

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA FARM BUREAU LEGAL
FOUNDATION, et al.

Petitioners,

v.

OKLAHOMA WATER RESOURCES BOARD,

Respondent,

v.

TISHOMINGO NATIONAL FISH HATCHERY,
et al.,

Other Parties of Record.

Case No. CV-2013-2414

RESPONSE TO MOTION TO TRANSFER VENUE

Petitioners Pontotoc County Farm Bureau, Oklahoma Farm Bureau Legal Foundation, Oklahoma Independent Petroleum Association, Oklahoma Aggregates Association, Environmental Federation of Oklahoma, Oklahoma Cattlemen’s Association, and TXI (collectively “Petitioners”), respond Citizens for the Protection of the Arbuckle-Simpson Aquifer’s (“CPASA”) Motion to Transfer Venue to Pontotoc County (“Motion”) filed under the principle of priority.

Petitioners seek judicial review of the Oklahoma Water Resources Board’s (“Board”) a final order determining the Maximum Annual Yield of the Arbuckle-Simpson Groundwater Basin (“MAY Order”). The Board entered the MAY Order over Petitioners’ objections, evidence, and arguments in opposition. CPASA was a prevailing party in that proceeding who uniformly advocated for the result reached by the order and fully encouraged the Board to enter it. As soon as the Board entered the order, however, CPASA filed a petition in Pontotoc County seeking judicial review of an evidentiary ruling to clarify the administrative record in anticipation of defending the MAY Order in Petitioners’ appeal. Now, CPASA asks the Court to defeat Petitioners’ choice of venue for their appeal by transferring this case to Pontotoc County under

the principle of priority. Ruling on CPASA's Motion requires this Court to answer the following questions:

1. The priority principle applies only when two cases involve identical subject matter, parties, and requested relief. Petitioners have filed a petition asking for judicial review of the Board's order restricting the amount of groundwater that landowners are allowed to use each year. CPASA has filed a petition asking a court review an evidentiary ruling by a hearing examiner to clarify the contents of the administrative record in case another party appeals the Board's order. Does the principle of priority apply between these cases?

2. Where the priority principle applies, the tribunal that first exercises jurisdiction generally proceeds to the exclusion of the tribunal that exercises jurisdiction second. Under Oklahoma law, no court has jurisdiction to hear a speculative controversy and a prevailing party does not have standing to appeal. CPASA advocated for the substantive determination made by the Board's order and its asserted need for review is expressly contingent on the need to defend the order if another party seeks review. Is CPASA capable of invoking a court's appellate jurisdiction to acquire "first filed" status for the purposes applying the priority principle?

3. Under Oklahoma law, a petition for review of a non-final order is a premature nullity. After CPASA filed its petition, another party made a timely request for rehearing, which the Board subsequently heard and denied. Does CPASA's petition validly invoke jurisdiction for purposes of applying the priority principle?

4. The priority principle is an equitable principle and not a rigid or inflexible rule to be mechanically applied. Well established exceptions include bad faith, forum shopping, and when the first-filing party instituted suit in one forum in anticipation of the opposing party's imminent suit in another. CPASA's petition for review is expressly made in anticipation of defending the Board's order in the Petitioner's appeal. Can CPASA invoke the priority principle to force Petitioners to prosecute their appeal in CPASA's preferred forum?

The Pontotoc County Court has not decided nor heard arguments regarding whether it has jurisdiction over CPASA's appeal.

Before discussing the legal questions that CPASA's Motion presents to this Court, it's important to clarify that the Pontotoc County Court has not heard arguments regarding whether it

has jurisdiction nor has it made any findings in light of such arguments. CPASA's Motion inaccurately suggests otherwise by reference to an Order staying Pontotoc County proceedings entered November 12, 2013. (See Exhibit 2 to Motion.) Such Order, however, was entered without affording Protestants notice or an opportunity to be heard, and is void on its face. (See Notice That The 11/12/13 Order Was Entered Without Notice To Protestants Or Opportunity To Respond, *CPASA v. OWRB*, District Court of Pontotoc County Case No. CV-2013-144 (Dec. 2, 2013) (copy attached as Exhibit 1).) The order recites that it is made on presentation of "the Agreed Motion to Stay filed by the parties", and it is endorsed as "Agreed" to by counsel for CPASA and the Board. (See Exhibit 2 to Motion.) However, counsel for Petitioners were not consulted about either the motion or the form of the order, and neither document suggests that there was any effort to do so. (Ex. 1.) The copy of the Order attached to CPASA's Motion omits the certificate of service, which reflects that it was served on Petitioners via U.S. Mail on November 12, 2013 — the same day that both the "agreed motion" and the "order" were filed. (See Ex 1. (attaching a copy of the "agreed motion" complete with certificate of service).) A copy of Petitioners' notice to the Pontotoc County Court further describing the circumstances surrounding the order is attached as Exhibit 1.

1. The principle of priority doesn't apply to this case because the proceeding in Pontotoc County is not identical.

The principle of priority only applies when two cases are so identical as to subject matter, parties, and relief sought such that a final adjudication of the first case would, as *res judicata*, be a bar to further proceedings in the second court. *Autry v. Dist. Court of Muskogee Cnty.* 1969 OK 159, 459 P.2d 865. The cases must be truly identical. Cases between identical parties presenting related or even substantially similar issues are insufficient to trigger the priority principle. In *Autry*, a wife could not enjoin her husband's suit for divorce, but she was also entitled to proceed with her own action for separate maintenance because relief sought was not identical. *Id.* at 868. The principle also didn't apply in the case CPASA originally cited in its motion to transfer Petitioner's related appeal: *Stipe v. Theus*, 1979 OK 153, 606 P.2d 347. (See Motion to Transfer Venue to Pontotoc County, *Okla. Farm Bureau Legal Found. v. OWRB*, Dist. Ct. of Oklahoma County Case No. CV-2013-2250 (Oct. 13, 2013).) There, the same parties

were allowed to prosecute separate proceedings over the amount of the same oil and gas expenses because the relief sought from the Corporation Commission was different from that sought from a district court. *Id.* at 350.

In this case, CPASA's filing in Pontotoc County asks the court to clarify whether certain documents are included in the administrative record on which the MAY Order is based. (See Exhibit 3 to Motion at Page 10.) Ignoring the fact that this conflates the contents of the administrative record with the contents of the agency's final order¹, and assuming that Oklahoma's district courts might have jurisdiction to hear such an appeal, the only relief CPASA seeks is to clarify the hearing examiner's ruling on a particular evidentiary motion. (See *id.* at ¶¶ 19, 25-31.) Petitioners do not seek review of this ruling. Rather, they seek review of the Board's final order and of various other preliminary actions that were essential for the determination reached in the final order. (See Petition (describing principal points of error.) A court proceeding on CPASA's filing in Pontotoc County would never reach or resolve any of the issues raised by the Petitioners in this proceeding. And because no resolution of CPASA's filing in Pontotoc County could bar Petitioners from presenting their separate issues to this Court, the cases are not identical. Thus, the principle of priority does not provide a basis to transfer this case to Pontotoc County, and CPASA's motion should be denied.

2. Even if the cases were identical, CPASA's filing in Pontotoc County is incapable of seizing the jurisdiction of Oklahoma's district courts because CPASA cannot appeal from a proceeding in which it prevailed.

The principle of priority does not look mechanically at the date stamp on competing filings, but to the date on which the courts properly exercised jurisdiction. CPASA's filing in Pontotoc County is made as a petition for judicial review authorized by Oklahoma's Administrative Procedures Act ("OAPA"), 75 O.S. § 318. (See Exhibit 3 to CPASA's Motion to Transfer Venue to Pontotoc County.) By its own terms, however, the filing in Pontotoc County is incapable of seizing the jurisdiction of Oklahoma's district courts because it presents a

¹ Compare 75 O.S. §§ 250.3 and 312 (defining final agency order) with § 309(F) (defining the contents of the administrative record).

speculative controversy and because CPASA is not an aggrieved party

2.1. The Pontotoc County filing is facially incapable of invoking the jurisdiction of Oklahoma's district courts because it presents a speculative controversy.

Both the Oklahoma and federal constitutions limit courts to deciding “justiciable matters,” Oklahoma Constitution, art. 7, § 7(a); Art. 3, § 2, U.S. Const. Where there is no actual, justiciable controversy, there is no subject matter jurisdiction. *Indep. Sch. Dist. No. 1 of Oklahoma Cnty. v. Scott*, 2000 OK CIV APP 121, 15 P.3d 1244, 1250. This jurisdictional requirement of a justiciable issue applies to both original and appellate jurisdiction. *Chandler U.S.A., Inc. v. Tyree*, 2004 OK 16, 87 P.3d 598, 601 (applying mootness doctrine). A “justiciable controversy,” presents antagonistic material facts and law to the trial court, but antagonistic demands that are merely speculative are a request for prohibited advisory opinion. *State ex rel. Oklahoma Capitol Imp. Authority v. E.A. Cowen Const. Co.*, 1974 OK 4, 518 P.2d 1264, 1266; *Post Oak Oil Co. v. Stack & Barnes, P.C.*, 1996 OK 23, 913 P.2d 1311, 1314.

On its face, the Pontotoc County filing asserts that “CPASA *will be injured* if it is required to defend the Board’s Final Determination” and that “upon information and belief” other parties intend to appeal. (Exhibit 3 to Motion at ¶¶ 29 and 21-23.) Thus, CPASA’s need for review is expressly contingent on someone else seeking review of the MAY Order — a contingency that couldn’t possibly have been realized since CPASA filed its appeal in Pontotoc County the moment after the Board issued the MAY Order. (Exhibit 3 to Motion at 1.) For this reason alone, CPASA’s filing in Pontotoc County fails to present a justiciable controversy over which any court could exercise jurisdiction.

But CPASA isn’t even sure it disagrees with the evidentiary ruling it seeks to appeal. CPASA claims only that the MAY Order is unclear whether certain documents were included in the record or not. (Exhibit 3 to Motion at ¶ 26.) It’s entirely possible that once the Board prepares the record in this appeal, CPASA’s questions will be answered and it will have no complaints. Thus, by its own terms, CPASA’s filing in Pontotoc County presents a speculative controversy over which no court could exercise jurisdiction.

2.2. The Pontotoc County filing is facially incapable of invoking the jurisdiction of Oklahoma's district courts because CPASA is not an aggrieved party.

The Pontotoc County filing's failure to present a justiciable controversy is also symptomatic of a more fundamental defect in its ability to invoke the jurisdiction of Oklahoma's district courts: CPASA is not an aggrieved party.

The exclusion of speculative controversies from courts' appellate jurisdiction generally means that, "[o]ne who is not aggrieved by a court's decision, however erroneous, may not bring an appeal from it." *Petroleum Corp. v. Harrison*, 1980 OK 188, 621 P.2d 528,530(citations omitted). An "aggrieved party" is one whose interest "*in the subject-matter is directly and injuriously affected...by the decision from which the appeal is prosecuted.*" *Cleary Petroleum Corp. v. Harrison*, 1980 OK 188, 621 P.2d 528, 530 (emphasis added and citations omitted). It has long been the case that a party is not aggrieved by a decree in its favor even if the judge has given no reasons or recited insufficient ones. *Corning v. Troy Iron & Nail Factory*, 56 U.S. 451, 465, 14 L. Ed. 768 (1853). Thus, a prevailing party cannot appeal a final order even if she disagrees with the agency's reasoning or its rulings on preliminary procedural or evidentiary issues. *Id.*

CPASA has always been in favor of the Board's MAY ruling. It fully supported the Board's Tentative MAY ruling. It supported the Tentative MAY ruling through its participation in the evidentiary hearing held thereon. (See Audio Trans. of MAY Evidentiary Hearing (May 15 and 16, 2012.)) It supported the Tentative MAY ruling in post-hearing briefing. (See CPASA's Brief in Response (June 14, 2012.)) It even fully supported and explicitly endorsed the exact form of the final MAY Order directly to the Board literally minutes before it made the Pontotoc County filing. (See Audio Trans. of Meeting of the Oklahoma Water Resources Board (Oct. 23, 2013); Exhibit 3 to Motion.) And even CPASA's own filing in Pontotoc County acknowledges that it will only "be injured if it is required to *defend* the Board's Final Determination". (Exhibit 3 to Motion at ¶ 29 (emphasis added).) CPASA is not an aggrieved party.

Because CPASA can't pretend to appeal a determination it won and seeks to defend, it purports to ask for review of a ruling on an evidentiary motion to clarify the record, again, not for its own appeal but in anticipation of Petitioner's appeal. (Exhibit 3 to Motion at ¶¶ 21-31.)

Even on this evidentiary issue, however, the Final MAY Order recites that the hearing examiner ruled in CPASA's favor to the maximum extent permitted by the Board's rules:

Prior to the Hearing, CPASA filed a Motion to Include Certain Documents in the Administrative Record. *The Hearing Examiner granted the motion* to the extent each document met the applicable criteria set forth in 785 OAC § 4-7-7.

(Final MAY Order, Finding No. 2(emphasis added).) Thus, even if CPASA could appeal a ruling that was preliminary to a judgment in its favor, it is not even aggrieved by the only preliminary ruling it purports to appeal.

CPASA's status as a non-aggrieved party is all the more fatal because it purports to be made pursuant to the OAPA, which only provides special jurisdiction for a party aggrieved by a final agency order to seek judicial review. 75 O.S. § 318. And where jurisdiction is founded on a special statute, substantial compliance with its terms is not enough, "*strict compliance is mandatory.*" *Oklahoma Found. for Med. Quality v. Dep't of Cent. Servs.*, 2008 OK CIV APP 30, 180 P.3d 1, 4 (emphasis in original) (applying *Edmondson v. Siegfried Ins. Agency, Inc.*, 1978 OK 45, 577 P.2d 72).

3. Even if CPASA could appeal the MAY Order, its filing in Pontotoc County was premature.

Section 318 provides that "any party aggrieved by a final agency order in an individual proceeding is entitled to certain, speedy, adequate and complete judicial review. 75 O.S. § 318. "Final Agency Order' means an order that ... is dispositive of an individual proceeding *unless there is a petition for rehearing, reopening, or reconsideration pursuant to Section 317 of this title and which is subject to judicial review.*" 75 O.S. § 250.3 (emphasis added). Under section 317, a party aggrieved by an agency order may make an application for reconsideration within ten days. 75 O.S. § 317(A). If a timely application for rehearing is made, the period to seek judicial review "shall run from the final disposition of such application." 75 O.S. § 317(E). Thus, an appeal pursuant to § 318 must be from a final agency order, but an order that is subject to a timely § 317 request for rehearing is *not* an appealable final order. Any petition for judicial review filed before the agency disposes of a timely request for reconsideration is premature, and a premature appeal is incapable of conferring appellate jurisdiction on the court that receives it.

Delhi Gas Pipeline Corp. v. Mayhall, 1975 OK CIV APP 61, 546 P.2d 1019, 1020

Here the Board entered its order around 5:26 p.m. on October 23, 2013, and CPASA filed its petition literally seconds later. (See Exhibit 3 to CPASA's Motion to Transfer Venue to Pontotoc County.) Carolyn and John Sparks filed a timely Application for Reconsideration on November 1, 2013, and the Board denied it on November 19th. Thus, any petition for judicial review of the MAY Order filed before November 19th, including CPASA's petition in Pontotoc County, was premature and incapable of conferring appellate jurisdiction on any court. Thus, even if Oklahoma law allowed a prevailing party to appeal, CPASA's filing in Pontotoc County still wouldn't provide a basis to transfer this case.

4. If the principle of priority applies, CPASA's Motion should be denied, because this Court was the first to exercise jurisdiction as the first to receive a petition for judicial review from an aggrieved party.

Because CPASA's filing in Pontotoc County fails to invoke the jurisdiction of Oklahoma's district courts, this Court was the first to properly exercise jurisdiction over an appeal from the MAY Order. Thus, if the principle of priority were to apply to this case, it would be an impediment to transfer. This serves the interests of justice, which favor placing the adjudication in their forum chosen by the party most significantly aggrieved by the agency Order. See *ITT World Commc'ns, Inc. v. F. C. C.*, 621 F.2d 1201, 1208 (2d Cir. 1980)(citing examples). Petitioners opposed the MAY throughout the underlying proceedings, and were identified by the Board itself as "Protestants" of its final determination. Petitioners are representative of the landowners whose right to use groundwater from the Arbuckle-Simpson Groundwater Basin is strongly curtailed by the MAY Order. These are the aggrieved parties.

Moreover, recognizing Petitioners' right to select the forum of their appeal in no way inhibits CPASA's ability to clarify the record. The OAPA explicitly provides a mechanism to resolve any questions in this appeal. Pursuant to 75 O.S. § 320, the Board compiles and transmits the record to the reviewing Court, who is explicitly given the power to resolve any dispute regarding the record.

5. Even if this Court hadn't been the first to exercise jurisdiction, the principle of priority still wouldn't provide for a transfer of this case.

Even if this Court hadn't exercised jurisdiction first, transfer under the priority principle would still be inappropriate. The principle of priority "is not a rigid or inflexible rule to be mechanically applied." *E.E.O.C. v. Univ. of Pennsylvania*, 850 F.2d 969, 976 (3d Cir. 1988) (hereinafter "*Penn.*") (collecting cases explicitly declining to follow the rule under varying circumstances) *aff'd*, 493 U.S. 182, 110 S. Ct. 577, 107 L. Ed. 2d 571 (1990). The letter and spirit of the principle are grounded on equitable principles, which require a flexible response based on all the circumstances of each case. *Id.* In at least two federal administrative appeals courts have declined to follow the principle of priority and instead looked to which party was most aggrieved by the final order. *See, e.g., J.L. Simmons Co. v. N.L.R.B.*, 425 F.2d 52 (7th Cir. 1970); *Ins. Workers Int'l Union, AFL-CIO v. N. L. R. B.*, 360 F.2d 823 (D.C. Cir. 1966). More frequently applied exceptions include bad faith, forum shopping, and when the first-filing party instituted suit in one forum in anticipation of the opposing party's imminent suit in another. *Penn.*, 850 F.2d at 976. In *Penn.*, the 3rd Circuit upheld a federal district court's refusal to dismiss a second-filed action where the substance and timing of the first filing indicated an attempt to defeat the opposing party's proper venue preference. 850 F.2d at 976.

CPASA's filing in Pontotoc County is expressly made in anticipation of defending the MAY Order in an appeal brought by the Petitioners. (*Id.* at ¶ 21-31.) And how long did CPASA wait to see if or where anyone else might actually appeal? It didn't. CPASA filed its petition appealing the MAY Order at 5:26:17 p.m. (Exhibit 3 to Motion at 1.) A year and a half passed between the hearing examiner's ruling on CPASA's evidentiary motion and the Board's vote on the MAY Order, and CPASA never sought clarity. Then, literally the moment after the Board entered the MAY Order — an order that makes the exact determination CPASA spent years advocating for and that uses language CPASA specifically endorsed — CPASA tried to appeal it.

The only thing that might be more curious is how CPASA ever became confused about which documents were included in the administrative record. The hearing examiner ruled on CPASA's motion during the evidentiary hearing on May 15, 2012. Shortly thereafter, CPASA submitted a "Designation of Record" pursuant to that ruling:

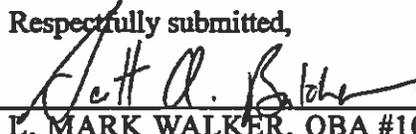
This designation is submitted pursuant to Hearing Examiner Meazell's Order on May 15, 2012 in which Examiner Meazell granted the Joint Motion to Include Records insofar as the documents (1) were either files/records of the OWRB pertaining to the subject of the hearing or reports prepared by any governmental agency; and (2) the parties specified the portions of the documents upon which they relied.

(Letter from Krystina E. Hollam to Anissa Campbell, Hearings Clerk, OWRB (June 14, 2012) (copy attached as Exhibit 2).) Attached to the letter were copies of the documents that CPASA had moved to include in the record with highlighted designations of every line on which CPASA relied. Since then, both the letter and copies of the same documents have been included in the hearing record maintained on the Board's website. (Oklahoma Water Resources Board, *Arbuckle-Simpson Maximum Annual Yield*, www.owrb.ok.gov/util/rules/arbucklesimpson_hearing.php.) In fact, every single one of the documents identified in CPASA's filing in Pontotoc County has been posted on the Board's website as part of the record for well over a year. (*Compare id.* "Documents Presented at Prehearing Conference" numbers 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 22, 24, 26, 31, 32, and 34 *with* Exhibit 3 to Motion at ¶ 26.) CPASA clearly understood the ruling.

CONCLUSION

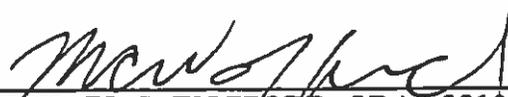
For the reasons stated, CPASA's Motion to Transfer should be denied.

Respectfully submitted,



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**Attorneys For Protestants Oklahoma
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this 26th day of December, 2013, to the addresses on Exhibit A.



Scott A. Butcher

IN THE DISTRICT COURT OF PONTOTOC COUNTY
STATE OF OKLAHOMA

Citizens for the Protection of the Arbuckle-
Simpson Aquifer,

Petitioner,

v.

Oklahoma Water Resources Board,

Respondent.

Case No. CV-2013-144

FILED

DEC - 2 2013

KAREN DUNNIGAN, Court Clerk
Pontotoc County, Oklahoma
By _____
Deputy

**NOTICE THAT THE 11/12/13 ORDER WAS ENTERED WITHOUT
NOTICE TO PROTESTANTS OR OPPORTUNITY TO RESPOND**

Pontotoc County Farm Bureau, Oklahoma Farm Bureau Legal Foundation, Oklahoma Independent Petroleum Association, Oklahoma Aggregates Association, Environmental Federation of Oklahoma, Oklahoma Cattlemen's Association, and TXI, (collectively "Protestants"), who previously filed special appearances in this case, hereby give notice that the Court's November 12, 2012 Order, which purported to grant CPASA's alleged "agreed" motion to stay, was entered without notice to Protestants and without opportunity to respond. As such, the Order is facially void for lack of notice. *Mullins v. Ward*, 1985 OK 109, 712 P.2d 55 (facially void for violating constitutional due process guarantee of adequate notice and adversary hearing); *see also Gibson v. Copeland*, 2000 OK CIV APP 112, ¶9, 13 P.3d 989, 991 (consideration of motion was not served in a timely manner so as to provide an opportunity to respond violates Okla. Dist. Ct. R. 4). In further support, Protestants state:

1. CPASA filed this proceeding as a purported appeal under Oklahoma's Administrative Procedures Act ("OAPA") of the Oklahoma Water Resources Board's ("Board"),

Final Determination of the Maximum Annual Yield of the Arbuckle-Simpson Aquifer ("MAY Order").

2. Pursuant to the OAPA, 75 O.S. § 318, Protestants responded to CPASA's petition on November 4, 2013 by way of special appearance and contested the Court's subject matter jurisdiction.

3. At the same time, Protestants notified the Court that the MAY Order was not final, because the Board had retained jurisdiction of the proceeding to consider a timely application to reconsider pursuant to 75 O.S. § 317.

4. On November 12th, CPASA filed an "Agreed Motion To Stay" and brief in support, acknowledging that the application for reconsideration was pending before the Board. A copy of the motion is attached as Exhibit 1.

5. The motion asserts that counsel for the Board consented to stay the motion, but is silent as to the Protestants' position or whether there had been any effort to contact Protestants. (Ex. 1 at ¶7.)

6. The motion recites that it was served on Protestants by mailing on November 12th. (Ex. 1 at ¶6.)

7. The same day the motion was filed, and before Protestants received notice of the motion, the Court entered the purportedly agreed order submitted by CPASA, of which the Protestants also had no prior notice. A copy of the Order is attached as Exhibit 2.

8. The order recites that it is made on presentation of "the Agreed Motion to Stay filed by the parties", and it is endorsed as "Agreed" to by counsel for CPASA and the Board.

9. Despite the fact that Protestants had filed an appearance in the case and were entitled to notice and opportunity to respond to CPASA's motion, no notice was given to Protestants until after the Court signed CPASA's proposed order. *After* the motion was filed and the order was signed, CPASA then emailed the motion and signed order to Protestants' counsel.

10. The order does not make any findings as to why it was entered without notice to the Protestants or without affording them an opportunity to be heard.

11. The order that CPASA presented as an agreed order purports to reject Protestants position on lack of subject matter jurisdiction even though Protestants did not agree to such a ruling. CPASA had no right to present an order which suggested that Protestants agreed to the Court overruling Protestants' position on jurisdiction when Protestants did not agree to same.

12. The order further purports to have been made "for good cause shown *and there being no objection thereto*". (Ex. 2 (emphasis added).) CPASA had no basis to make such representation to the Court as it had not notified Protestants or inquired as to whether Protestants objected thereto.

13. Protestants object to the motion as being untimely served and being presented to the Court without notice or an opportunity to respond in violation of Okla. Const. art. II, § 7 and Okla. Dist. Ct. R. 4. Had Protestants received timely notice and been given an opportunity to respond, they would have presented objections to CPASA's motion.

WHEREFORE, Protestants provide notice that the order is invalid for the reasons described above.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached document was mailed on November 29, 2013 to the following addresses:

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L. Mark Walker

IN THE DISTRICT COURT OF PONTOTOC COUNTY
STATE OF OKLAHOMA

FILED

NOV 12 2013

KAREN DUNNIGAN, Court Clerk
Pontotoc County, Oklahoma
By _____
Deputy

**CITIZENS FOR THE PROTECTION
OF THE ARBUCKLE-SIMPSON
AQUIFER**, an Oklahoma
not-for-profit corporation,

Petitioner,

v.

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

Respondent.

Case No. CV-2013-144

AGREED MOTION TO STAY

COMES NOW, Citizens for the Protection of the Arbuckle-Simpson Aquifer (herein "CPASA"), and respectfully requests this Court grant its Agreed Motion to Stay. In support, CPASA states as follows:

Background and Facts

1. On October 23, 2013, the Oklahoma Water Resources Board (herein "OWRB") formally adopted the Final Determination of Maximum Annual Yield for the Arbuckle-Simpson Groundwater Basin (herein "Final Determination").
2. Also on October 23, 2013, CPASA filed the instant appeal of the OWRB's Final Determination. CPASA's appeal focuses on the OWRB's failure to properly identify which documents are part of the administrative record.
3. A day later, on October 24, 2013, the Oklahoma Farm Bureau Legal Foundation, Pontotoc County Farm Bureau, Oklahoma Independent Petroleum Association, Environmental Federation of Oklahoma, Oklahoma Cattlemen's Association, Oklahoma Aggregates

Association, TXI, and the Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. (herein collectively the "Non-local Interests") filed an appeal of the Final Determination in Oklahoma County. The Non-local Interests claim, *inter alia*, that the Final Determination was made in violation of the Oklahoma Administrative Procedures Act, and that the hydrologic study conducted on the Arbuckle-Simpson Aquifer, which is the most comprehensive and detailed hydrologic study ever conducted on an aquifer in Oklahoma, is flawed.

4. On October 31, 2013, CPASA filed a Motion to Transfer Venue to Pontotoc County in the Non-local Interests' Oklahoma County case. Additionally, on the same day, CPASA filed a Motion to Intervene in the Oklahoma County case.

5. The next day, on November 1, 2013, John and Carolyn Sparks—who are represented by the same law firm as two of the Non-local Interests—filed an application for reconsideration with the OWRB alleging the Final Determination would result in an unlawful takings without just compensation.

6. On or about November 4, 2013, the Non-local Interests¹ filed a Special Appearance and Notice of Lack of Jurisdiction in the case at hand, erroneously asserting that the Application for Reconsideration rendered CPASA's appeal "premature" and divested this honorable Court of jurisdiction.²

7. On November 7, 2013, the OWRB's legal counsel consented to stay this case pending the OWRB's resolution of the Application for Reconsideration.

¹ CPASA notes that the Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. did not join in the Special Appearance and Notice of Lack of Jurisdiction—likely because the attorney representing the group, Jim Barnett, also represents John and Carolyn Sparks, who filed the Application for Reconsideration.

² Interestingly, the Non-local Interests have yet to give similar notice to the District Court for Oklahoma County that their *own* appeal is premature and that the Oklahoma Court lacks jurisdiction.

8. Upon information and belief, the OWRB is placing the Application for Reconsideration upon its November 19, 2013 agenda. Staff recommends denial of the Application for Reconsideration upon the grounds that it is frivolous.

Argument and Authority

Oklahoma law is silent on how to proceed when one party legally files a petition for judicial review of an agency's final order in district court and another party subsequently files an application for reconsideration of an agency's final order with the agency.

On one hand, Oklahoma law provides that "[a]ny party aggrieved by a final agency order in an individual proceeding is entitled to certain, speedy, adequate and complete judicial review thereof . . ." 75 O.S. § 318(A)(1). Moreover, "*neither a motion for new trial nor an application for rehearing shall be prerequisite to secure judicial review.*" 75 O.S. § 318(A)(3) (emphasis added). As such, an aggrieved party is legally entitled to file an appeal immediately after a final agency order. Indeed, both CPASA and the Non-local Interests exercised this right to appeal immediately, although CPASA's suit was filed before the Non-local Interests' suit.

On the other hand, aggrieved parties may also file a request for rehearing, reopening, or reconsideration within ten (10) days from the date of the final agency order. 75 O.S. § 317(A). What is unclear, however, is what happens when one party exercises its legally protected right to file an immediate appeal and another party exercises its legal right to request a reconsideration.

Here, CPASA timely filed its appeal in Pontotoc County immediately after a final agency order, as set forth in 75 O.S. § 318(A)(3). The Non-local Interests filed an appeal a day later in Oklahoma County, also pursuant to 75 O.S. § 318(A)(3). Because both CPASA and the Non-local Interests were legally entitled to file appeals immediately upon the OWRB's Final

Determination, the Non-local Interests' argument that the subsequent filing of an Application for Reconsideration with the OWRB renders CPASA's appeal premature misses the mark.

In fact, the Non-local Interests' construction would lead to procedural gamesmanship in administrative appeals. In this instance, if the Court were to agree with the non-local interests and dismiss this action for lack of jurisdiction, then the Sparks—who as noted above are represented by the same law firm as some of the Non-local Interests—could simply withdraw their application for reconsideration and the Non-local Interests could immediately re-file their appeal. Such a result, which would allow procedural gymnastics to leapfrog in front of a first-filed action, is clearly absurd. See *TXO Production Corp. v. Okla. Corp. Comm'n.*, 1992 OK 39, ¶ 7, 829 P.3d 964 (“Statutory construction that would lead to an absurdity will be avoided if this can be done without violating legislative intent.”). Accordingly, the Non-local Interests' claim that this Court is divested of jurisdiction is legally unsupported.

WHEREFORE, CPASA, with the agreement of the OWRB, respectfully requests that this Court stay the instant case until the OWRB resolves the Application for Reconsideration.

Respectfully,

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CERTIFICATE OF MAILING

I hereby certify that on the 12th day of November, 2013, 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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Attorneys for Oklahoma Farm Bureau Legal Foundation, Pontotoc County Farm Bureau, Oklahoma Independent Petroleum Association, Environmental Federation of Oklahoma, Oklahoma Cattlemen's Association, and Oklahoma Aggregates Association

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Krystina E. Phillips

IN THE DISTRICT COURT OF PONTOTOC COUNTY
STATE OF OKLAHOMA

FILED

NOV 12 2013
KAREN DUNAGAN, Court Clerk
Pontotoc County, Oklahoma
By _____
Deputy

CITIZENS FOR THE PROTECTION)
OF THE ARBUCKLE-SIMPSON)
AQUIFER, an Oklahoma)
not-for-profit corporation,)
)
Petitioner,)
)
v.)
)
OKLAHOMA WATER)
RESOURCES BOARD, an agency of)
the State of Oklahoma,)
)
Respondent.)

Case No. CV-2013-144

ORDER

NOW, this 12 day of November, 2013, comes on for consideration the Agreed Motion to Stay filed by the parties in the instant action. Having fully considered the Agreed Motion to Stay and the Special Appearance and Notice of Lack of Jurisdiction filed by Oklahoma Farm Bureau Legal Foundation, Pontotoc County Farm Bureau, Oklahoma Independent Petroleum Association, Oklahoma Aggregates Association, Environmental Federation of Oklahoma, Oklahoma Cattlemen's Association, and TXI, the Court finds as follows:

1. Plaintiff's appeal was legally filed pursuant to 75 O.S. § 318(A)(1) and 318(A)(3).
2. This Court has subject matter jurisdiction over the action.

For good cause shown and there being no objection thereto, Plaintiff's Agreed Motion to Stay is granted. This Stay is effective until the Oklahoma Water Resources Board resolves the Application for Reconsideration.

Thomas S. Landrith

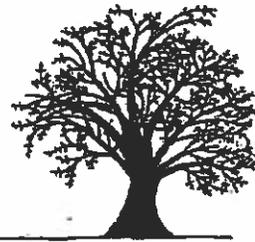
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Agreed by:

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Counsel to Oklahoma Water Resources Board

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AAMODT LAW FIRM



June 14, 2012

Sent via U.S Mail, First Class

Mrs. Anissa Campbell, Hearings Clerk
Oklahoma Water Resources Board
3800 N. Classen Blvd.
Oklahoma City, Oklahoma 73118

Re: CPASA's Designation of Record

Dear Mrs. Campbell:

I hope this letter finds you well. This serves as confirmation of Citizens for the Protection of the Arbuckle-Simpson Aquifer's (herein "CPASA") designation of those portions of documents relied upon in its Joint Motion to Include Certain Documents in the Administrative Record for the Determination of the Maximum Annual Yield for the Arbuckle-Simpson Groundwater Basin (herein "Joint Motion to Include Records"). This designation is submitted pursuant to Hearing Examiner Meazell's Order on May 15, 2012 in which Examiner Meazell granted the Joint Motion to Include Records insofar as the documents (1) were either files/records of the OWRB pertaining to the subject of the hearing or reports prepared by any governmental or public agency; and (2) the parties specified the portions of the documents upon which they relied.

Said designation was mailed to the Oklahoma Water Resources Board, to your attention, on June 4, 2012. A CD containing a copy of the designation was mailed to all formal parties on June 14, 2012. Additionally, an online repository was created at <http://basecamp.com>. It can be accessed by clicking on the "log in" button, then inputting the username "Public 1" and password "Public1". An email containing the login information was sent via electronic mail on June 14, 2012 to all those parties who elected to receive e-mail notice.

Please do not hesitate to contact me or Jason Aamodt should you have any questions at (918) 347-6169.

Very truly yours,



Krystina E. Hollam

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