 75 O.S. §§ 24A.5(1), A.9. For these reasons, Protestants' Motion for Production of Post-Hearing Communications Between the Hearing Examiner and OWRB Staff is hereby DENIED.

Alternatively, Protestants' Motion may be understood as a challenge to the Board's response to Protestants' Open Records Act request. The Hearing Examiner lacks jurisdiction to resolve such a dispute; to the extent Protestants challenge the Board's response to the Open Records Act request, Protestants' Motion for Production of Post-Hearing Communications Between the Hearing Examiner and OWRB Staff is hereby DENIED.

So ordered, this 3rd day of October, 2013.



Emily Hammond Meazell

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[1] National Park Service

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[2] U.S. Fish and Wildlife Service, Department of the Interior
[3] Citizens for the Protection of the Arbuckle-Simpson Aquifer
[4] Oklahoma Aggregates Association

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[5] Protestants collectively include Oklahoma Farm Bureau Legal Foundation, the Cattlemen's Association, Oklahoma Independent Petroleum Association, the Pontotoc County Farm Bureau, the Environmental Federation of Oklahoma, the Oklahoma Aggregates Association, TXI, Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc., John Sparks, and Floyd Bergen

[6] Protestants' Exhibits are listed in the order by which they were submitted at the hearing and with the exhibit number with which they were labeled.

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[7] Oklahoma Department of Wildlife Conservation
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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA FARM BUREAU LEGAL FOUNDATION, et al.,	)	
Petitioners,	)	
v.	)	**Case No. CV-2013-2414**
OKLAHOMA WATER RESOURCES BOARD,	)	
Respondent,	)	**District Judge Barbara Swinton**
v.	)	
TISHOMINGO NATIONAL FISH HATCHERY,et al.,	)	
Other Parties of Record.	)	

OBJECTION AND RESPONSE TO PETITIONERS' MOTION TO SUPPLEMENT ADMINISTRATIVE RECORD WITH SEPTEMBER 14, 2012 ATTORNEY MEMORANDUM

Respondent Oklahoma Water Resources Board ("OWRB") hereby responds to the joint motion of Petitioners to Supplement the Administrative Record ("Petitioners' Motion"). Contrary to the express language of the Oklahoma Administrative Procedures Act (OAPA), Petitioners want this Court to enlarge the scope of judicial review to include an extrinsic document – one that contains no information not already found in the administrative record – for reasons that Petitioners have not yet revealed. The OWRB objects to the inclusion of this document because it will be used to interject issues and disputed facts which are entirely outside the scope of this appeal. The OWRB further objects to the document's inclusion because, without proper context, it will be used to distort the record and to cast a false light on the

proceedings, which are accurately and completely recounted in the administrative record as submitted.

ARGUMENT AND AUTHORITY

I. Petitioners' Motion Does Not Accurately Describe the Facts and Circumstances Surrounding the Attorney Memorandum

Background

In their post-hearing Brief, Petitioners made a number of conclusory arguments and factual claims about matters which were purportedly testified to during the hearing, but failed to adequately support such arguments with specific references to the record. *See generally Protestant's Post-Hearing Brief*, Administrative Record Vol. VI, Tab 116, Bates Nos. 1847-1891. Specifically, Petitioners failed to provide any quotes from actual testimony from witnesses at the hearing. *Id.* While Petitioners might have preferred that the Hearing Examiner make Findings of Fact based on paraphrased recollections of the testimony as argued in Petitioners' Brief, this would have been inappropriate. Even if Petitioners' description of the testimony could be trusted as accurate, such descriptions, as often presented in briefs, would likely be presented without context, and would not address surrounding or subsequent testimony which might be unfavorable to the Petitioners' arguments.

As a result, the Hearing Examiner was improperly burdened with searching volumes of evidentiary material and hours of recorded testimony in order to either verify or contradict Petitioner's claims. Such efforts might not have been necessary if adequate and appropriate citations to the record had been provided. Exercising the discretion afforded to Hearing Examiners in Section 313[1] of the Oklahoma Administrative Procedures Act (OAPA) and in

[1] 75 O.S. § 313, titled "Agency Members Not to Communicate."

OWRB Rule 4-3-4(c),[2] the Hearing Examiner in this case sought assistance from agency staff in *locating the portions of the record relevant to Petitioners' unsupported arguments and factual claims*.

No New Evidence or Argument

Contrary to the suggestive language in Petitioners' Motion, the agency members were not asked to find new evidence, data, or technical information. Rather, agency members were asked to review documents and testimony already admitted into evidence during the MAY proceeding and to refer the Hearing Examiner to the location of that evidence in the record. Exhibit 1, Affidavit of Emily Hammond Meazell (February 8, 2013), at ¶ 3(g)-(j); Exhibit 2, Affidavit of Emily Hammond (September 4, 2014), at ¶¶ 6-9. It is uncontroverted that the September 14, 2012 Attorney Memorandum (hereafter "Attorney Memorandum") contained no new evidence, data, technical information, arguments, or comments not already appearing in the administrative record. Ex. 1, at ¶ j; Ex. 2, at ¶¶ 8-9; Exhibit 3, Attorney Memorandum (September 14, 2012); Exhibit 4, OWRB's Aide to the Court – In Camera Review.[3]

Not "Received" or "Noticed" by the Hearing Examiner

Also contrary to the suggestive language in Petitioners' Motion, the Hearing Examiner did not receive the Attorney Memorandum into evidence. Ex. 1, at ¶ 3(f) and ¶ 3(q); Ex. 2 at ¶ 12. Likewise, the Hearing Examiner did not "take official notice" of the Attorney Memorandum or its contents within the meaning of Section 309(F)[4] of the OAPA or OWRB Rule 4-7-7.[5] Exhibit 5, "Order on Evidentiary Matters Following Remand" at pp. 3-4. The Hearing Examiner provided additional time for the named parties to submit additional evidence if they wished;

[2] Oklahoma Administrative Code Section 785:4-3-4(c), titled "Hearing Examiners."
[3] The Affidavit of Emily Hammond (September 4, 2014) initially included an attached exhibit, a redacted copy of the September 14, 2012 Attorney Memorandum. To avoid confusion, the OWRB has bates-stamped this document in the lower right hand corner as pages 3-5 of Exhibit 2 to this Response.
[4] 75 O.S. § 309, titled "Individual Proceedings – Notice – Hearing."
[5] Oklahoma Administrative Code Section 785:4-7-7, titled "Evidence by reference and official notice."

however, none of the parties did so with respect to the MAY determination. Ex. 1, at ¶ 3(c)-(d); Ex. 2, at ¶ 4. All documents received into evidence and documents officially noticed were "appropriately identified and designated by number in the record as an exhibit of the party offering same or of the Board or its staff," as required under OWRB Rule 4-7-7.[6] *See* Exhibit 6, "Administrative Record Index" at Nos. 14-47, 58-99, 157, and 160 (Materials received into evidence identified by party and exhibit number).

Findings Based Entirely on Official Record

Finally, Petitioners' Motion speculates regarding a connection between the Attorney Memorandum and certain Findings of Fact in the Hearing Examiner's Proposed Final Order. However, the Proposed Final Order refers only to testimony and documents admitted into evidence during the MAY proceedings. Furthermore, the fact that the Proposed Final Order made factual findings on the issues of storage amount, modeling procedures, and scope of the aquifer study is not remarkable. Such findings are required by Oklahoma Groundwater Law:

> A. After completing the hydrologic survey, the Board shall make a tentative determination of the maximum annual yield of groundwater to be produced from each ground water basin or subbasin therein. Such determination must be based upon the following:
> 1. The total land area overlying the basin or subbasin;
> 2. The amount of water in storage in the basin or subbasin;
> 3. The rate of recharge to the basin or subbasin and total discharge from the basin or subbasin;
> 4. Transmissibility of the basin or subbasin; and
> 5. The possibility of pollution of the basin or subbasin from natural sources.

82 O.S. §1020.5(A). Since such findings are explicitly required by statute (or, in the case of modeling, inseparable from such findings), they would have ultimately appeared in the Proposed Final Order regardless of what arguments were made by Petitioners in their post-hearing briefing.

[6] Oklahoma Administrative Code Section 785:4-7-7, titled "Evidence by reference and official notice."

II. Attorney Memorandum Outside the Scope of Judicial Review

Final Orders determining a maximum annual yield are subject to judicial review pursuant to Article II[7] of the OAPA. 82 O.S. § 1020.6(C). Judicial review is confined to the administrative record on appeal, except when irregularities in agency procedure are alleged which are not shown in the record, testimony may be taken in the court. 75 O.S. § 321. The administrative record is to be assembled and transmitted by the agency, and must include information required by Section 309[8] of the OAPA. 75 O.S. § 320.

Section 309(F) delineates the scope of documents and materials to be included in the administrative record as follows:

> 1. All pleadings, motions and intermediate rulings;
> 2. Evidence received or considered at the individual proceeding;
> 3. A statement of matters officially noticed;
> 4. Questions and offers of proof, objections, and rulings thereon;
> 5. Proposed findings and exceptions;
> 6. Any decision, opinion, or report by the officer presiding at the hearing; and
> 7. All other evidence or data submitted to the hearing examiner or administrative head in connection with their consideration of the case provided all parties have had access to such evidence.

75 O.S. § 309(F), *in relevant portion.* Noticeably absent from the items listed in Section 309(F) are: (1) communications between a hearing examiner and other members of the agency permitted under Section 313, (2) documents involving the aid and advice rendered to the hearing examiner by one or more personal assistants, pursuant to Section 313, (3) deliberations by administrative heads and hearing examiners pursuant to Section 309(D), and (4) "Incompetent, irrelevant, immaterial and unduly repetitious evidence" excluded by an agency pursuant to Section 310(1).

The rule limiting the scope of judicial review to the administrative record is not limited to Oklahoma. Federal appellate courts have explained that the reason for limiting the scope of

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[7] 75 O.S. §§ 308a *et seq.*
[8] 75 O.S. § 309, titled "Individual Proceedings – Notice – Hearing."

review to the administrative record is that judicial review of the reasonableness of an agency's actions should concentrate upon the evidence available to the agency when making its decision. *Iowa League of Cities v. Envtl. Prot. Agency*, 711 F.3d 844 (8th Cir., 2013). The Respondent would also point out that, while the Hearing Examiner was tasked with presiding over the hearing process and preparing a proposed order, it was the nine-member board of Oklahoma Water Resources Board which approved and issued the Final Order. When considering and acting on a proposed order from a hearing examiner, the Board is limited to evidence presented at the hearing or otherwise accepted into evidence, although the parties are permitted to submit briefs and make oral arguments to the Board on request. OAC 785: 4-9-2(a). Since the ultimate decision makers at the OWRB, the nine-member Board, were limited to materials now found in the administrative record, it stands to reason that any judicial review of their decision should also be limited in scope to the materials found in the administrative record.

III. Disclosure of Attorney Memorandum Rendered Petitioner's "Procedural Issues" Moot.

Petitioners' Motion states that "there are also several procedural issues that relate – some directly and others indirectly – to the attached memorandum." Are Respondents and the Court left to guess at what those issues are at this late point in the litigation? Although Petitioners' Motion does not identify what procedural issues relate to the Attorney Memorandum in question, there is, in truth, only one issue that has been raised by Petitioners with respect to this document. Prior to the OWRB's disclosure of the unredacted Attorney Memorandum, the Petitioners continuously and explicitly alleged, with great conviction, that the Attorney Memorandum contained new evidence or argument upon which the Hearing Examiner relied, and argue that they were prejudiced thereby. *See e.g. Petitioners' Motion for Discovery,* at p. 5 ("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 [. . .]."). Now that the Attorney Memorandum has been disclosed, Petitioners' allegations about the Attorney Memorandum have been shown to be completely without merit. *See* Ex. 4, *OWRB's Aide to the Court – In Camera Review*. It is uncontroverted that the Attorney Memorandum contained no new evidence or argument, instead containing merely citations, quotes, and summaries of the written and recorded record. *Compare* Ex. 3 *with* Ex. 4. It is further uncontroverted that all evidence and argument received or noticed by the Hearing Examiner is already part of the administrative record. Ex. 1, at ¶ 3(j); Ex. 2, at ¶¶ 8-9, Ex. 3. There is no need to supplement the Administrative Record.

Since the Attorney Memorandum contained no new evidence or argument, Petitioners cannot use it to show that the Hearing Examiner relied on matters outside of the official record. Likewise, because it contained no new evidence or argument, Petitioners cannot show that they were entitled to respond. Finally, Petitioners cannot show that the Attorney Memorandum contained improper *ex parte* communications because the Oklahoma Supreme Court explicitly held that communications between the Hearing Examiner and OWRB staff are proper, and that they are not prohibited *ex parte* communications because the OWRB is not a party to the action. *Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. v. Oklahoma Water Resources Board*, 2013 OK 29, ¶¶ 6-9. Every issue raised by Petitioners involving the Attorney Memorandum has been rendered moot by its disclosure. Therefore, Petitioners' Motion to Supplement the Administrative Record must be denied.

CONCLUSION

The scope of judicial review in the present matter is limited to the administrative record. Because Petitioners have shown no need to supplement to administrative record to include a

document which was not received into evidence or considered in the drafting of the Proposed Final Order, Petitioners' Motion must be denied.

Robert Singletary, General Counsel, OBA #19220
E-Mail: Robert.Singletary@owrb.ok.gov

Sara D. Gibson, OBA #20214
E-Mail: Sara.Gibson@owrb.ok.gov

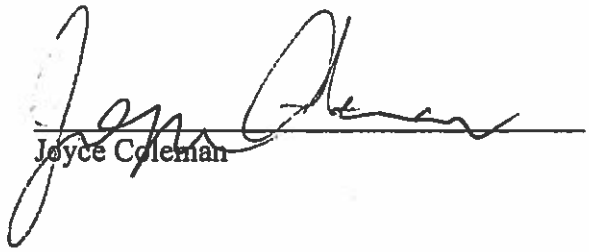
Jonathan Allen, OBA #22048
E-Mail: Jonathan.Allen@owrb.ok.gov

OKLAHOMA WATER RESOURCES BOARD
3800 North Classen Boulevard
Oklahoma City, Oklahoma 73118
Telephone: (405) 530-8800
Facsimile: (405) 530-8900

ATTORNEYS FOR RESPONDENT
OKLAHOMA WATER RESOURCES BOARD

CERTIFICATE OF SERVICE

This is to certify that on April 13, 2015, a true and correct copy of the above and foregoing instrument was mailed by US mail, postage prepaid, to all persons listed below and on the following pages.



Joyce Coleman

Deanna L. Hartley, OBA No. 19272
Krystina E. Phillips, OBA No. 30111
Environmental Law Center, PLLC
1723 East 15th Street, Suite 100
Tulsa, Oklahoma 74104
Tele: (918) 347-6169
Fax: (918) 398-0514
ATTORNEYS FOR RESPONDENT
CITIZENS FOR THE PROTECTION OF THE
ARBUCKLE-SIMPSON AQUIFER

L. Mark Walker, OBA #10508
Scott A. Butcher, OBA #22513
CROWE & DUNLEVY
A Professional Corporation
Braniff Building
324 North Robinson Avenue, Suite 100
Oklahoma City, Oklahoma 73102
ATTORNEYS FOR PETITIONERS
OKLAHOMA FARM BUREAU LEGAL
FOUNDATION, PONTOTOC COUNTY FARM
BUREAU, OKLAHOMA INDEPENDENT
PETROLEUM ASSOCIATION,
ENVIRONMENTAL FEDERATION OF
OKLAHOMA, OKLAHOMA CATTLEMEN'S
ASSOCIATION, AND OKLAHOMA
AGGREGATES ASSOCIATION

James R. Barnett, OBA #547
Michael C. Minnis, OBA #6251
DOERNER, SAUNDERS, DANIEL &
ANDERSON, LLP
105 N. Hudson Ave., Suite 500
Oklahoma City, Oklahoma 73102-4805
(405) 319-3507
(405) 319-3537 (Facsimile)
jbarnett@dsda.com
ATTORNEYS FOR PETITIONER ARBUCKLE-SIMPSON AQUIFER PROTECTION FEDERATION OF OKLAHOMA, INC.

Michael C. Wofford, OBA #9810
Michael C. Minnis, OBA #6251
DOERNER, SAUNDERS, DANIEL &
ANDERSON, LLP
105 N. Hudson Ave., Suite 500
Oklahoma City, Oklahoma 73102-4805
(405) 319-3507
(405) 319-3537 (Facsimile)
mwofford@dsda.com
ATTORNEYS FOR PETITIONERS OKLAHOMA AGGREGATES ASSOCIATION AND TXI

AFFIDAVIT

STATE OF NORTH CAROLINA)
)
COUNTY OF Forsyth)

I, Emily Hammond Meazell, being first duly sworn, upon my oath state:

1. I am currently employed as a Professor of Law at the Wake Forest University School of Law in Winston-Salem, North Carolina. Prior to the current 2012-2013 academic year, I was employed as Associate Dean for Academic Affairs, Associate Director of the Law Center, and Associate Professor at the University of Oklahoma College of Law in Norman, Oklahoma.

2. Beginning in March 2012 I served as a Hearing Examiner on a contractual basis for the Oklahoma Water Resources Board ("OWRB") in an administrative proceeding to determine the maximum annual yield ("MAY") of the Arbuckle-Simpson Groundwater Basin located in south central Oklahoma. I will refer to that proceeding as the "A-S MAY Proceeding."

3. In the course of my work as Hearing Examiner in the A-S MAY Proceeding:
   a. I conducted a pre-hearing conference on May 9, 2012, in Ada, Oklahoma, during which I granted in part and denied in part certain Protestants' Motion in Limine;
   b. I conducted a hearing on the record on May 15 and May 16, 2012 in Sulphur, Oklahoma;
   c. Following the hearing, I gave participants the opportunity to file post-hearing briefs and took the matter under advisement. Because the parties may have needed additional time to assess the expert evidence that was presented for the first time at the hearing, I also stated that I would permit motions to admit additional evidence. Only one party sought to do so on a matter unrelated to the MAY; this motion and its disposition are addressed in the Proposed Findings of Fact, Conclusions of Law, and Board Order ("Proposed Order"), which is attached hereto as Exhibit 1 and speaks for itself;
   d. Although entirely hypothetical, had a party moved to submit additional evidence relevant to the MAY itself, I would have considered such motion and, had I granted such motion, I would have re-opened the record to permit full adversarial consideration of the evidence;
   e. In July 2012, I began drafting the Proposed Order for recommendation to the OWRB members;
   f. In drafting the Proposed Order, I considered the evidence admitted into the record, and the briefs and other materials filed after the hearing by the parties;
   g. In August 2012, I communicated by telephone with Dean Couch, who was OWRB's General Counsel at the time, to inquire about obtaining

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 Meazell

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

Sonya Casstevens Jones
Notary Public

My Commission Expires: 10-7-2015

(SEAL)

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

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA FARM BUREAU LEGAL FOUNDATION, et al.,	)	
Petitioners,	)	
v.	)	**Case No. CV-2013-2414**
OKLAHOMA WATER RESOURCES BOARD,	)	
Respondent,	)	**District Judge Barbara Swinton**
v.	)	
TISHOMINGO NATIONAL FISH HATCHERY,et al.,	)	
Other Parties of Record.	)	

AFFIDAVIT OF HEARING EXAMINER

COUNTY OF _____)
DISTRICT OF COLUMBIA: SS) SS
STATE OF _____)

Emily Hammond, the undersigned affiant, being of lawful age and duly sworn, states as follows:

1. I am Professor of Law at the George Washington University Law School, and I have previously taught at University of Oklahoma College of Law, and Wake Forest University School of Law.

2. During my time at the University of Oklahoma College of Law and for some months thereafter, I also served as a part-time hearing examiner for the Oklahoma Water Resources Board (Board) from 2007-2013.

3. In May of 2012, I presided over the prehearing conference and two-day hearing for the determination of the Maximum Annual Yield for the Arbuckle-Simpson Groundwater Basin underlying parts of Murray, Pontotoc, Johnston, Garvin, Coal, and Carter Counties in Oklahoma ("A-S MAY Proceeding").

4. At the conclusion of the A-S MAY Proceeding, I issued an order setting forth a timeframe during which the parties had the opportunity to file post-hearing briefs,

responses, and comments. All the named parties submitted post-hearing materials, as did many other individuals.

5. Thereafter, I began drafting a Proposed Findings of Fact, Conclusions of Law, and Board Order ("Proposed Order") for consideration by the nine-member Board at one of its regular meetings.

6. In the process of preparing the Proposed Order, I sought assistance from the legal staff of the Board in locating testimony or other evidentiary materials on certain issues in the extensive record taken during and after the hearing. The Board's legal staff also provided input and reference to other portions of the record that they thought might assist me regarding those same issues.

7. A redacted memorandum from the Board's legal staff is attached hereto as "Exhibit 1."

8. Based on my recollection of the memorandum in question, and my recent review of the unredacted memorandum to refresh my memory, I can confirm that the redacted portions of the memorandum contained no new evidence, data, or technical information.

9. Likewise, the redacted portions of the memorandum contained no new arguments or comments that had not already appeared in the record.

10. In accordance with the mandate of the Oklahoma Supreme Court in Arbuckle Simpson Aquifer Protection Federation of Oklahoma, Inc. v. Oklahoma Water Resources Board, 2013 OK 29, I disclosed certain communications to all interested parties, and received responses from said parties to the record.

11. The Proposed Order was provided to all parties before being considered by the Board.

12. 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.

Emily Hammond

DISTRICT OF COLUMBIA : SS
Subscribed and sworn to before me this 4th day of September, 2014.

VERONICA SEVIER NOTARY PUBLIC DISTRICT OF COLUMBIA Exp.-2/14/2017

Veronica Sevier
Notary Public, DC

My commission expires:
FEBRUARY 14, 2017

My commission number is:
NONE

Evidence to answer inquiries by Professor Meazell: 9/14/2012

1. Amount of water in storage: 9,408,461 AF vs. "about 11,000,000" AF

The latter figure is in OWRB Exhibit 5 (the March 13, 2012 Tentative Order approved and signed by the Board) at page 3, Tentative Finding paragraph no. 6. It is based in part on an average saturated thickness of 3,400 feet (id.).

The former figure is in OWRB Exhibit 4 (the PowerPoint presentation made by Julie Cunningham at the February 13, 2012 Board meeting). It is based in part on an average saturated thickness of 3,000 feet (id.).

Staff's evaluation is that this difference is immaterial for the reasons stated in OWRB Exhibit 5 at page 6 and following, particularly the last sentences of Tentative Conclusions paragraphs nos. 3 and 4 and paragraph no. 5.

2. "Why Scott Christenson used the model he did rather than the model used by Dr. Poeter"

OWRB Exhibit 10, Slides 30 and 31;
Testimony of Scott Christenson, Hearing Recording Part 6, 1:00 through 4:30 and following; and
OWRB Exhibit 1:

Abstract, page 1 first paragraph and page 2 third paragraph and following; and
Pages 80-89

Staff points out that Dr. Poeter did not develop a different model of her own; she used the model used by Christenson and USGS, and asserted that the parameter for the storage coefficient should be changed. Aside from this different input, she did not recalibrate the model and did not run it to see what the result would be. See the testimony of Dr. Poeter, Hearing Recording Part 9, 10:40 through 12:42:

> "...I believe that the other issues will also make a difference, but I did not take the time to start working on those and recalibrate the model. I mean, even with my addition of unconfined storage coefficient I'm not saying that's the right number, or that it gives us the right answer. It was just that I said, whoa, this is an issue; I wonder how much difference including the unconfined zone can make. And so I made a very simple run to find that out. Now if someone decides that they're going to change the model and put that in and they really need to consider the whole calibration over again, because now it may not match the streams any more and so those values might need to be adjusted. Not just storage coefficient but recharge – I mean, there's a lot of work to be done.
>
> "[By Mr. Aamodt] Q: Sure. Well, when you were testifying on direct earlier, I wrote down a piece of your testimony –
>
> "A: Um-hum.

"Q: - and I, word for word, and I want to make sure –

"A: Okay.

"Q: - you'll stand behind that. And you stated that you don't know how much difference any of your conclusions would make. Do you stand behind that statement? Fair enough?

"A: Yes, I have not made the runs to find out how much difference. They could be very large. They could not be so large. You have to find out.

"Q: Or there could be no difference at all.

"A: Unlikely. When you change something in the model, usually something changes. In the second [inaudible] important, but something changes."

* * *

Testimony of Dr. Poeter, Hearing Recording Part 9, 18:06 and following:

"[By Mr. Aamodt:] Q: Well after you went to that higher level did you bring yourself back and analyze other, any other issues?

"A: No because this is not, this is not my job to get this model right. All I wanted to know is does it make a difference if I have an unconfined aquifer. And I said, well, it does. Now maybe the numbers are different. But, you know, that, that's a six-year, 6 1/2 million dollar study. I worked on this for two weeks.

"Q: Sure. That, that's, that's my point exactly."

3. Why the eastern portion of the aquifer was primarily studied

OWRB Exhibit 1 (the USGS Study Report) page 5, second column, second full paragraph:

"The hydrogeologic study and groundwater-flow model were focused on the eastern Arbuckle-Simpson aquifer because (1) the data needed to build the model are sparse in the western and central Arbuckle-Simpson aquifer, (2) the eastern Arbuckle-Simpson aquifer is the largest part of the aquifer by area and volume, (3) most of the current (2011) groundwater withdrawals from the aquifer are from the eastern Arbuckle-Simpson aquifer, and (4) the largest (by flow) streams and springs sourced from the aquifer are on the eastern Arbuckle-Simpson aquifer. Although the study emphasized the eastern Arbuckle-Simpson aquifer, understanding of the eastern part of the aquifer requires studying the entire aquifer, especially with respect to the geology."

For evidence of the scope and depth of the other studying and work done leading up to the Tentative Order (i.e., much work was done besides the work and modeling pertaining to the eastern portion of the aquifer), see:

> Exhibit 18 of CPASA et al. Joint Exhibits Presented at Prehearing Conference ("Arbuckle-Simpson Hydrology Study/Final Report to the U.S. Bureau of Reclamation", or "Final Report to BuRec"); Executive Summary at Bates MAY-00636 through MAY-00638; pages 13-15 at Bates MAY-00648 through MAY-650; and Appendix A at Bates MAY-00675 through MAY-00677; and
>
> Testimony of Noel Osborn, Hearing Recording Part 13, 42:45 through 49:30.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA FARM BUREAU LEGAL FOUNDATION, et al.,	)	
Petitioners,	)	
v.	)	**Case No. CV-2013-2414**
OKLAHOMA WATER RESOURCES BOARD,	)	
Respondent,	)	**District Judge Barbara Swinton**
v.	)	
TISHOMINGO NATIONAL FISH HATCHERY, et al.,	)	
Other Parties of Record.	)	

OWRB'S AIDE TO THE COURT – IN CAMERA REVIEW

To assist the Court in its review of the Unredacted Attorney Memorandum, Respondent Oklahoma Water Resources Board submits the following citations to the Administrative Record.

I. Paragraph 1, Titled "Amount of water in storage: 9,408,461 AF vs. "about 11,000,00" AF

Unredacted Portions: Vol I, Tab 8 at 66-85; Vol. 5, Tab 61 at 1470-1490.

Redacted Portions: Vol. I, Tab 7 at 51-52 (Senate Bill 288's impact on the study).

II. Paragraph 2, Titled "Why Scott Christenson used the model he did [. . .]"

Unredacted Portions: Vol. 2, Tab 27 at 658-659; Vol. 6, Tab 101 at 1810; and Vol. 5, Tab 58 at 237-38, 316-325.

Redacted Portions: Vol. 6, Tab 101 at 1810.

III. Paragraph 3, Titled "Why the eastern portion of the aquifer was primarily studied"

Unredacted Portions: Vol. 5, Tab 58 at 241.

Redacted Portions: Vol. 2, Tab 31 at 745-790, specifically 749-51, 761-63, 788-90; Vol. 6, Tab 101 at 1810.

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	))))

ORDER ON EVIDENTIARY MATTERS FOLLOWING REMAND

This proceeding concerns the Oklahoma Water Resources Board's (OWRB or "the Agency" or "the Board") administrative proceeding to determine the maximum annual yield (MAY) of fresh groundwater that may be used from, and allocated to each acre of land over, the Arbuckle-Simpson Groundwater Basin. A full statement of the procedural background for this matter is set forth in the Proposed Findings of Fact, Conclusions of Law, and Board Order issued contemporaneously herewith. However, it should be noted that a pre-hearing conference (the Pre-Hearing Conference) took place on May 9, 2012, and a full evidentiary hearing (the Hearing) took place on May 15-16, 2012.

During the time that the Hearing Examiner had the MAY determination under consideration, she received, unsolicited, a memorandum drafted by one of the witnesses in the matter, Scott Christensen that had been provided to Board staff. The Hearing Examiner disregarded the Christensen memorandum in preparing a proposed order.

A proposed order was provided to the parties on December 27, 2012. Thereafter, various Protestants challenged, among other things, the Christensen memorandum and sought a Writ of Mandamus in the Supreme Court of Oklahoma. Pursuant to the Court's mandate in *Arbuckle-Simpson Aquifer Protection Fed'n of Okla. v. OWRB*, 2013 OK 29, the Hearing Examiner placed the Christensen memorandum in the record and issued an order providing the parties an opportunity to file responses to the material in the memorandum.

Various Protestants, as well as Citizens for the Protection of the Arbuckle-Simpson Aquifer ("CPASA"), filed responses. The parties also filed several motions following the Court's remand. This Order considers the parties' responses to the Christensen memorandum and sets forth the Hearing Examiner's rulings on the parties' motions.

The Christensen memorandum essentially directs the reader to the record concerning (a) natural flow; (b) model calibration to streamflow; (c) streamflow depletion; (d) storage coefficient; and (e) data availability and review. In their response, Protestants challenge only one matter addressed in the Christensen memorandum: that Scott Christenson et al., *Hydrogeology and simulation of groundwater flow in the Arbuckle-Simpson aquifer, south-central Oklahoma*, Sci. Invs. Report 2011-5029

[hereinafter USGS Report], was "subjected to rigorous report and technical review processes before being approved." (Christensen Mem. at 2) Protestants' arguments are as follow. First, they suggest that the fact of peer review was not raised at the Hearing, i.e., that it was new evidence presented for the first time in the Christensen memorandum. Petitioners are factually incorrect. At the Hearing, Mr. Christensen himself testified that the USGS peer review process did not identify any issues with his methodology. (Christenson Test. (6) at 00:21:50 – 22:46.)

Protestants dedicate the majority of their Response to (a) raising questions about the robustness of the USGS peer review process; and (b) providing argument in support of their position that the USGS model was not properly developed. As to the robustness of the peer review process, Protestants should have used their opportunity for cross-examination at the Hearing itself to explore the issue once it was raised. Protestants may not rectify their failure to do so at the Hearing by attempting to raise such questions in their Response.

Second, Protestants attempt to introduce new evidence, in the form of an Affidavit by Dr. Poeter (who was a witness at the Hearing), to support their argument that the USGS Report was based on flawed modeling. CPASA has moved to strike the Affidavit. Protestants make no showing why this Affidavit should be admitted into the record; their only arguments are that their witness was surprised by (a) Mr. Christensen's testimony at the hearing and (b) the assertion regarding peer review in the Christensen memorandum. That their witness was surprised is an insufficient reason to re-open the record, particularly given the wealth of evidence Protestants already submitted during the Hearing itself.[1] Nor is the fact of peer review sufficient to justify additional evidence, given that peer review was raised at the Hearing and could have been explored there. In sum, Protestants have failed to make any showing to support re-opening the record to add yet more evidence; thus, the Hearing Examiner hereby GRANTS CPASA's Motion to Strike Exhibit B (the Poeter Affidavit) from the record.[2]

Protestants also filed two motions following the remand. In their Motion to Strike or for Reconsideration, they argue that certain post-Hearing evidence on which CPASA purported to rely should not be made part of the record. With respect to footnotes 1-5 of CPASA's Response in Opp'n to CSIG's Br. In Opp'n of the Tentative Maximum Annual Yield Determination ("CPASA's Post-Hearing Brief"), Protestants are correct that this

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[1] In the weeks immediately following the Hearing, the Hearing Examiner also gave the parties the opportunity to file for leave to submit additional evidence before closing the Record. Protestants filed no such motion for leave.

[2] Elsewhere in their filings, Protestants mention that material they sought to be stricken from the record remains on the OWRB website. Because this is an administrative record that may under proper circumstances be appealed to the courts, materials for which a motion to strike is granted are not removed from the record, but rather are disregarded for decisionmaking purposes. Should any of the parties ultimately appeal, notations are made in the index to the record to specify which materials were not stricken and therefore not considered.

information should have been explored during the Hearing itself; as CPASA explains, those footnotes were included to demonstrate bias and motive during the Hearing. CPASA makes no showing why it was unable to present such evidence at the Hearing itself. Thus, the Motion to Strike is hereby GRANTED IN PART with respect to these footnotes.

Protestants challenge references to Mr. Smith's testimony not in the record from the Hearing, but CPASA has agreed that those portions of its brief may be removed. Thus, the Motion to Strike is hereby DENIED AS MOOT as to Mr. Smith's evidence.

Protestants also challenge CPASA's proposed findings of fact and conclusions of law, which CPASA submitted in its response briefing rather than its initial briefing following the Hearing. CPASA clearly submitted those materials in response to Protestants' own proposed findings of fact. Even if CPASA might have been better advised to develop these materials for an initial brief, Protestants fail to demonstrate how they are prejudiced by those materials remaining in the record. Thus, the Motion to Strike is hereby DENIED IN PART as to the proposed findings of fact and conclusions of law that CPASA submitted with its Post-Hearing Brief.

Finally, Protestants submitted a Motion for Production of Post-Hearing Communications Between the Hearing Examiner and OWRB Staff. Specifically, Protestant seeks disclosure of an attachment to an email communication between OWRB Counsel Jerry Barnett and the undersigned. In support of its Motion, Protestants rely on 75 O.S. § 310(4). That section of the Oklahoma Administrative Procedures Act provides that an agency may rely on the staff's technical expertise in connection with individual proceedings. Indeed, it was upon this portion of the APA that the Oklahoma Supreme Court relied in holding that the Hearing Examiner's post-Hearing communications with Board staff were permissible.

Protestants argue that an additional clause of § 310(4), which provides that where notice is taken of technical or scientific facts within the agency's expertise, the parties must be notified of the material noticed and be provided an opportunity to contest those materials. This argument, however, is misplaced for two reasons. First, it is true that the Board must notify the parties when it takes judicial notice of facts within its specialized knowledge. *See Arbuckle-Simpson*, 2013 OK 29, para. 8. Here, the Hearing Examiner has already entertained motions relating to judicial notice; the record speaks for itself in this regard, and Protestants do not challenge any of the materials the Hearing Examiner has already taken notice of.

Second, Protestants conflate staff assistance in interpreting the record with "notice" as contemplated by § 310(4). As emphasized by the Supreme Court of Oklahoma, the agency is not considered a party to this proceeding, nor are communications with agency staff within the ex parte prohibition of 75 O.S. § 313. *See Arbuckle-Simpson*, 2013 OK 29, paras. 6-7. There is good reason for this approach: the agency itself is responsible for holding the proceeding. *Id.* Logically, the agency's efforts in doing so are distinguishable from judicially noticeable facts. Moreover, the

legislature has recognized that agency deliberations are distinct from judicially noticeable facts by providing for the confidentiality of such materials as work product and personally created materials developed prior to taking action on a matter. *See* 75 O.S. §§ 24A.5(1), A.9. For these reasons, Protestants' Motion for Production of Post-Hearing Communications Between the Hearing Examiner and OWRB Staff is hereby DENIED.

Alternatively, Protestants' Motion may be understood as a challenge to the Board's response to Protestants' Open Records Act request. The Hearing Examiner lacks jurisdiction to resolve such a dispute; to the extent Protestants challenge the Board's response to the Open Records Act request, Protestants' Motion for Production of Post-Hearing Communications Between the Hearing Examiner and OWRB Staff is hereby DENIED.

So ordered, this 3rd day of October, 2013.

Emily Hammond Meazell

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[1] National Park Service

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84	OKAA[4] Exhibit 1 - Document titled "Groundwater Basin Maximum Annual Yields"	1685

[2] U.S. Fish and Wildlife Service, Department of the Interior
[3] Citizens for the Protection of the Arbuckle-Simpson Aquifer
[4] Oklahoma Aggregates Association

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[5] Protestants collectively include Oklahoma Farm Bureau Legal Foundation, the Cattlemen's Association, Oklahoma Independent Petroleum Association, the Pontotoc County Farm Bureau, the Environmental Federation of Oklahoma, the Oklahoma Aggregates Association, TXI, Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc., John Sparks, and Floyd Bergen

[6] Protestants' Exhibits are listed in the order by which they were submitted at the hearing and with the exhibit number with which they were labeled.

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[7] Oklahoma Department of Wildlife Conservation
[8] Oklahoma Farm Bureau

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114	Letter from Julie Aultman	1841
115	Motion to Admit Evidence submitted by the City of Ada, Submitted May 31, 2012	1843
116	Protestants' Post-Hearing Brief in Opposition to the Arbuckle-Simpson Tentative Maximum Yield/Equal Proportionate Share, submitted May 31, 2012	1847
117	Notice to Hearing Examiner submitted by CPASA, submitted May 31, 2012	1892
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123	Protestants Arbuckle-Simpson Aquifer Protection Federation of Oklahoma Inc., Charles Roos, Paul Warren, Bill Clark, John Sparks, and Floyd Bergen Motion to Admit, submitted May 31, 2012	1955

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130	Response to Protestants' Post-Hearing Brief in Opposition to the Arbuckle-Simpson Tentative Maximum Annual Yield/Equal Proportionate Share Filed by the U.S. Fish and Wildlife Service and National Park Service, submitted June 13, 2012	1978
131	CPASA's Brief in Response to the Corporate Special Interest Groups' Briefs in Opposition to the Tentative Determination of Maximum Annual Yield for the Arbuckle-Simpson Groundwater Basin, submitted June 14, 2012	1988
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133	Response to City of Ada Brief filed by Kelly Hurt, submitted June 14, 2012	2049
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139	Letter from Scott Butcher on behalf of Protestants Oklahoma Farm Bureau Legal Foundation, the Pontotoc County Farm Bureau, the Oklahoma Independent Petroleum Association, the Environmental Federation of Oklahoma, the Oklahoma Aggregates Association and the Oklahoma Cattlemen's Association, submitted June 20, 2012	2090
140	Motion to Strike and for Leave to File Response filed by Protestants Oklahoma Farm Bureau Legal Foundation, the Pontotoc County Farm Bureau, the Oklahoma Independent Petroleum Association, the Environmental Federation of Oklahoma, the Oklahoma Aggregates Association and the Oklahoma Cattlemen's Association, submitted June 20, 2012	2093
141	Motion to Recuse/Disqualify Hearing Examiner and to Stay Proceeding and Brief in Support filed by Protestants Oklahoma Farm Bureau Legal Foundation, Oklahoma Aggregates Association, Environmental Federation Of Oklahoma, TXI, and the Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc, submitted November 8, 2012	2106
142	CPASA's Response in Opposition to Protestants' Motion to Recuse/Disqualify Hearing Examiner and to Stay Proceeding and Brief in Support, submitted November 26, 2012	2157
143	December 7, 2012 Memo to Board Members, and Staff's Recommended Order Denying Motion to Recuse	2173
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151	Order issued January 10, 2013 by Oklahoma Supreme Court in Case No. 111,381, *Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. v. Oklahoma Water Resources Board*	2299
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158	Protestants' Motion for Ruling on or Reconsideration of Motion to Strike and for Leave to File Response, filed July 22, 2013	2378
159	Motion for Production of Post-Hearing Communications between Hearing Examiner and OWRB Staff, filed July 22, 2013	2410
160	CPASA's Response to Materials Discussed in USGS Memorandum, filed July 22, 2013	2459
161	CPASA's Motion to Strike, filed July 29, 2013	2485
162	CPASA's Response to the Corporate Special Interest Groups Renewed Motion to Strike, filed July 29, 2013	2503
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