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STATE OF OKLAHOMA

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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

CPASA'S ANSWER BRIEF IN OPPOSITION TO PETITIONERS' BRIEF-IN-CHIEF

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**CPASA’S RESPONSE IN OPPOSITION TO PETITIONERS’
BRIEF-IN-CHIEF AND BRIEF IN SUPPORT**

Citizens for the Protection of the Arbuckle-Simpson Aquifer (“CPASA”) is a grassroots citizens organization whose mission is to protect and preserve springs and streams emanating from the Arbuckle-Simpson Aquifer. Tab 48 at 1401. The vast majority of CPASA’s members depend upon the Aquifer (either through groundwater wells or surface water flows) for drinking water, recreational use, agricultural use, and domestic use. *Id.*; Tab 101, Part 11 at 00:10:20 – 00:10:38 (CPASA President Amy Ford outlining her ranch’s dependence on the Blue River, which is fed by the Aquifer);¹ Tab 125 (CPASA member Floy Parkhill stating her life and property depend upon the Aquifer without any other viable alternative source of water).² As such, it is of vital importance to CPASA and its members that the Aquifer be sustainably managed. As detailed herein, this Court should affirm the final order and decision of the Oklahoma Water Resources Board (herein “OWRB”) in the matter of the maximum annual yield for the Arbuckle-Simpson Groundwater Basin (herein “OWRB’s Order”) because it reasonably regulates the use of groundwater, because it is based upon substantial, detailed, and credible scientific evidence found in the record, and because it is overwhelmingly supported by local stakeholders.³

¹ Mrs. Ford’s CPASA membership is established in Tab 100 at 1783.

² Mrs. Parkhill’s CPASA membership is established in Tab 100 at 1803.

³ CPASA submitted a Motion to Strike Petitioners’ fifty page Brief-In-Chief on July 10, 2015. In it, CPASA requested alternative relief, including permission to file an oversized brief. The Court has not made a determination on CPASA’s Motion at the time of filing. CPASA is compelled to file this oversized brief without express approval from this Court in order to avoid gross injustice, in light of Petitioners’ unilateral decision to more than double the established page limitations.

I. BACKGROUND

The Arbuckle-Simpson Groundwater Basin (herein “Aquifer” or “ASA”) underlies in excess of 500 square miles in South-Central Oklahoma. Tab 17 at 172; Tab 18 at 237. It serves as the cornerstone of the region’s economy, providing both groundwater and surface water for agricultural use, industrial use, and recreational use. Tab 18 at 238; Tab 92 at 1742; Tab 94 at 1748. Recreational facilities dependent upon the Aquifer include the Lake of the Arbuckles, Chickasaw National Recreation Area, Turner Falls Park, the Blue River Public Fishing and Hunting Area, and numerous youth camps. Tab 31 at 755. Indeed, the Chickasaw National Recreation Area *alone* boasts over 1.2 million visitors each year who contribute significantly to the region’s economy. Tab 20 at 345.

Additionally, the Arbuckle-Simpson Aquifer provides public water supplies in the form of groundwater and surface water to tens of thousands of Oklahoma citizens. The OWRB’s Order is supported by all water suppliers in the area—including those reliant on groundwater and those reliant on surface water. *See* Tab 57 at 1465 (a resolution from the City of Durant stating its water supply is partially provided by surface flow from the Aquifer and requesting it be sustainably managed); Tab 63 at 1501 (the City of Sulphur declaring it “vital that this [Aquifer] be sustainably managed so that the City of Sulphur’s water supply, obtained through groundwater wells, remains reliable”); Tab 63 at 1506 -07 (the City of Ada emphasizing its reliance on surface water and groundwater from the Aquifer and calling on the OWRB to establish a sustainable MAY); Tab 63 at 1519-30 (letter from the Arbuckle-Simpson Aquifer Protection Committee, which is comprised of municipalities, rural water districts, county commissions, and other local stakeholders, requesting a sustainable MAY in order to ensure adequate water supplies); Tab 63 at 1532 (Bryan County Commissioners supporting the

sustainable management of the Aquifer in order to ensure its source of water remains viable); Tab 63 at 1536 (the City of Ardmore calling for sustainable management of the Aquifer in order to protect its water supply); Tab 63 at 1540 (the City of Tishomingo requesting sustainable management of the Aquifer to protect its sole source of water, Pennington Creek, which is fed by the ASA). This widespread support results from the fact that the OWRB Order provides certainty to water suppliers and residents alike, enabling everyone to plan for the future with confidence that water will be available.

Petitioners quote Mr. Dave Roberson, representing Murray County Rural Water District No. 1, as evidence that the OWRB's Order injures those water suppliers who depend upon the Aquifer. Petitioners' Brief at 9. As the record establishes, there is broad support for the OWRB's Order from an overwhelming number of water suppliers reliant upon the ASA because they realize the critical necessity of ensuring a sustainable water supply. Even the Chairman of Murray County Rural Water District No. 1, David Gainey, admits that the OWRB's Order is "based on the best available science [and] will help our part of the state maintain the lifestyle which makes this area such a great place to live and visit, which is part of why I think the Oklahoma Legislature passed SB288." Tab 124 at 1963. Mr. Gainey believes it possible to mitigate "an unfortunate, unforeseen consequence of an otherwise admirable action." *Id.* Contrary to Petitioners' assertions, all water suppliers who participated in this proceeding⁴ believe sustainable development is critical and "admirable." The only question, then, is how to

⁴ The record shows that Velta Wingard attended at least one day of the formal hearing on behalf of Wingard Water Corp. Tab 52 at 1433. The record reflects that Ms. Wingard personally opposes a phase-in period for the MAY. Tab 63 at 1544. There is no evidence in the record, however, of Wingard Water Corp. actually supplying potable water to residents or opposing the MAY, itself.

assist one rural water district (Murray County RWD No. 1) with implementation (a question far outside the realm of this Court's substantial evidence analysis).

Regardless of whether said drinking water comes from surface flow or from groundwater, it is ultimately supplied by the ASA. The Oklahoma Supreme Court recognized this fact by noting the interconnection between groundwater levels in the Aquifer and the flow of springs and streams in the region. *Jacobs Ranch et al. v. Smith et al*, 2006 OK 34, ¶ 12 (determining it indisputable that "a decline in groundwater level of the Arbuckle-Simpson Groundwater Basin could jeopardize the flow of springs and streams, such as the spring that is the source of the water for the City of Ada").

Because of the Aquifer's importance as a drinking water source, the U.S. Environmental Protection Agency ("EPA") designated the Hunton (or eastern) Anticline of the Aquifer as a Sole Source Aquifer. Tab 14. As a Sole Source Aquifer, the Arbuckle-Simpson Aquifer supplies all of the public and domestic water consumed in the aquifer area to which no feasible alternative source of potable water exists should the Aquifer become contaminated. Tab 14 at 115. The ASA is the only designated Sole Source Aquifer in the State of Oklahoma. Tab 18 at 241.

In recognition of the ASA's importance, and prompted by attempts to withdraw vast quantities of groundwater for sale to distant cities, the Oklahoma Legislature passed Senate Bill 288 ("SB288"), codified at 82 O.S. §§ 1020.9, 1020.A, and 1020.9B, which designated the entire ASA as a Sensitive Sole Source Groundwater Basin. Tab 35; Tab 18 at 239. SB288 directed the OWRB to conduct a hydrologic study and set a maximum annual yield (MAY) that would not "reduce the natural flow of water from springs or streams emanating from said basin or subbasin." Tab 35 at 940.

SB288 signaled an intentional departure by the Oklahoma Legislature from the normal maximum annual yield process. For groundwater basins that are not Sensitive Sole Source Groundwater Basins, the OWRB is required to set a MAY “based upon a *minimum* basin or subbasin life of twenty (20) years from the effective date of the order establishing the final determination of the maximum annual yield.”⁵ 82 O.S. § 1020.5(B) (emphasis added). However, for Sensitive Sole Source Groundwater Basins, such as the Arbuckle-Simpson Aquifer, the OWRB is to set a sustainable MAY. Although the Legislature chose to measure sustainability by spring and stream flows, the concept has equal application to groundwater. SB288 ensures that groundwater will still be available to provide municipal, agricultural, industrial, recreational, and other beneficial uses for the next 20 years, 50 years, 75 years, or even 100 years.

It is under this sustainable framework that the OWRB began the most comprehensive hydrologic study ever conducted on a groundwater basin in Oklahoma. Tab 101, Part 13 at 00:49:31 – 00:50:45. Before beginning its scientific inquiry, the OWRB assembled a technical peer review team consisting of experts from the U.S. Geological Survey, Oklahoma Geological Survey, Oklahoma State University, and the U.S. Environmental Protection Agency to “review the scope of work and provide advice to ensure the use of sound science and appropriate methods.” Tab 47 at 1398.⁶ The OWRB utilized the collective knowledge and expertise of researchers at the U.S. Geologic Survey (“USGS”), Oklahoma State University, University of

⁵ Petitioners incorrectly assert that a MAY is based upon a rigid 20-year period. Petitioners’ Brief at 1-2. The OWRB is authorized to, and indeed has, set MAYs based upon periods longer than 20 years. As such, Petitioners’ assertions based upon what they believe a 20 year EPS would be for the Arbuckle-Simpson Aquifer are nothing more than conjecture and are unsupported by law. See Petitioners’ Brief at 5, 49.

⁶ This technical peer review team is not to be confused with the independent peer review conducted by the USGS on the USGS groundwater flow model.

Oklahoma, and Oklahoma Climatological Survey (“OCS”). Tab 31 at 762. This “multidisciplinary team of researchers employed several methods to obtain and interpret the necessary information” including “monitoring of climate, surface water, and groundwater; evaluating petroleum-related information; drilling test wells; conducting aquifer tests; geophysics; geochemistry; isotopic age dating of groundwater; tree-ring analysis; and modeling of groundwater surface water, and geology.” Tab 31 at 760.

Over 30 reports were produced as part of this comprehensive hydrologic study, as well as a digital groundwater-flow model of the eastern Aquifer. Tab 31 at 749. This model “was developed and used to test conceptual models of the aquifer and to predict the consequences of aquifer-scale groundwater withdrawals on streamflow.” *Id.* The model closely mirrors actual stream flow data, meaning its calibration is excellent. Indeed, even Petitioners’ expert admitted the model’s calibration “was almost a perfect match.” Tab 101, Part 12 at 00:35:43 – 00:36:07.

All told, the OWRB invested six years and approximately \$4 million dollars into studying the Arbuckle-Simpson Aquifer. Tab 31 at 760. The plethora of information and data obtained provided the OWRB “the basis to predict the impacts of groundwater withdrawals on streamflow and to test various water-use strategies.” *Id.* As evidenced by the record, the OWRB utilized a multitude of data and reports—the digital groundwater model being one of the many—in making its final decision.

II. LEGAL STANDARD

When reviewing an agency order, a District Court, “in the exercise of proper judicial discretion or authority, may set aside or modify the order, or revise it and remand it to the agency for further proceedings, if it determines that the substantial rights of the appellant or petitioner for review have been prejudiced because the agency findings, inferences, conclusions or

decisions.” 75 O.S. § 322(1). Here, Petitioners claim the OWRB’s Order was made in violation of constitutional provisions, was made upon unlawful procedure, and is arbitrary and capricious.

“The standard of review in Oklahoma under the Administrative Procedures Act is that of substantial evidence and further that the findings should not be reversed unless they are clearly erroneous.” *Kline v. State ex rel. Okla. Water Res. Bd.*, 1988 OK 18, ¶ 7 (citing 75 O.S. § 322). “[G]reat weight is accorded the expertise of an administrative agency. On review a presumption of validity attaches to the exercise of expertise. An appellate court may not substitute its judgment for that of an agency, particularly in the area of expertise which the agency supervises.” *City of Hugo v. State ex rel. Public Employees Relations Bd.*, 1994 OK 134, ¶ 10; see also *City of Oklahoma City v. Public Employees Relation Board*, 1997 OK CIV APP 34, ¶¶ 6-10.

This review “is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 621 (1966). As the U.S. Supreme Court famously described the review, “[s]ubstantial evidence is more than a mere scintilla.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Accordingly, a “court reviewing an agency’s adjudicative action should accept the agency’s factual findings if those findings are supported by substantial evidence on the record as a whole. The court should not supplant the agency’s findings merely by identifying alternative findings that could be supported by substantial evidence.” *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (internal citation omitted). In other words, courts “will not weigh conflicting evidence to determine its preponderance. This is a function of the [agency].” *Union*

Tex. Petroleum Corp. v. Jackson, 1995 OK CIV APP 63, ¶ 39 (citing *Delaney v. Osborn*, 265 P.2d 481 (Okla. 1953)).

It is undeniably true that Petitioners put the full weight of their substantial financial resources into the development of alternative findings and scientific opinions. However, such alternative findings and scientific opinions are not enough to overturn the OWRB's Order. The OWRB utilized its considerable expertise in water management and hydrogeology in making its determination of the maximum annual yield for the Aquifer and based its decision upon substantial evidence. As such, Petitioners' appeal must be denied and the OWRB's Order affirmed.

III. CERTAIN PETITIONERS FAILED TO ESTABLISH FROM THE RECORD THAT THEIR SUBSTANTIAL RIGHTS HAVE BEEN PREJUDICED BY THE OWRB'S ORDER

This Court's review of Petitioners' appeal "shall be conducted by the court without a jury and shall be confined to the record" 75 O.S. § 321. Based upon that review, the Court may, in its discretion, set aside, modify, revise, or remand the OWRB's Order. 75 O.S. § 322(1). However, before doing so, this Court must determine from its review of the record "that the substantial rights of the appellant or petitioner for review have been prejudiced" by the Order. *Id.* The record does not support such a finding with regards to Oklahoma Farm Bureau Legal Foundation ("OFBLF"), Oklahoma Independent Petroleum Association ("OIPA"), Environmental Federation of Oklahoma ("EFO"), Oklahoma Cattlemen's Association ("OCA"), and Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc ("ASAPFO").

Other than jointly hiring legal counsel to oppose the OWRB's Order, the record fails to demonstrate OIPA, EFO, or OCA⁷ have substantial rights that could be prejudiced. Additionally, while ASAPFO jointly filed documents with certain individuals, *see* Tab 122, 123, and 136, the record fails to demonstrate as to whether those individuals are members of ASAPFO or whether any member of ASAPFO has "substantial rights" that may be prejudiced by the OWRB's Order.

Similarly, a representative of OFBLF attended the formal hearing but did not submit comments. Tab 100 at 1794. The only other evidence pertaining to OFBLF in the record is a fleeting line included in an inside address to a cover letter. Tab 89 at 1729. Oklahoma Farm Bureau (as opposed to Oklahoma Farm Bureau Legal Foundation) did submit written comments establishing how its county chapters have members with substantial interests. Tab 98. However, nothing in the record establishes any sort of relationship between OFBLF and Oklahoma Farm Bureau.

Because these organizations failed to establish substantial rights—let alone substantial rights that have been prejudiced—in the record below, it is now impossible for them to establish for this Court that the OWRB's Order prejudices their substantial rights as required by Oklahoma statute. As such, this Court should dismiss the appeal of OFBLF, OIPA, EFO, OCA, and ASAPFO.

⁷ The record does contain a statement by Mrs. Amy Ford supporting the OWRB's Order. In her statement, Mrs. Ford states she is a member of the Oklahoma Cattlemen's Association. Tab 101, Part 11 at 00:10:20 – 00:10:38. However, OCA's effort to undo the OWRB's Order is in stark contrast to Mrs. Ford's position and best interests. It is not sufficient to establish OCA has a substantial right that has been prejudiced. If anything, OCA has prejudiced its member's substantial rights by opposing the OWRB's Order.

IV. THE AGENCY'S ORDER IS VALID AND SHOULD BE AFFIRMED

Historically, MAYs were determined under a "mining" theory. In other words, MAYs for groundwater basins that are not sensitive sole source groundwater basins were determined without regard for the impact on springs and streams. Tab 101, Part 7 at 00:46:20 - 00:48:41. A prime example is the Ogallala Aquifer, which encompasses the panhandle and parts of far western Oklahoma. Once the MAY was set, a number of high volume wells were installed and the Beaver River "just went away." *Id.* In those instances, the aquifer's storage coefficient played a much more prominent role in the modeling. Tab 101, Part 6 at 00:14:54 - 00:16:00.

However, SB288 signaled a paradigm shift in the determination of MAYs, at least for sensitive sole source basins like the Arbuckle-Simpson Aquifer. Tab 101, Part 7 at 00:46:20 - 00:48:41. For the first time, the MAY must be determined on a sustainable basis, taking into account the negative impact groundwater withdrawals can have on spring and stream flow. Moreover, the Arbuckle-Simpson Aquifer differs from most aquifers in that ". . . this particular aquifer, not every aquifer, but in this particular aquifer the stream flow originates as recharge." Tab 101, Part 7 at 00:46:20 - 00:48:41. In other words, the surface discharge of groundwater originates as recharge (infiltrated precipitation) and if you withdraw groundwater in amounts equal to or greater than the recharge "the streams are going to go away." *Id.* As such, recharge is a very sensitive factor in determining the MAY for the ASA, much more so than storage coefficient. This point was made time and again at the formal hearing. Tab 101, Part 6 at 00:14:54 - 00:16:00; 00:16:01 - 00:16:26;⁸ 00:34:35 - 00:34:54⁹; Part 7 at 00:06:21 - 00:06:47

⁸ **Q (Mark Walker):** Thank you. Because ultimately the Board decided to use stream base flow as the criteria to set the maximum annual yield, that's what made storage coefficient so important, isn't it?

A (Scott Christenson): That's what makes recharge so important.

Q: And storage coefficient, correct?

(Mr. Christenson stating the depletion of streams are more sensitive to recharge), 00:46:20 - 00:48:41.

The USGS set about constructing a groundwater model that encompassed much of the data gathered as part of the hydrologic study. The emphasis of the model was recharge, since recharge is the deciding factor of spring and stream flow in the Aquifer. Tab 101, Part 7 at 00:06:21 – 00:06:47. Even Petitioners' experts agree that the USGS expended great care in developing a model to accurately depict recharge and stream flow. Tab 101, Part 12 at 00:10:19 – 00:12:26 (Dr. Reely stating that “the model was developed to do just that: to simulate recharge, flow, and discharge from the eastern lobe”); Tab 89 at 1731 (Dr. Poeter admitting that “much effort was applied to representing the distribution of hydraulic conductivity and recharge in the model”).

The results of the USGS's labor are exceptional. The modeled recharge and stream flow was almost a perfect match to observed recharge and stream flow. Tab 101, Part 12 at 00:15:05 – 00:15:06¹⁰; Tab 101, Part 7 at 00:56:33 – 00:57:06. Scott Christenson, who developed the

A: The recharge.

Q: [Are you] equating the two?

A: No.

⁹ Q (Mark Walker): This is important because what storage coefficient you plugged in that model is going to make a big difference on the effect of groundwater removal on streams and springs.

A (Scott Christenson): I disagree. Storage coefficient isn't that important. That is why we didn't emphasize it against the recharge rate.

¹⁰ Petitioners' expert, Dr. Reely, noted that the USGS model had “almost a perfect match” between the observed recharge and stream flow and modeled recharge and stream flow. Dr. Reely then stated that “in [his] experience it is very unusual to get that close.” Instead of congratulating the USGS on an exceptional job, Dr. Reely discounted the USGS's feat by stating that the USGS “manipulated” the data in order to get that result. It is apparent that no amount of science or technical information can overcome Petitioners' ideological objection to this MAY. Fortunately for CPASA, its members, local water suppliers, and businesses, Petitioners' continued efforts to confuse, obfuscate, and delay this determination fail to meet the stringent substantial evidence standard applied in this appeal.

model and who was deemed an expert in hydrogeology and groundwater modeling in this administrative proceeding, stated that in his expert opinion the modeling work done by the USGS was valid. Tab 101, Part 13 at 00:10:14 – 00:10:49. Additionally, Noel Osborn, who worked at the OWRB for over 20 years conducting groundwater studies and investigations—much like this hydrologic study, stated that the ASA is the most studied aquifer in the state and that the technical and scientific work completed was more than adequate to use in this proceeding. Tab 101, Part 13 at 00:27:10 – 00:28:24 and 00:49:31 – 00:50:45.

A. The Chosen Storage Coefficient Is Supported By Substantial Evidence

Petitioners' criticisms of the USGS groundwater model highlight their fundamental misunderstanding of the purpose of the hydrologic study. As discussed, *supra*, the OWRB was statutorily required to determine a MAY for the Arbuckle-Simpson Aquifer using a sustainable development theory, rather than a mining theory. For this particular Aquifer, recharge was the most important factor in determining a sustainable MAY. Tab 101, Part 7 at 00:46:20 – 00:48:41. However, Petitioners largely ignore the importance of recharge and instead focus on less important considerations, such as storage coefficient and unconfined top layers.

With regards to the storage coefficient,¹¹ Petitioners argue that the model should have utilized different storage coefficients for the confined, semi-confined, and unconfined layers. Petitioners' Brief at 27. Petitioners allege the storage coefficient used was too low, which "guaranteed a model result that predicted a greater adverse impact on springs and streams." *Id.* For support, Petitioners point to one of the 30 studies published as part of the OWRB's hydrologic study; specifically, the report entitled "Estimating Selected Hydraulic Parameters of the Arbuckle-Simpson Aquifer from the Analysis of Naturally-Induced Stresses." Tab 34. This

¹¹ Storage coefficient is the "volume of water an aquifer releases from or takes into storage per unit surface area of the aquifer per unit change in head." Tab 18 at 278.

report calculated the Aquifer's storage coefficient to range from 0.0063 to 0.018. Tab 34 at 926.¹² A previous study of the Aquifer determined its storage coefficient to be 0.008 for confined portions. Tab 34 at 926. In that regard, both storage coefficients are very close to each other. Tab 34 at 927.

Additionally, a very short pump test was conducted that provided a preliminary storage coefficient of 0.011. Tab 101, Part 7 at 00:11:39 – 00:12:57. However, the pump test was only conducted for twenty-four hours when it is preferred to continue for at least seven days in order to determine storage coefficient. *Id.* For that reason, the preliminary storage coefficient of 0.011 as derived from the pump test was given less weight because of its inherent inaccuracy. *Id.*; Tab 18 at 282.

Consideration was also given to the relative thickness of the Aquifer. Data establishes the Aquifer is approximately 3,500 feet thick, with the majority of the Aquifer being confined. Tab 101, Part 13 at 00:03:44 – 00:07:52; Tab 18 at 249, Figure 5 (showing the Aquifer's depth to be at least 4,700 feet). As such, the USGS determined it appropriate to utilize one regional storage coefficient because the storage coefficients in the other relatively small layers would not substantially change the result for the entire (primarily confined) aquifer. Tab 101, Part 7 at 00:24:19 – 00:24:52. This Aquifer-wide approach is also preferable because storage coefficients can vary widely for the same well. Tab 101, Part 7 at 00:24:19 – 00:24:52; *see also* Tab 18 at 280 (stating that regional methods, such as the ones used in this study, "provide descriptions of hydraulic properties that are applicable on the scale of miles," which was the exact purpose for this aquifer-wide hydrologic study). Based upon these considerations, a storage coefficient of

¹² The study found the storage coefficient, or storativity, ranged from 6.3E-3, which equates to 0.0063, to 1.8E-2, which equates to 0.018.

0.008 was chosen, which is well within the range of storage coefficients identified in the hydraulic analysis report. Tab 101, Part 7 at 00:17:06 – 00:17:26.

Petitioners allege that Dr. Poeter re-ran the USGS model using an unconfined storage coefficient value for the top layer and that the resulting reduction in stream flow was five times less than what the model predicted when treating all layers as confined. Petitioners' Brief at 28. However, Dr. Poeter did not recalibrate the model after making this change and, as Petitioners' other expert Dr. Reely testified, "without calibration the model is essentially useless." Tab 120 at 1939; Tab 101, Part 12 at 00:13:54 – 00:14:03. Thus, Petitioners' so-called "evidence" is admittedly useless and must be disregarded.

In attempting to prove a higher storage coefficient changes the result, Petitioners cited to evidence that was struck from the record. *See* Petitioners' Brief at 23-24. CPASA objects to Petitioners' willful disregard for the statutory scope of review, which is limited to the record. 75 O.S. § 321. Despite Petitioners' improper citations, the record establishes that the use of a higher storage coefficient does not make a difference. Specifically, "storage coefficient affects the amount of time it takes [the aquifer] to come to the new dynamic equilibrium, but the discharge is, should be, very similar." Tab 101, Part 6 at 00:38:27 – 00:38:54. Moreover, the record reflects that when asked if she knew how much difference her conclusions would make, Dr. Poeter replied "[y]es, I have not made the runs to find out how much difference. They could be very large; they could be not so large." Tab 101, Part 9 at 00:12:14 – 00:12:30.

Petitioners may disagree with the chosen storage coefficient, but the fact remains that the OWRB utilized its undeniable technical expertise and relied upon substantial evidence when determining a storage coefficient of 0.008. Accordingly, Petitioners' challenge fails.

B. Modeling The Top Layer Of The Aquifer As Confined Is Supported By Substantial Evidence

In a somewhat related argument to the storage coefficient, Petitioners claim that the USGS erred when modeling the top layer of the Aquifer as confined, rather than unconfined. According to Petitioners, this distinction affects the Aquifer's ability to give up water to the stream. Petitioners' Brief at 21.

In support of their argument, Petitioners represent to this Court that "it is uncontroverted that the uppermost part of the ASA . . . is unconfined" and that "[a]ll seven of the hydrologists who testified at the Hearing agreed on this fact." Petitioners' Brief at 21. However, that statement is not entirely accurate. For instance, Jennifer Back from the National Park Service testified that *generally*, the presence of a water table indicates an unconfined aquifer. Tab 101, Part 3 at 00:58:33 – 00:59:45. Ms. Back did not testify that the uppermost part of the ASA is unconfined. Quite the opposite, Ms. Back testified that "the storage coefficient for the Arbuckle-Simpson Aquifer is relatively low, relatively small. It's a small number." Tab 101, Part 3 at 01:02:47 – 01:03:08.¹³ A small storage coefficient indicates a confined layer.

This is consistent with the testimony of Scott Christenson. Mr. Christenson stated that "there certainly are confined parts of the aquifer here under where the post-simpson is on top of the Arbuckle Simpson it is definitely confined, but as you go to where the Arbuckle group stays at the surface, we would normally expect that to behave in an unconfined manner, but there is also—if you look at [] the response in wells, it actually seems to behave in a confined manner, too." Tab 101, Part 6 at 00:21:30 – 00:22:46. Like the other hydrologists, Mr. Christenson expected the storage coefficient for the unconfined zone to be much higher (consistent with most

¹³ Although Ms. Back testified that she had not gone out and conducted her own independent scientific study as to the storage coefficient of the Aquifer, her status as a hydrogeologist and her intimate knowledge of the ASA render her opinion relevant.

other aquifers), however, “not so much this aquifer. . .Where we have actually measured the volume of water that is being drained, it’s also very, very small.” Tab 101, Part 6 at 00:24:35 – 00:24:58. When asked if he disagreed with the testimony of two other hydrologists, Mr. Christenson replied, “I also expected [the storage coefficient] to be much higher. We made measurements. It isn’t.” Tab 101, Part 6 at 00:25:23 – 00:25:28.

The USGS decided to simulate the aquifer as confined and gave this detailed explanation for doing so:

The eastern Arbuckle-Simpson aquifer was simulated as a confined aquifer, for several reasons. As described in the Aquifer Confinement section of this report, parts of the aquifer definitely are confined, and parts of the aquifer that would appear to be unconfined have measured storage properties similar to those of confined aquifers. Another reason for simulating the entire eastern Arbuckle-Simpson aquifer as a confined aquifer is related to the methods used to simulate confined and unconfined aquifers in MODFLOW. Transmissivity is calculated for confined aquifers as the product of the thickness of the aquifer and the hydraulic conductivity, and for unconfined aquifers is calculated as the product of the saturated thickness (head minus altitude of aquifer base) and the hydraulic conductivity. Preliminary simulations showed that to meet the objectives of determining the amount of water that could be withdrawn with minimal reduction of stream and spring flow, heads would be reduced by only small amounts, and, therefore, the change in transmissivity would be small as wells were pumped, considering that the average thickness of the aquifer is on the order of 3,000 ft. Treating the modeled aquifer as confined has numerical benefits in that the solution is more linear and instability is reduced. Some areas exist at the southern edge of the aquifer where the thickness of the aquifer is small and the fractional change in transmissivity as the head changes is substantial, but these areas represent only a small part of the aquifer, and the limited benefit of updating transmissivity in small areas of thinly saturated aquifer was considered to be outweighed by the numerical benefits of treating the aquifer as confined.

Tab 18 at 295.

This reasoned and careful analysis by the USGS provides substantial evidence as to why the top layer was modeled as confined. Petitioners simply do not like it, which is a far cry from proving arbitrary and capricious agency action. The decision to model the top layer as confined was made by experts who had studied the aquifer for years and made countless site visits. Tab

101, Part 13 at 00:31:44 – 00:32:14 (Noel Osborne testifying she made well over 100 site visits to the Aquifer). Conversely, Dr. Poeter had three weeks (at most) to review the model and made no site visits to the Aquifer. Tab 101, Part 9 at 00:00:24 – 00:00:50.

The Oklahoma Civil Court of Appeals faced similar arguments in *El Paso Natural Gas Co. v. Oklahoma Tax Commission*. 1996 OK CIV APP 69. There, El Paso and Anson (herein collectively “El Paso”) asserted the Oklahoma Tax Commission (“OTC”) should have used different calculations in determining a take-or-pay deficiency. *Id.* at ¶ 21. The administrative law judge determined El Paso’s calculations to be artificially low. The court acknowledged that the evidence conflicted on this point. *Id.* Ultimately, the court decided that “[w]hile OTC might have used other figures, our standard of review is substantial evidence – that which possesses something of substance and of relevant consequences that carries with it fitness to induce conviction.” *Id.* (citing *Teleco, Inc. v. Corporation Comm’n*, 653 P.2d 209, 212 (Okla. 1982)).

Although conflicting evidence exists in the record regarding the storage coefficient and confining upper layer used in the model, these conflicts do nothing to detract from the substantial evidence contained in the record supporting the validity of the model and the OWRB’s decision. Thus, the Court “may not substitute [its] judgment for that of the agency’s factual determinations.” *Cox v. State ex rel. Okla. Dep’t of Human Servs.*, 2004 OK 17, ¶31. Based upon the great weight given to agencies in the exercise of their experience and expertise, substantial evidence supporting the OWRB’s Order exists.

C. **Substantial Evidence Supports A Finding That The Aquifer Contains The Same Geological And Hydrological Characteristics**

In a footnote, Petitioners claim that the Central and Western lobes of the Aquifer are not hydrologically or geologically similar to the Eastern lobe. Petitioners’ Brief at 26, n. 7. Petitioners’ superficial treatment of this issue fails to provide a “reasoned argument or

supporting authority.” *In re Southwestern Bell Tel., L.P. v. State ex rel. Okla. Corp. Comm’n*, 2007 OK 55, ¶ 33. In *Southwestern Bell*, a party included a footnote in its brief-in-chief objecting to certain evidence. *Id.* The court found that such nonchalant treatment of an issue “clearly [fell] short of meriting judicial attention” and rejected the argument altogether. *Id.* Similarly, Petitioners’ argument, included as an afterthought in footnote 7, clearly falls short of meriting judicial attention and must be rejected. However, even if this Court considers Petitioners’ superficial argument, the record contains substantial evidence supporting the OWRB’s Order.

Oklahoma law requires the OWRB to conduct hydrologic surveys and investigations of groundwater basins “having substantially the same geological and hydrological characteristics and data from wells in such basin . . .” 82 O.S. § 1020.4(B). For purposes of the study, the Aquifer was subdivided into three lobes: eastern, central, and western. “The designations eastern, central, and western Arbuckle-Simpson aquifer are based primarily on outcrop areas, but the three geographic areas share similar hydrogeologic characteristics.” Tab 18 at 242.

As Noel Osborn explained, a peer review group was assembled to review the OWRB’s plans and to ensure the hydrologic study provided the requisite information for the OWRB to make its tentative MAY order. Tab 31 at 762. It was the decision of that peer review team to *model* only the eastern lobe, but to continue to *study* the central and western lobes. Tab 101, Part 13 at 00:42:53 – 00:44:35. Part of that continued study included gathering “geologic information for all parts of the aquifer. Geochemical studies were performed across the aquifer.” Tab 16 at 160, ¶ 18. The locations of said geochemical studies are found at Figure 7 of Tab 17 at 180. “Perhaps most importantly, recharge calculations done on streamflow data show that timing and magnitude of recharge on the western part of the aquifer is similar to recharge on the eastern

Arbuckle-Simpson aquifer.” Tab 16 at 160, ¶ 18; *see also* Tab 15 at 149 (map identifying location of USGS stream gage in western lobe).

Stream data was collected from all three lobes. Tab 15 at 150 (map identifying the location of OWRB monitoring sites, OWRB periodic gages, and USGS stream gages). The residence time of water from the entire Aquifer was studied, personnel examined springs, wells, sinkholes and caves all over the Aquifer, and a thorough review of published literature was conducted for all lobes of the Aquifer. Tab 101, Part 13 at 00:44:36 – 00:45:30. Based upon this study and the data obtained, the OWRB determined that the three lobes have substantially the same geologic profile and hydrogeology. Tab 101, Part 13 at 00:46:12 – 00:49:30; Tab 18 at 242.

Petitioners blatantly misrepresent to this Court that the “OWRB admits that it only studied one of the three aquifers of the ASA, being the Eastern Aquifer.” Petitioners’ Brief at 26, n. 7. The OWRB consistently stated that although it only *modeled* the eastern lobe, it *studied* the entire Aquifer. Tab 16 at 160, ¶ 18; Tab 17 at 177, Figure 5 (identifying springs located over entire Aquifer); Tab 31 at 765, Figure 5 (identifying monitoring stations located over entire area). As support for their claim, Petitioners rely upon the testimony of Dr. Kyle Murray, from the Oklahoma Geologic Survey, related to a research proposal he submitted to the OWRB. As an initial matter, Petitioners’ reliance on Dr. Murray’s research proposal is sorely misplaced. Dr. Murray’s superior stated at the formal hearing that, while he endorsed the document as a proposal, he regretted that the proposal was being treated as if it were a report, generated after several years of work. Tab 101, Part 5 at 01:22:55 – 01:23:14.

Dr. Murray’s proposal sought funds to conduct further study of the Aquifer’s central and western lobes. Tab 85 at 1706. To support his project proposal, Dr. Murray stated that

“hydrologic conditions in the western and central segments were not monitored or modeled prior to proposing the MAY or EPS.” Tab 85 at 1699. Even after being presented data collected from the western and central segments Dr. Murray refused to change his opinion. Tab 101, Part 5 at 00:46:23 – 00:47:23 (admitting he believed that recharge rates may be different between the lobes in his proposal, but claiming evidence presented showing the recharge rates in the western lobe and eastern lobe to be similar was insufficient). Moreover, Dr. Murray stated it did not change his opinion that the data was part of a peer reviewed study by the USGS. Tab 101, Part 5 at 00:47:27 – 00:47:39. The record undeniably proves Dr. Murray wrong—the OWRB conducted a careful analysis and literature review of the entire Aquifer, including the central and western lobes. But, Dr. Murray’s refusal should come as no surprise since he could not even be bothered to read the entirety of the USGS report (Tab 18) before deeming it insufficient and self-servingly seeking funding for his research. Tab 101, Part 5 at 00:25:14 – 00:26:03.

Thus, even if this Court deems Petitioners footnote as worthy of judicial attention, the record contains substantial evidence supporting the OWRB’s factual findings that the three lobes have substantially similar hydrologic and geologic characteristics. As such, Petitioners’ claims fail.

D. The OWRB’s Determination Of Natural Flow Is Supported By Substantial Evidence

SB 288 directed the OWRB to complete a hydrological study and approve a MAY that ensured the removal of groundwater from the basin would not “reduce the natural flow of water from springs or streams emanating from said basin or subbasin.” Tab 35 at 940, ¶ (B)(1). As discussed, *supra*, this shifted the decision from one based on mining (in which the OWRB did not consider negative impacts of groundwater withdrawals on springs and streams) to one of

sustainability (in which the OWRB must consider the hydrologic relationship between surface and groundwater and make reasonable regulations of both).

Although natural flow is well-understood in the legal arena,¹⁴ quantifying it was a matter of first impression for the OWRB. The OWRB assembled the Arbuckle-Simpson Study Surface Water Technical Advisory Group (“TAG”) to help frame the analysis and recommend an empirical parameter of natural flow. Tab 101, Part 10 at 00:04:21 – 00:06:25. The TAG considered many different possibilities for quantifying natural flow. Tab 101, Part 10 at 00:09:56 – 00:10:26. For instance, the TAG considered fishing, recreation, and water supply. Tab 101, Part 10 at 10:30 – 00:12:22. However, each of these considerations required a subjective analysis. *Id.* (Mr. Smithee equating how much water is needed in Honey Creek to sustain Turner Falls Park to asking who is the prettiest girl in the room—it is completely subjective). Thus, the TAG identified an indicator that (1) would protect the other considerations discussed (such as fishing, recreation, water supply, and economic development), and (2) could be scientifically and objectively quantified. *Id.* Specifically, the TAG agreed that analyzing the relationship between certain spring obligate (or spring dependant) fish species and their usable habitat would enable the OWRB to make a determination that followed the letter and the spirit of SB288. Such a study looked at the “least common denominator” of all of the other considerations. Tab 101, Part 10 at 00:12:23 – 00:13:55. In this way, the other uses, such as recreation, fishing, and public water supply, were protected. Tab 101, Part 10 at 00:16:38 – 00:17:08 (Mr. Walker: But the SSA designation means preserving for drinking water use. Derek Smithee: Right. And we did.).

¹⁴ For a more detailed review of natural flow in the legal context, see Tab 131 at 1995-1999.

Two instream flow assessments were conducted for the purpose of providing information to the OWRB that would allow it “to account for the impacts of groundwater withdrawal on fish habitat in streams of the Arbuckle-Simpson.” Tab 36 at 947; *see also* Tab 37. The fish, then, were the aquatic equivalent to a canary in a coalmine. Just as a canary’s death would warn coal miners to the presence of deadly gases, a sharp decline in the Aquifer’s spring obligate fish species would warn of an unacceptable decrease in spring flow. Ultimately, the TAG recommended “a target of 10 to 25% maximum reduction in baseflow.” Tab 41 at 1095.

Petitioners argue that the TAG’s recommendation was without a scientific basis because the recommendation was based upon *base flow*, while the instream flow assessment was based upon *baseline low flow*. Petitioners’ Brief at 30-45. However, Petitioners’ argument is patently false and stems from a fundamental misunderstanding of technical flow terms and regimes.

The instream flow assessment (“IFA”) analyzed three different stream flow patterns—baseline flow, baseline low flow, and baseline high flow. Tab 35 at 948. Stream flow includes both a groundwater component and a surface runoff component. Baseline flow represents the median discharge at each site. *Id.* In other words, baseline flow represents that flow that occurs at least 50 percent, or half, of the time. Baseline low flow represents the 25th quartile (or percentile) flow. *Id.* Importantly, it represents flow during dry or drought-stricken periods when there is little or no surface water runoff contributing to the flow. *Id.* Baseline high flow represents the 75th quartile (or percentile), which equates to wet years. *Id.*

Petitioners are outraged that the OWRB looked closely at baseline low flow, which Petitioners incorrectly believe to be “the lowest low flow” when establishing natural flow. Petitioners’ Brief at 34 (as defined in the IFA, baseline low flow is the 25th percentile flow). By doing so, Petitioners accuse the OWRB of choosing the most restrictive flow regime such that

even minor reductions in baseline low flow would result in significant reductions in fish habitat, “much more so than had the Technical Advisory Group selected the Baseline Average Flow or Baseline High Flow also addressed in the IFA.” *Id.* This argument highlights Petitioners’ lack of understanding on the issue. The MAY proceedings at hand focused on the impact to the natural flow of springs and streams from groundwater withdrawal. As such, the OWRB was only concerned with the decrease in the groundwater component of stream flow. Because baseline average flow and baseline high flow include a surface water component, the OWRB could not use those flow regimes.

Petitioners’ mistaken understanding of flow regimes is further evidenced by this erroneous conclusion:

Instead, and inexplicably, the Technical Advisory Group expressed the empirical number as a percentage reduction in the “75th Percentile Flow” which it called “Base Flow.” The 75th Percentile Flow is that amount of water in the stream which occurs at least 75% of the time throughout the year.

Petitioners’ Brief at 35. In actuality, Petitioners misconstrued the testimony given by Mr. Smithee. When asked, Mr. Smithee stated “Base flow is that flow that occurs at that location the majority of the time. At least 75% of the time. The low flow is the lowest major flow at any time. There’s a big difference.”¹⁵ Tab 101, Part 10 at 00:29:14 – 00:29:38. Petitioners erroneously equate flow that occurs at least 75% of the time (defined as base flow by Mr.

¹⁵ CPASA objects to Petitioners repeated attempts to rewrite testimony from the formal hearing. For example, Petitioners substantively changed Mr. Smithee’s statement that “[t]he low flow is the lowest measured flow at any time,” to “[t]he Low Flow (Baseline Low Flow) is the lowest measured flow at any time.” Mr. Smithee is correct that low flow is the lowest measured flow at any time (not baseline low flow). A simple review of the record reveals that baseline low flow is the 25th Percentile flow—not the lowest measured flow at any time. Tab 35 at 948. Petitioners’ unilateral revisions to substantive testimony to bolster their argument is unquestionably inappropriate. Often, Petitioners insert the incorrect terms. Petitioners’ Brief at 36 (twice inserting “(75th Percentile Flow)” after base flow, when the two are not equivalent); at 37 (again inserting “(75th Percentile Flow)” after base flow).

Smithee) to 75th Percentile Flow. Petitioners' Brief at 35. In fact, the two terms are exact opposites.

A percentile is a value on a scale of one to one hundred that indicates the percent of a distribution that is equal to or below it. Percent exceedance, on the other hand, is a way to describe the percentage of time for which an observed streamflow is greater than or equal to a defined streamflow. Percentile flow and percent exceedance are inversely related.¹⁶ For example, assume a hypothetical stream has a discharge of 30 cubic feet per second (cfs), which ranks at the 20th percentile. This means that 30 cfs is equal to or greater than 20 percent of the recorded discharges for the hypothetical stream. The percent exceedance for this hypothetical is 80. An 80% exceedance flow means that the hypothetical stream's flow will be equal to or greater than 30 cfs 80% of the time. Low flow events have high exceedance percentages because most of the time observed flows exceed the low flow. Similarly, high flow events have low exceedance percentages because most observed flows are lower than the high flow events.

As such, when Mr. Smithee stated that base flow was that flow that occurs "at least 75% of the time" he was referring to the 75% *exceedance* flow, which is equivalent to the 25th *percentile* flow. This is completely consistent with the IFA's baseline low flow, defined as the 25th quartile flow. Indeed, the title of the master slide used by the TAG is "Site and Species WUA [weighted usable area] Impacts at 25% Flow." Tab 41 at 1111. Additionally, this is entirely consistent with what the TAG communicated to the modelers. Tab 91 at 1739 ("From a technical perspective, it was generally agreed that no substantial impact would occur if the 75% *exceedance of total flow* were reduced between 10 and 25%, and we have forwarded this information to Scott Christenson to input into his groundwater model") (emphasis added).

¹⁶ This mathematical relationship is: $X = 100 \text{ percent} - Y$, where X equals Percent Exceedance and Y equals Percentile.

To be sure, Petitioners did their best to confuse, misuse, and interchange these terms at the formal hearing—so much so that they were able to confuse Mr. Smithee at the formal hearing. Because of Petitioners' efforts in confusion, the Hearing Examiner failed to understand that 75% exceedance flow, 25th percentile flow, baseline low flow, and base flow were all functionally equivalent. *See* Tab 170 at 2608, ¶¶ 36-37. Despite the Hearing Examiner's confusion, the OWRB's Order adopts the proper definition of natural flow: a maximum reduction of 25% of base flow. This definition is consistent with the IFA's baseline low flow, with 25th percentile flow, and with 75% exceedance flow. As such, it is a difference without distinction.

Even if these flows were not functionally equivalent, the OWRB's Order would still be supported by substantial evidence. Mr. Smithee explained that the OWRB did not rely upon the exact numbers produced in the IFA; rather, the OWRB looked at trends and other relevant criteria, such as "frequency, duration, magnitude, rate of change, timing of change, seasonality. All those factors come into play in recommendation back to the workgroup." Tab 101, Part 10 at 00:34:35 – 00:35:51. Contrary to Petitioners' assertions, the IFA is not—and was never intended to be—the sole basis for the OWRB's decision. As explained by Mr. Smithee:

There's a little bit of a misconception not only on this work but other work that, science doesn't give us the answer. Science informs our answer. . . It's more like the gutters on a bowling alley. It tells us where the out of bounds lines are, but it rarely gives us the answer. So right now we are operating in the alley and we know what's out. We need to use our experience, expertise, judgment, and help with others on what is the correct policy call within the boundaries the science provides.

Tab 101, Part 10 at 00:34:13 – 00:35:37. Using its experience, expertise, and judgment, the OWRB made a determination that was both supported by science and complied with its statutory

mandates. This technical determination is presumed valid and must be given great weight. *City of Hugo v. State ex rel. Public Relations Bd.*, 1994 OK 134, ¶ 10.

Petitioners next claim that the determination of natural flow is flawed because the USGS model analyzed and was calibrated to the Five-Year Average Annual Flow, not the 75th percentile flow. Petitioners' Brief at 37. This is yet another instance of Petitioners dramatizing a non-issue. As established above, neither the 75th percentile flow nor the 75% exceedance flow (which is likely what Petitioners meant) is a standalone flow regime; rather, both are statistical analyses of flow.

Based upon the TAG's recommendation of no more than a 25% reduction in base flow, the USGS model simulated three different equal proportionate share (EPS) scenarios: 0.125, 0.250, 0.392. Tab 18 at 323, Table 24. A 21.6% depletion of base flow (using the 5-year average base flow) was simulated using an EPS of 0.125. *Id.* The simulation of 0.250 estimated a 47.3% reduction in base flow. *Id.* Thus, using the TAG's recommendation, the OWRB knew its EPS must be between 0.125 and 0.250 to achieve an EPS that does not reduce base flow by more than 25 percent.

The record establishes that, after analyzing this issue from various scientific methods, the OWRB exercised its expertise and judgment in arriving at an EPS of 0.2 for the Arbuckle-Simpson Aquifer. Because substantial evidence exists supporting the OWRB's decision, and because a presumption of validity attaches to the OWRB's exercise of experience and expertise, this Court must affirm the OWRB's Order.

V. **THE AGENCY'S ORDER FOLLOWED LAWFUL PROCEDURE AND SHOULD BE AFFIRMED**

A. **The Technical Advisory Group's Recommendation Is Not Equivalent To An Agency Rule**

For the first time, Petitioners claim that the TAG's recommendation regarding natural flow somehow qualifies as a rule under the Oklahoma Administrative Procedures Act. Petitioners' Brief at 9-11. However, Petitioners are barred from bringing this objection for the first time on appeal. As the Oklahoma Supreme Court stated:

At the very heart of our adversary judicial system is informed opposition. Orderly procedure and good administration require that objections available in proceedings before an administrative agency be made while it has an opportunity for reconsideration and correction at the time appropriate under its practice. To permit an adversary to sit quietly by until an administrative proceeding is closed and lodged in an appeal, and then raise issues on appeal, which if timely objected to in the manner authorized by the rules governing the agency's proceedings might have been cured, is subversive of both the purposes for which the [agency] was created and of the adversary system which gives those purposes fulfillment.

State ex. rel. Cartwright v. Okla. Natural Gas Co., 1982 OK 11, ¶ 11.

Petitioners' note that the TAG's recommendation was discussed at a 2009 public meeting. Petitioners' Brief at 11. At no time between 2009 and March 13, 2012 (when the tentative MAY was issued) did Petitioners raise their "concern." Moreover, Petitioners failed to directly raise their "concern" at the formal hearing, although they did make two vague references to this topic. In one instance, Petitioners' counsel asked Derek Smithee if the TAG took a vote in reaching its recommendation and whether minutes were kept. Tab 101, Part 10 at 00:51:49 – 00:52:36. Additionally, Petitioners' counsel asked Mr. Smithee whether there was any discussion of making the natural flow determination through rulemaking. Tab 101, Part 10 at 00:56:50 – 00:57:45. However, at no time during the formal hearing did Petitioners assert the OWRB *should have* conducted rulemaking on this point.

Petitioners had numerous post-hearing opportunities to object. After the hearing, Petitioners were allowed to—and did—file a post-hearing brief. Tab 116. Although Petitioners objected to the OWRB’s definition and evidence supporting its natural flow determination, Petitioners failed to object on the grounds that it constituted unlawful rulemaking. Petitioners could have raised this issue in their exceptions to the Hearing Examiner’s proposed order. Tabs 149 and 150. They did not. Petitioners could have raised this issue in their “Additional Exceptions to the Hearing Examiner’s Proposed MAY Order” filing. Tab 166. They did not. Moreover, Petitioners could have raised this issue in a motion for reconsideration after the OWRB’s decision. 75 O.S. § 317(A). They did not. As such, Petitioners cannot “sit quietly by until an administrative proceeding is closed and lodged in an appeal, and then raise issues on appeal.” *State ex rel. Cartwright v. Okla. Natural Gas Co.*, 1982 OK 11, ¶ 11.

Even if Petitioners had not waived the right to bring such a claim, their argument still fails. The very name of the committee, Technical Advisory Group, clearly conveys—to everyone but Petitioners—that the committee is not the final decision-maker. Moreover, the presentation given by the Advisory Group, which Petitioners cite no less than six times, is boldly titled “Arbuckle Simpson Study Surface Water Technical Advisory Group Recommendations.” Tab 41 at 1092 (emphasis added). This fact is further driven home by a slide in the presentation that states “Working group recommendation: Groundwater management should be based upon a target of 10 to 25% maximum reduction in baseflow.” Tab 41 at 1095 (emphasis added).

A rule is “any agency statement or group of related statements of general applicability and future effect that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of the agency.” 75 O.S. § 250.3(17). The term “rule” specifically excludes “orders by an agency.” 75 O.S. § 250.3(17)(e). Petitioners agree that

“MAY hearings are individual proceedings under the Administrative Procedures Act which means they are adversarial evidentiary hearings presided over by a Hearing Examiner, *not* rulemaking proceedings.” Petitioners’ Brief at 4 (emphasis in original). Pursuant to the Administrative Procedures Act, the OWRB issued an order with findings of fact and conclusions of law, including its interpretation of natural flow, in disposition of the MAY individual proceeding. As such, it is by definition *not* a rule.

Moreover, the OWRB’s determination of natural flow has no “general applicability and future effect.” The record establishes that one of the challenges associated with watershed management is that “flow relationships may not be transferrable to other systems.” Tab 38 at 1192. The Aquifer’s unique hydrogeologic characteristics have been discussed at length, both here and in the record. Because of the unique flow relationship between groundwater and surface water in the Arbuckle-Simpson Aquifer, it is unlikely the OWRB could apply its interpretation of natural flow to any other groundwater basin, even if it wanted to. Petitioners’ argument lacks factual or legal merit.

B. The Hearing Examiner Complied With The Oklahoma Supreme Court’s Writ Of Mandamus

After the MAY Hearing, the Hearing Examiner requested the OWRB assist her with finding specific information in the voluminous record. Tab 154 at 2311, ¶ 5. In one of the communications, the OWRB sent to the Hearing Examiner an unsolicited memorandum from the USGS with citations to the record. *Id.* at 154-55, ¶ 5. Petitioner Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. requested the Oklahoma Supreme Court assume original jurisdiction and issue a writ of prohibition and a writ of mandamus for these alleged *ex parte* communications. The Oklahoma Supreme Court found that the OWRB is not a party to the MAY proceeding and, as such, any communications between the Hearing Examiner and the

OWRB staff are not *ex parte*. Tab 154 at 2312, ¶ 6. However, the Supreme Court found the transmission of the USGS memorandum to be *ex parte* and ordered the Hearing Examiner “to provide notice of her *ex parte* communications [with the USGS] to all parties to the MAY proceeding, to disclose the contents of those communications to the parties, and to incorporate communications and responses to them into the record.” *Id.* at 2318, ¶ 17.

Pursuant to the Supreme Court’s order, the Hearing Examiner provided a copy of the USGS memorandum to all parties to the MAY proceeding and allowed parties ten (10) pages in which to “file any responses that they may have to the material discussed in the memorandum.” Tab 156 at 2321. The USGS memorandum provided citations to the record on five (5) topics: natural flow, model calibration to stream flow, stream flow depletion, storage coefficient, and data availability and review. Tab 156 at 2322-24. Although Petitioners describe the USGS Memo as “new” evidence, in actuality, it does not contain new evidence—only citations to the record.

That fact did not stop Petitioners from attempting to submit new evidence. Petitioners attached to their response an affidavit from Dr. Poeter, which contained new opinions and evidence—all of which could have been presented at the formal hearing prior to the conclusion of the evidentiary portion of the proceeding. Even if, for some reason, Petitioners could not have presented Dr. Poeter’s new opinions and evidence at the formal hearing (which is when the evidentiary portion of the proceeding closed, *see* Tab 101, Part 13 at 01:23:35 – 01:23:37), the Hearing Examiner set forth a clear procedure for submitting new evidence:

(Hearing Examiner) To the extent that somebody does feel that they need to present something that is in the nature of evidence, I ask you to please submit a motion to admit that along with a statement justifying why that could not be done today and explaining its relevance and importance to the proceeding.

Tab 101, Part 13 at 01:24:37 – 01:25:06.

Petitioners willfully chose not to follow the procedure clearly articulated by the Hearing Examiner. As such, Petitioners cannot now ask this Court to provide some sort of relief when Petitioners themselves failed to follow the proper procedure. Moreover, “a judgment or order will not be reversed based on a hearing officer’s ruling to admit or exclude evidence absent a clear abuse of discretion.” *In re Southwestern Bell Tel., L.P. v. State ex rel. Okla. Corp. Comm’n*, 2007 OK 55, ¶ 30. In other words, the hearing examiner’s wide evidentiary discretion will only be reversed “if the trial court is deemed to have erred with respect to a pure, simple, and unmixed question of law.” *Jones, Givens, Gotcher & Bogan, P.C. v. Berger*, 2002 OK 31, ¶ 5.

Here, the Hearing Examiner gave explicit direction on how to submit new evidence after the conclusion of the evidentiary portion of the proceeding. Petitioners were well aware of this procedure yet *chose* not to follow the procedure. The Hearing Examiner was well within her discretion to exclude Petitioners’ untimely submission of new evidence.

Petitioners point to the fact that CPASA submitted “new” evidence to allege bias on the part of the Hearing Examiner. Petitioners’ Brief at 14. In its response to the USGS Memo, CPASA submitted the written USGS peer review protocol discussed at the formal hearing. Tab 101, Part 9 at 00:06:26 – 00:07:00 (Dr. Poeter admitting that the USGS peer review process is long and stating she believed it was in written form). However, the very nature of the written USGS peer review protocol differs drastically from Petitioners’ new opinions and testimony. The written USGS peer review protocol stands on its own—no hearsay or cross-examination concerns exist. It qualifies as a public record because it is “a record of a public office or agency setting forth its regularly conducted and regularly recorded activities.” 12 O.S. § 2803(8). Conversely, Petitioners’ new opinions and testimony contained flagrant hearsay and prevented

CPASA from conducting cross-examination—all with great prejudice to CPASA and the other parties.

Moreover, Petitioners were free to file their own motion to strike. The Oklahoma Evidence Code requires “a timely objection or motion to strike” to appear on the record stating the specific ground or objection before a party may claim error in an evidentiary ruling. 12 O.S. § 2104(A)(1). Petitioners were clearly capable of filing a motion to strike because they filed a motion to strike certain portions of CPASA’s briefing previously in the administrative proceeding. *See* Tab 139. Petitioners were also aware that motions to strike could be filed in this particular instance because CPASA had done so. *See* Tab 161. *Yet, Petitioners chose not to file a motion to strike.* Arguing that the Hearing Examiner somehow exhibited bias against Petitioners because Petitioners failed to object is disingenuous, at best. Petitioners failed to prove the Hearing Examiner abused her discretion in excluding their untimely new evidence. Accordingly, Petitioners’ argument fails.

VI. THE AGENCY’S ORDER COMPORTS WITH CONSTITUTIONAL PROVISIONS

The Oklahoma Constitution guarantees that “[p]rivate property shall not be taken or damaged for public use without just compensation.” Okla. Const. Art. II, § 24. However, it is a long-standing and well-understood principle that private property, such as water, can be restricted by the state through the exercise of its police power “for the preservation of the public health, safety and welfare without compensating the property owner.” *Franco-American Charolaize, LTD v. OWRB*, 1990 OK 44, ¶ 16 (herein “*Franco-American*”). In other words, “[w]hile a governmental taking of private property for public use must be compensated, a reasonable government regulation of the property is not compensable.” *Jacobs Ranch, LLC v. Smith, et al.*, 2006 OK 34, ¶ 52 (*citing Suntime Inn Operating Corp. v. State*, 1977 OK 204, 571

P.2d 1207, 1209). The question, then, “is not the propriety of the exercise, but is [one] of impairment.” *Mattoon v. City of Norman*, 1980 OK 137, ¶ 10.

It has long been established that “the Legislature may regulate and restrict the use and enjoyment of landowners of the natural resources of the state such as subterranean waters, so as to protect them from waste and to prevent the infringement of the rights of others. Such legislation does not infringe the constitutional inhibitions against the taking of property without due process of law” *Kline v. State ex rel. Okla. Water Res. Bd.*, 1988 OK 18, ¶ 6. With regard to groundwater rights in the Arbuckle-Simpson Aquifer specifically, the Oklahoma Supreme Court wisely noted that

The utilization and the conservation of the state’s water resources are rightful subjects for legislative regulation. The Oklahoma Legislature not only has the power to regulate but also the profound responsibility to allocate this precious natural resource for the benefit of the whole state. The state’s water resources is a subject over which the Oklahoma Legislature must be vigilant and act with prudence for the benefit of all the citizens in the state. Unquestionably, a statewide comprehensive policy for both the utilization and the conservation of the state’s water is crucial to the health and welfare of every inhabitant in this state.

Jacobs Ranch LLC v. Smith, et al., 2006 OK 34, ¶57.

Here, the OWRB’s Order reasonably restricts Petitioners’ rights—to the extent any Petitioner has “substantial rights”—in groundwater in order to preserve the public health, safety, and welfare. *Franco-American* does not support Petitioners’ argument of a taking; in fact, it supports a finding of a non-compensable reasonable regulation. In *Franco-American*, riparian landowners challenged the constitutionality of the 1963 amendments to Oklahoma’s water law insofar as the amendment extinguished a riparian owner’s vested property right to make reasonable use of stream water. 1990 OK 44, ¶¶ 1-2. The Oklahoma Supreme Court held that this absolute taking of a riparian owner’s right to make reasonable use of stream water violated

Art. 2 § 24 of the Oklahoma Constitution. *Id.* at ¶ 2. However, the Court's analysis in *Franco-American* is not applicable to the instant case because there has been no absolute deprivation of rights. Petitioners are able to make use of their groundwater—just not in the quantities they desire (assuming any Petitioner actually owns or has members who own property over the ASA).

Petitioners attempt to couch *Franco-American* such that it appears riparian owners were allowed a small use of their property. Specifically, Petitioners characterize the issue in *Franco-American* to be a *reduction* in “the riparian right to use stream water from any reasonable use to domestic uses only.” Petitioners' Brief at 47. Petitioners then analogize the reduction in riparian rights to the reduction in groundwater withdrawals at issue in this case. Despite Petitioners' valiant effort, this argument fails. There is no legal difference between extinguishing all riparian rights except for domestic use and extinguishing *all* riparian rights. Under the state's prior appropriation law, any person has the right to take water for domestic use. *See* 82 O.S. § 105.2(A). As such, the provision allowing riparian owners domestic use was nothing more than what an individual would be afforded under the prior appropriation scheme. Accordingly, the 1963 amendment was held unconstitutional because it “abolish[ed] the right of riparian owners to assert their vested interest in the prospective reasonable use of the stream.” *Franco-American*, 1990 OK 44, ¶ 17 (emphasis added). Here, Petitioners' rights are not abolished, but rather constitutionally regulated.

Petitioners also claim the OWRB's Order is unconstitutional because it takes private property for public use. Petitioners' Brief at 49 (relying upon 60 O.S. § 60). This argument suffers the same fatal infirmities as above. First, and as established above, the OWRB's Order does not amount to a takings.

Second, *Jacobs* recognized at least one of the underlying purposes of SB288 was to protect in-basin drinking water supplies. The record shows that public water suppliers obtain water both from springs and streams and from groundwater. *See supra* at 2. Thus, the OWRB is walking the line between “utilization” and “conservation.” *Jacobs*, 2006 OK 34, ¶ 57. Protecting water supply (obtained from both the surface and the ground) is undoubtedly a legitimate exercise of police power. Even if Petitioners’ argument that the OWRB’s Order takes private property and converts it to public property had merit—which it does not—the OWRB’s actions constitutionally and reasonably regulate the use of groundwater to protect legitimate state interests. “If two possible interpretations of a statute are possible, only one of which would render it unconstitutional, a court is bound to give the statute an interpretation that will render it constitutional, unless constitutional infirmity is shown beyond a reasonable doubt.” *Fent v. Oklahoma Capitol Improvement Authority*, 1999 OK 64, ¶¶ 3-4. Thus, even assuming Petitioners were able to prove the OWRB’s Order constituted a takings, they cannot prove its constitutional infirmity beyond a reasonable doubt in light of the convincing state interest in utilizing and conserving the state’s water for the benefit of “the health and welfare of every inhabitant in this state.” *Jacobs Ranch LLC v. Smith, et al.*, 2006 OK 34, ¶57.

Third, the OWRB’s Order seeks—and achieves—a balance between the private property rights held by landowners and the private property rights held by surface water permit holders. The OWRB’s hydrologic study established that allowing groundwater withdrawals equal to the recharge rate would essentially dry up the region’s streams—the same streams on which numerous individuals have established rights to stream flow. To allow Petitioners to withdraw as much of their “property” as they wished would be to deny other users of their property rights. The OWRB’s Order does not attempt to “convert” private property to public property. Rather,

the OWRB's Order seeks to balance the property rights of both groundwater owners and surface water permit holders.¹⁷

VII. CONCLUSION

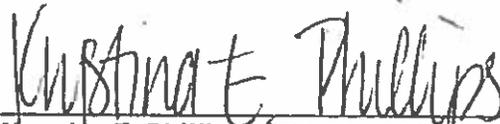
Sustainably managing the Arbuckle-Simpson Aquifer is imperative to the continued growth and well-being of south-central Oklahoma—a fact keenly understood by municipalities, water suppliers, ranchers, landowners, and citizens, alike. SB288 departs from the mining scheme of groundwater use, in which the usable life of an aquifer can be depleted in as little as 20 years, and instead requires a sustainable scheme of groundwater use—one in which groundwater withdrawals are reasonably limited in order to maintain spring and stream flow. The OWRB's hydrologic study of the Arbuckle-Simpson Aquifer is the most comprehensive study conducted on a groundwater basin in Oklahoma to date. The impressive technical and scientific information obtained through the hydrologic study enabled the OWRB to make a determination using its best judgment, experience, and expertise.

Clearly, Petitioners disagree with SB288 and the OWRB's resulting order—despite their obvious benefits to the region. However, Petitioners' Brief-In-Chief wholly fails to meet the burden of proof required in such an administrative appeal. Where, as here, the agency exercised its technical expertise, courts are required to give such technical decisions great weight and a presumption of validity. Only if there is no substantial evidence in the record supporting the agency's determination may a court overturn, modify, reverse, or remand the proceeding. As shown above, the record is *full* of evidence supporting the OWRB's Order. For the reasons stated herein, Citizens for the Protection of the Arbuckle-Simpson Aquifer respectfully requests

¹⁷ It is obvious that Petitioners are simply upset about the “number” set by the OWRB, not by the actual regulation. Otherwise, Petitioners should be claiming that *any* limitation of their right to withdraw groundwater unconstitutionally takes their property for public use.

this Court deny Petitioners' Brief-In-Chief and affirm the Oklahoma Water Resources Board's Final Determination of Maximum Annual Yield for the Arbuckle-Simpson Groundwater Basin and grant any other relief this Court deems proper.

Respectfully submitted this 5th day of August, 2015.



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I hereby certify that on the 5th day of August, 2015, a true and correct copy of the foregoing instrument was deposited in the United States mail, to the following persons, postage prepaid, first class:

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