

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

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TIM RHODES
COURT CLERK

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ASSOCIATION, OKLAHOMA AGGREGATES)
ASSOCIATION, TXI, and ARBUCKLE-)
SIMPSON AQUIFER PROTECTION)
FEDERATION OF OKLAHOMA, INC.,)

Petitioners,)

v.)

OKLAHOMA WATER RESOURCES BOARD,)
an agency of the State of Oklahoma,)

Respondent,)

v.)

TISHOMINGO NATIONAL FISH HATCHERY,)
et al.,)

Other Parties of Record.)

Case No. CV-2013-2414

**RESPONSE OF OKLAHOMA WATER RESOURCES BOARD
TO PETITION FOR JUDICIAL REVIEW**

COMES NOW the Oklahoma Water Resources Board ("OWRB" or "Respondent") and for convenience of the Court, although not required under provisions of the Oklahoma Administrative Procedures Act regarding judicial review of state agency orders, OKLA. STAT. tit. 75, §§ 318-323 (2011), submits the following Response to the Petition for Judicial Review filed by Petitioners herein.

JURISDICTION AND SCOPE OF REVIEW

1. Petitioners seek review by this District Court of a final agency order (“Final Order”) issued by the OWRB, pursuant to provisions of the Oklahoma Administrative Procedures Act (“OAPA”), OKLA. STAT. tit. 75, §§ 250-323 (2011), specifically §§ 318 through 323 regarding judicial review of state agency orders. In conducting this review, the District Court exercises appellate jurisdiction only.¹

- a. Section 321 provides that “[t]he review shall be conducted by the court without a jury and shall be confined to the record...” and
- b. Section 322(1)(e) provides that the court shall not “substitut[e] its judgment as to the weight of the evidence for that of the agency on question[s] of fact”.

2. Section 322(3) of the OAPA provides that the reviewing court shall affirm the order and decision of the agency, if the order and decision is found to be valid and the proceedings are free from prejudicial error to the appellant.

3. Contrary to the contentions in the Petition, the OWRB’s Final Order is not vulnerable to any of the statutorily-enumerated grounds for the reviewing court in the exercise of discretion to set aside, modify or reverse and remand the decision to the state agency.² Because the Final Order and decision of the OWRB in this matter is valid and the proceedings were free from prejudicial error to Petitioners, the Court must affirm the OWRB’s order as mandated by § 322(3).

¹See Reif, *Judicial Review of Administrative Agency Decisions: A Discussion of Jurisdiction and Standards of Review*, 81 Okla. Bar Journal 102 (Jan. 16, 2010), citing *State ex rel. Henry v. Mahler*, 1990 OK 3.

²*Id.* at § 322(1) and (2).

SUMMARY OF LAW ON MAXIMUM ANNUAL YIELD DETERMINATION

4. The OWRB is a body corporate and politic and an instrumentality, agency and department of the State of Oklahoma, created pursuant to OKLA. STAT. tit. 82, § 1085.1 (2011). Various statutes prescribe powers and duties for the OWRB, including but not limited to the Oklahoma Groundwater Law in OKLA. STAT. tit. 82, §§ 1020.1-1020.22 (2011).

5. The Oklahoma Groundwater Law provides a regulatory system of groundwater use that allocates an amount of groundwater to surface owners or their lessees based on the number of acres of land owned or leased that overlie a given groundwater basin. Generally, the Oklahoma Groundwater Law provides for the OWRB to make a determination of the "maximum annual yield" ("MAY") for each of the various groundwater basins in Oklahoma.³ Once determined, a MAY is allocated on a per-acre of land basis. This allocation, referred to as the "equal proportionate share" ("EPS"), is used to ascertain (in a separate individual proceeding on an application for a permit) how much groundwater can be used by a holder of a "regular" permit⁴.

6. The Oklahoma Groundwater Law prescribes a process by which the OWRB is to determine a MAY.⁵ Among other things, these statutes provide to the effect that the OWRB is to

- (a) conduct a hydrologic survey of the groundwater basin;
- (b) make a tentative MAY based upon the factors stated in the applicable statutes;
- (c) provide public notice and hold a hearing at which the OWRB staff presents evidence upon which the tentative MAY has been based, and in which any interested party shall have the right to present evidence in support or opposition thereto; and
- (d) make a final determination of the MAY by issuing a final order.

³ See generally OKLA. STAT. tit. 82, §§ 1020.4 - 1020.6.

⁴ OKLA. STAT. tit. 82, § 1020.11(A).

⁵ See generally OKLA. STAT. tit. 82, §§ 1020.4 - 1020.6 (2011).

If the groundwater basin in question is a "sensitive sole source groundwater basin", the OWRB must satisfy additional requirements in reaching the determination.⁶ The hearings are to be conducted pursuant to Article II of the OAPA⁷, which governs notice and hearing requirements for "individual proceedings", or quasi-adjudications, conducted by administrative agencies. The OWRB's Final Order determining a MAY is subject to judicial review as provided in the OAPA.⁸

SUMMARY OF THE INSTANT CASE

7. Pursuant to the foregoing authorities, the OWRB commenced a hydrologic study of the Arbuckle-Simpson Groundwater Basin in 2003. That study involved collaboration with numerous federal and state agencies and institutions which lasted several years and cost several million dollars.

8. After the study was completed, OWRB staff prepared a Tentative Order as required by Oklahoma Groundwater law. On March 13, 2012, the OWRB approved and entered an interlocutory order entitled "Tentative Determination of Maximum Annual Yield of Groundwater from the Arbuckle-Simpson Groundwater Basin" (herein, "Tentative Order"). Among other things, the Tentative Order stated the following tentative findings and determinations:

- (a) the Arbuckle-Simpson aquifer underlying portions of Murray, Pontotoc, Johnston, Garvin, Coal and Carter Counties is a major groundwater basin and a sensitive sole source groundwater basin as defined in the law;
- (b) the MAY of the basin is 78,404 acre feet; and

⁶ See OKLA. STAT. tit. 82, §§ 1020.9A and 1020.9B (2011).

⁷ OKLA. STAT. tit. 75, §§ 308a – 323 (2011).

⁸ OKLA. STAT. tit. 82, § 1020.6(C) (2011).

(c) the EPS of the yield to be allocated to each acre of land overlying the basin is 0.20 acre-foot per acre per year.

9. The OWRB engaged and assigned Emily Hammond Meazell (then Associate Professor of Law at the University of Oklahoma College of Law, now Professor of Law at Wake Forest University School of Law), to be the Hearing Examiner responsible for conducting the hearing and administrative proceeding on behalf of the OWRB.

10. On March 26, 2012 the Hearing Examiner issued a "Notice of Prehearing Conference and Hearing" which gave information about the matter, scheduled a prehearing conference for May 9, 2012 in Ada, Oklahoma, and scheduled a hearing for May 15, 2012 in Sulphur, Oklahoma. The Notice was published once a week for two consecutive weeks in late March and early April, 2012 in newspapers of general circulation in each county overlying the basin. The last such notice was published April 8, 2012 in the *Pauls Valley Democrat* newspaper in Garvin County.

11. Prior to the prehearing conference and the hearing, the OWRB made available copies of the pertinent hydrologic survey and investigation documents and publications on which the Tentative Order was based, along with the Tentative Order itself. The documents were available for examination and inspection by all interested persons (a) at the office of the OWRB in Oklahoma City, Oklahoma, (b) on the OWRB website, and (c) at public libraries in Ada, Ardmore, Coalgate, Pauls Valley, Sulphur and Tishomingo.

12. At the prehearing conference on May 9, 2012, the Hearing Examiner received the appearances of parties who wanted to raise issues in the proceeding, including parties who supported and parties who opposed the Tentative Order. Additionally, the Hearing Examiner directed that the hearing would consist of (a) an evidentiary hearing on the MAY, as provided in

the Oklahoma Groundwater Law and (b) as provided in the OWRB's Tentative Order, an opportunity for public comment on two issues for possible future rulemaking. The two issues presented for possible rulemaking were (i) a time period within which the final MAY should be implemented, and (ii) requirements for spacing from wells, springs and streams in the basin area; issued directives regarding service on parties via email and/or regular mail. The Hearing Examiner also directed submissions of lists of witnesses and identification of corporate representatives, and issued other rulings and directives in preparation for the hearing to follow.

13. The hearing was held May 15 and 16, 2012 in Sulphur, Oklahoma, which is centrally located within the area of the Arbuckle-Simpson Groundwater Basin. During the evidentiary portion of the hearing, OWRB staff presented evidence of the geological and hydrological findings and determinations upon which the tentative MAY was based. Parties presented evidence in support of the tentative MAY. Other parties, including the Petitioners herein, presented evidence in opposition to the tentative MAY. During the public comment portion of the hearing, interested persons submitted oral and written comments on the subjects of an implementation period and spacing wells from other wells, springs and streams.

14. Following the adjournment of the hearing and as allowed by the Hearing Examiner, numerous parties filed briefs of legal arguments and authorities.

15. While the Hearing Examiner had the case under advisement, OWRB staff communicated with her to provide administrative, technical and legal support, including evaluating the evidence and legal arguments raised by the parties. Among other communications, OWRB staff transmitted to the Hearing Examiner a memorandum dated September 27, 2012 written by two witnesses affiliated with the U.S. Geological Survey (the "USGS Memo"). The USGS Memo was offered as assistance in finding evidence in the record.

16. Also while the case was under advisement by the Hearing Examiner, counsel for several protestants submitted to the OWRB an Open Records Act request for records relating to the MAY proceeding on or after May 17, 2012. Among other records, the OWRB disclosed the USGS Memo.

17. On November 8, 2012, protestants (and Petitioners herein) Oklahoma Farm Bureau Legal Foundation, Oklahoma Aggregates Association, Environmental Federation of Oklahoma, TXI and the Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. filed a Motion to Recuse/Disqualify Hearing Examiner and to Stay Proceeding and Brief in Support (the "Motion to Recuse"). Among other things, the Motion to Recuse contended the OWRB staff is a "party" in the proceeding, and staff's communications with the Hearing Examiner were improper *ex parte* communications that required her to be disqualified.

18. The OWRB heard and denied the Motion to Recuse at its December 18, 2012 meeting. The OWRB's Order Denying Motion held, *inter alia*, that (1) the OWRB and its staff is not a party in the MAY proceeding; (2) the Hearing Examiner's communications with OWRB staff are not *ex parte* communications prohibited by § 313; and (3) the communications from OWRB staff to the Hearing Examiner were lawful and provided neutral assistance in evaluating the evidence as permitted by numerous, cited authorities.

19. On December 27, 2012 the Hearing Examiner issued her "Proposed Findings of Fact, Conclusions of Law and Board Order" (the "December 2012 Proposed Order") in the case, which OWRB staff transmitted to the parties.

20. On January 4, 2013 protestant Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. filed an "Application to Assume Original Jurisdiction and Petition for Writs of Prohibition and Mandamus" in the Supreme Court of Oklahoma. Among other things, the

application and petition contended that the post-hearing communications between OWRB staff and the Hearing Examiner were prohibited *ex parte* communications that warranted extraordinary writs to compel the appointment of a new Hearing Examiner and restarting the MAY proceeding.

21. On January 10, 2013, the Supreme Court of Oklahoma issued an order granting a stay of all matters before the OWRB pending the further order of the Court.

22. On April 23, 2013, the Supreme Court issued its decision in *Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. v. Okla. Water Resources Bd.*, 2013 OK 29 (herein, "*ASAPFO*"). The Supreme Court held that (a) the OWRB is not a "party" to the MAY proceeding, and thus *ex parte* communications between the OWRB and the Hearing Examiner are not prohibited, (b) *ex parte* communications between the Hearing Examiner and other agencies serving as witnesses, passed through the OWRB, create the impression of partiality, which must be avoided, and (c) consequently, a writ of mandamus was appropriate, and issued, compelling the Hearing Examiner to provide notice of the *ex parte* communications to all parties, to disclose the contents of those communications to the parties, and incorporate those communications and the parties' responses to them into the record.

23. On July 8, 2013, the Hearing Examiner complied with the Supreme Court's mandate by issuing an order to the parties which attached and disclosed the USGS Memo, directed that the memo be filed in the record, and provided an opportunity for the parties to file responses to the memo.

24. Petitioners herein and Citizens for the Protection of the Arbuckle-Simpson Aquifer ("*CPASA*") filed responses to the USGS Memo. These same parties also filed various motions.

25. On October 3, 2013, the Hearing Examiner issued an Order on Evidentiary Matters Following Remand that ruled on the various motions and detailed her conclusion that the USGS Memo added no new evidence to the record.

26. Also on October 3, 2013, the Hearing Examiner issued her revised "Proposed Findings of Fact, Conclusions of Law and Board Order" (the "October 2013 Proposed Order") in the case, which OWRB staff transmitted to the parties.

27. On October 23, 2013, the members of the OWRB, at their regular monthly meeting, heard arguments from OWRB staff, numerous parties in support of the October 2013 Proposed Order, and numerous parties including Petitioners herein who opposed the October 2013 Proposed Order. Upon consideration of the entire matter, the OWRB approved and entered its Findings of Fact, Conclusions of Law and Board Order (the "Final Order", attached as Exhibit 1 to the Petition for Judicial Review filed by Petitioners in the instant case).

28. On October 23, 2013, a Petition for Judicial Review of Agency Order was filed in the District Court of Pontotoc County by CPASA, appealing the OWRB's Final Order. That case is numbered CV-2013-144.

29. On October 24, 2013, a Petition for Judicial Review was filed in the District Court of Oklahoma County by the Petitioners in the instant case, likewise appealing the OWRB's Final Order. That case is numbered CV-2013-2250.

30. On November 1, 2013, the OWRB received an application for reconsideration of the Final Order. The application was filed by Carolyn and John Sparks ("Sparks"), parties who opposed the Tentative Order in the OWRB's MAY proceeding. The OWRB denied the application for reconsideration at its regular monthly meeting on November 18, 2013.

RESPONSE TO PARAGRAPHS 5 THROUGH 14 OF PETITION

31. The OWRB denies the substance of the assertions in paragraphs 5 through 14 of the Petition which are without merit and must be rejected. The Final Order was not made in violation of the OAPA, due process, and the pertinent writ of mandamus issued by the Supreme Court of Oklahoma. Petitioners' substantial rights have not been prejudiced as claimed in these paragraphs.

32. The communications that occurred between the OWRB staff and the Hearing Examiner after the hearing were contested by Petitioner Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. and other Petitioners herein before the Supreme Court of Oklahoma in the *ASAPFO* case. The Supreme Court ruled that, with one exception, the communications between OWRB staff and the Hearing Examiner were permissible and were not covered by the *ex parte* communication prohibitions of 75 O.S. § 313.⁹ Petitioners are foreclosed from relitigating these claims by the doctrines of collateral estoppel and the law of the case.

33. In *ASAPFO*, the Supreme Court issued a writ of mandamus to remedy the appearance of partiality with respect to the post-hearing communication received by the Hearing Examiner from federal agency witnesses. The Hearing Examiner complied with the writ before preparing the proposed order which the OWRB approved. Therefore, no violation or procedural defect exists as claimed by Petitioners.

RESPONSE TO PARAGRAPHS 15 THROUGH 21 OF PETITION

34. The OWRB denies the substance of the assertions in paragraphs 15 through 21 of the Petition which are without merit and must be rejected. The Final Order is not clearly erroneous in light of the record, nor is it arbitrary and capricious, as claimed in these paragraphs.

⁹ *ASAPFO*, 2013 OK 29, ¶¶6, 9.

35. Petitioners' claim that the MAY determined in the Final Order "amounts to nearly a 90% reduction in the amount of groundwater that the Petitioners and other landowners are entitled to beneficially use each year" is disingenuous and incorrectly characterizes the pertinent law and the effect of the Final Order.

36. The Final Order sets forth 56 separately stated Findings of Fact and 20 separately stated Conclusions of Law on 17 single-spaced pages (excluding the Order itself and Appendix 1). It is supported by substantial evidence in the record. It amply provides a "reasoned explanation" for the final determination of the MAY.

RESPONSE TO PARAGRAPHS 22 THROUGH 25 OF PETITION

37. The OWRB denies the substance of the assertions in paragraphs 21 through 25 of Petition which are without merit and must be rejected. The Final Order is not clearly erroneous in light of the evidence in the record. Petitioners' assertions are incorrect. The final MAY and Final Order are supported by substantial evidence in the record.

RESPONSE TO PARAGRAPH 26 OF PETITION

38. The OWRB denies the contentions of paragraph 26 of Petitioners' Petition, which are without merit and must be rejected. Many of the numbered subparagraphs (including but not necessarily limited to subparagraphs A through E, L, M, P through U, and W through CC) are merely a rehash of incorrect assertions made by Petitioners in their previous paragraphs 5 through 25, which the OWRB has already refuted above. The other subparagraphs (F through K, N, O, V, DD and EE) are incorrect interpretations or arguments of fact and/or law. These latter subparagraphs are either (a) contrary to evidence or findings of the OWRB which are supported by substantial evidence, or (b) not supported by, or contrary to, the applicable law, or both (a) and (b).

RESPONSE TO FINAL, UNNUMBERED PARAGRAPH OF PETITION

39. The OWRB denies the contention of the final, unnumbered paragraph of the Petition that there are "irregularities...not shown in the record...that will necessitate the taking of testimony thereon." This claim is without merit and must be rejected based on the OAPA. Section 321 of the OAPA states, "The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs." The irregularities claimed by Petitioners have already been litigated by various Petitioners and adjudicated by the Supreme Court in the *ASAPFO* case. Therefore, the limited exception provided in the statute is not applicable in this case.

AFFIRMATIVE DEFENSES

40. As stated in paragraph 29 above, another action is pending between the same parties for the same claim in the Oklahoma County District Court.

CONCLUSION

The OWRB denies that its Final Order prejudiced the substantial rights of Petitioners herein for any of the enumerated reasons set out in Section 322(1) or (2). The Petitioners have not stated a claim upon which relief by this Court may be granted pursuant to the judicial review provisions of the OAPA. WHEREFORE, the OWRB respectfully requests that this Court find that the Final Order and decision of the OWRB are valid and the proceedings free from prejudicial error to the Petitioners, and affirm the Final Order.

Respectfully submitted,

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CERTIFICATE OF MAILING

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