

# OKLAHOMA WATER RESOURCES BOARD OFFICIAL MINUTES

February 18, 2020

## 1. CALL TO ORDER

The regular monthly meeting of the Oklahoma Water Resources Board was called to order by Chairman Robert L. Stallings, Jr., at 9:30 a.m. on February 18, 2020, in the second floor Board Room of the Oklahoma Water Resources Board located at 3800 N. Classen Boulevard, Oklahoma City, Oklahoma, 73118. The meeting was conducted pursuant to the Oklahoma Open Meeting Law with due and proper notice provided pursuant to Sections 303 and 311 thereof. The agenda was posted on February 13, 2020, at 5:35 p.m., at the Oklahoma Water Resources Board's offices at 3800 N. Classen Boulevard, Oklahoma City, Oklahoma, and provided on the agency's website.

A. Roll Call. Chairman Stallings called the meeting to order and asked for the roll call of members.

### Board Members Present

Robert L. Stallings, Jr., Chairman

Bob Drake, Secretary

Jennifer Castillo

Charles Darby

Ford Drummond

Suzanne Landess

Robert L. Melton (in at 9:32 a.m.)

Matt Muller

### Board Members Absent

Stephen Allen, Vice Chairman

### Staff Members Present

Julie Cunningham, Executive Director

Sara Gibson, General Counsel

Cleve Pierce, Chief, Administrative Services Division

Joe Freeman, Chief, Financial Assistance Division

Kent Wilkins, Chief, Planning and Management Division

Bill Cauthron, Chief, Water Quality Programs Division

Mary Schooley, Executive Secretary

### Others Present

Bodie Bachelor, Centennial Law, Durant, OK

Reggie Robbins, Arbuckle Aggregates

Shannon Shirley, Arbuckle Aggregates

Deanna Hardesty

Sharon Hardesty

Dale Hardesty, Tuttle, OK

Newakis Weber, Chickasaw Nation

Ammon Brisolar

Brian Cathey, Atoka, OK

Amy Anne Ford, Citizens for the Protection of the Arbuckle Simpson Aquifer, Durant, OK

Josh McClintock, Citizens for the Protection of the Arbuckle Simpson Aquifer, Edmond, OK

Cathy Thompson, Oklahoma Department of Environmental Quality, Oklahoma City, OK

Krystina Phillips, Citizens for the Protection of the Arbuckle Simpson Aquifer, Ada, OK

Carly Cordell, Office of the Secretary of Energy and Environment, Oklahoma City, OK

Eddie Rhandour, Department of Environmental Quality/Drinking Water SRF, Oklahoma City, OK

Charlie Swinton, BancFirst, Oklahoma City, OK

Dean Couch, Gable Gotwals, Oklahoma City, OK

Steve Hoffman, Oklahoma Department of Environmental Quality, Oklahoma City, OK

Shawnda Cox, Oklahomans for Responsible Water Policy, Antlers, OK

Elizabeth Nichols, Arbuckle Aggregates

Geoff Canty, Arbuckle Aggregates

Kandice Taylor, Thlopthlocco Tribal Town, Okemah, OK

B. Discussion, Amendments, and Vote to Approve Official Minutes of the January 21, 2020, Regular Meeting. Chairman Stallings asked if there were any comments, proposed amendments, or approval of the January 21, 2020, regular meeting minutes.

Mr. Muller moved to approve the minutes of the January 21, 2020, meeting, and Ms. Castillo seconded. There was no discussion. Chairman Stallings called for the vote.

AYE: Darby, Castillo, Drake, Muller, Landess, Melton, Stallings

NAY: None

ABSTAIN: Drummond

ABSENT: Allen

C. Executive Director's Report

Ms. Julie Cunningham, Executive Director, welcomed everyone in attendance and informed the members about the current drought conditions in the state. Regarding her calendar, she noted staff had been meeting with OMES regarding the agency's IT system conversion as well as the secure IT plan identifying the components OMES can provide, what can be contracted, and what can be provided through Enterprise services development. The OWRB has funding for public-facing forms and have assigned project managers for these large projects which also have significant O&M costs. She and Mr. Pierce have also met with OMES about the building lease which expires in June; she anticipated a one-year extension while negotiating points for the current office space and vehicle lot storage security. She said the OWRB lease is very cost efficient compared to other state agencies; the agency is looking to utilize the space more efficiently.

Regarding the State Legislature, Ms. Cunningham reported there are 34 environment-related bills including, flood control, REAP grant funding to assist small systems, water rights application protest--what is considered a valid protest, and expediting permitting--and an agency request bill regarding water resiliency (Senator Radar and Rep. Sims) for the development of a state flood plan as a part of the State Comprehensive Water Plan. Staff is working with Oklahoma Emergency Management, Oklahoma Conservation Commission (watershed dams), and FEMA and are excited about the multi-level, multi-government coordination.

Ms. Cunningham said the Board's Ad Hoc Legislative Committee met and were briefed regarding legislation being tracked. Staff also met with the Board's Ad Hoc Water Policy/Rules Committee. She noted that Mr. Cole Perryman is now tracking federal legislative activities and there is some movement on the Water Resources Development Act (WRDA) and includes the US COE and the SRF functions and there has been a commitment from the Congressional House and Senate Leadership to update the measure.

Ms. Cunningham concluded her report and there were no questions or discussion by Board members.

D. Financial Update

1. Budget Report. Mr. Cleve Pierce, Administrative Services Division Chief, addressed the members and stated the budget report is for the time period ending January 31, 2020. He said for the time period, the agency has spent 51% of the appropriated budget, leaving 49%; has spent 39% of the revolving budget leaving 61%; and has spent 37% of federal dollars with 63% remaining. The overall budget remaining stands at 58% with 42% of the fiscal year remaining. He said this time last year the agency had 60% of the budget remaining the spending level is at about the preferred level of 2%, bringing the level back from the previous month when federal spending was higher than usual due to beginning the year with more federal programs earlier.

Mr. Pierce said the agency is beginning preparations for the FY2021 budget next month as well as submitting reports to Secretary Maize regarding costs over and under budget line items for budget review by the Governor.

Mr. Pierce concluded his report, and there were no questions by members.

2. **FINANCIAL ASSISTANCE DIVISION**

A. Consideration of and Possible Action on a Proposed Order Approving Emergency Grant for Wilburton Public Works Authority, Latimer County. Recommended for Approval. Mr. Joe Freeman, Chief, Financial Assistance Division, stated to the members that this first item is \$31,875.00 emergency grant request by the Wilburton Public Works Authority. The Authority was undertaking the construction of a wastewater treatment plant when a 12-inch unmarked water line was broken leaving a portion of the Town and schools without water for two days. To correct the problem, a 12-inch water line was installed along with 12-inch valves connected to the existing line. He said the \$37,500.00 project will be funded with the \$31,875.00 OWRB emergency grant, and local funds of \$5,625.00. Staff recommended approval of the emergency grant request.

Mr. Steven Frosch, project engineer with Construction Solutions Group, was present representing the Town of Wilburton.

Mr. Muller, not implying ill will by the Town of Wilburton, asked hypothetically that if his town needed a supply line, what would prevent him from inadvertently digging up the line so that the town could apply for an emergency grant--what measures are in place to prevent that from happening. Mr. Freeman responded that in this particular case, the OWRB Engineering manager verified with Construction Solutions Group that they would normally call One Okie to determine where the line is located but the line was not marked and the PVC did not have a wire for detection, so the contractor did not know the line was there.

There were no other questions, and Chairman Stallings called for a motion.

Mr. Drummond moved to approve the emergency grant to the Wilburton Public Works Authority, and Mr. Drake seconded.

AYE: Melton, Darby, Castillo, Drake, Drummond, Muller, Landess, Stallings  
NAY: None  
ABSTAIN: None  
ABSENT: Allen

B. Consideration of and Possible Action on a Proposed Order Approving Drinking Water Funding Application for Atoka Municipal Authority, Atoka County. Recommended for Approval. Mr. Freeman stated that this item is a \$4,010,000.00 loan request from the Atoka Municipal Authority. The Authority is requesting the loan to upgrade the water treatment plant, rehabilitation of the existing elevated storage tank and a booster pump station, construct a new clear well, install an AMR system, and make improvements to the SCADA system. Mr. Freeman said the loan will be funded through the Drinking Water State Revolving Loan Program, and he noted provisions of the loan agreement. He said the Atoka MA currently has one loan

with the Board with a balance of approximately \$4.7 million; the debt coverage ratio stands at 2.5-times. Staff recommended approval of the loan DWSRF application.

Representing Atoka Municipal Authority was Mayor Bryan Cathey who spoke to the Board about the importance of the loan and project to securing the future of Atoka's water for its citizens.

Chairman Stallings asked how many people are on the system, and Mayor Cathey said there are 1,400-1,500 meters. Mr. Muller noted there were many different aspects including efficiencies to the project and he asked how the Authority came to develop such a forward-thinking, all-encompassing project. Mayor Cathey said there were a number of issues due to the age of the system and when looking at the overall scope of the project, leaving some components out did not complete the goal. The Mayor said that like most rural communities, there is a large amount of need and little revenue, and being able to come before this Board and request these funds is the only way to make that happen and provide the quality service to the citizens. Mr. Melton asked if the AMR system would be more efficient, and Mayor Cathey said that currently each and every meter has to be read each month.

There were no other questions, and Mr. Darby moved to approve the Drinking Water SRF loan request to the Atoka Municipal Authority, and Ms. Castillo seconded. Chairman Stallings called for the vote.

AYE: Melton, Darby, Castillo, Drake, Drummond, Muller, Landess, Stallings  
NAY: None  
ABSTAIN: None  
ABSENT: Allen

### 3. SUMMARY DISPOSITION AGENDA ITEMS

Any item listed under this Summary Disposition Agenda may, at the requested of any member of the Board, the Board's staff, or any other person attending this meeting, may be transferred to the Special Consideration Agenda. Under the Special Consideration Agenda, separate discussion and vote or other action may be taken on any items already listed under that agenda or items transferred to that agenda from this Summary Disposition Agenda.

A. Requests to Transfer Items from Summary Disposition Agenda to the Special Consideration Agenda, and Action on Whether to Transfer Such Items. There were no requests to move items to the Special Consideration Agenda.

B. Discussion, Questions, and Responses Pertaining to Any Items Remaining on Summary Disposition Agenda and Action on Items Listed. There were no questions and no discussion regarding the items on the Summary Disposition Agenda. Chairman Stallings stated he would entertain a motion to approve the agenda.

Mr. Drummond moved to approve the Summary Disposition Agenda, and Mr. Darby seconded. Chairman Stallings called for the vote.

AYE: Melton, Darby, Castillo, Drake, Drummond, Muller, Landess, Stallings  
NAY: None  
ABSTAIN: None  
ABSENT: Allen

The following items were approved:

C. Consideration of and Possible Action on Financial Assistance Division Items:

1. Rural Economic Action Plan (REAP) Grant Applications:

<u>Item No.</u>	<u>Application No.</u>	<u>Entity Name</u>	<u>County</u>	<u>Amount Recommended</u>
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None

2. DWSRF Principal Forgiveness Loan Applications:

<u>Item No.</u>	<u>Application No.</u>	<u>Entity Name</u>	<u>County</u>	<u>Amount Recommended</u>
a.	ORF-20-0024-DW	Weleetka Public Works Authority	Okfuskee	\$ 95,330.00

D. Consideration of and Possible Action on the Contracts and Agreements:

1. Intergovernmental agreement between OWRB and Central Oklahoma Master Conservancy District for providing services including water quality monitoring for Lake Thunderbird and reporting the results thereof.
2. Amendment Agreement between OWRB and Meshek & Associates, LLC to update data retention requirement for information provided by FEMA as part of the Cooperating Technical Partner Program Assistance for creation and maintenance of flood hazard data.
3. Sponsored Research Agreement between OWRB and Oklahoma State University to establish Master Irrigator Program and On-Farm Demo Program.
4. Joint Funding Agreement between OWRB and USGS to provide review of OWRB draft hydrological reports by USGS.
5. Contract for Legal Services between OWRB and Lyn Martin-Diehl, PLLC providing us an attorney to act as Hearing Examiner.

E. Consideration of and Possible Action on Applications for Temporary Permits to Use Groundwater:

1. Avard Regional Rail Park Authority, Woods County, #2017-573
2. Brent Arthur Wedel, Major County, #2018-572
3. Bergen Minerals, LLC, Oklahoma County, #2018-591
4. Fred & Sharlene Chamberlain, Mayes County, #2019-516
5. RWC Revocable Trust, Bryan County, #2019-546

F. Consideration of and Possible Action on Applications to Amend Temporary Permits to Use Groundwater:

1. Cedar Ridge Country Club, Tulsa County, #2012-522

G. Consideration of and Possible Action on Applications for Regular Permits to Use Groundwater: None

H. Consideration of and Possible Action on Applications to Amend Regular Permits to Use Groundwater: None

I. Consideration of and Possible Action on Applications to Amend Prior Right to Use Groundwater:

1. Wilds Grantor Trust dated August 27, 2013, Canadian County, #1969-275
2. Brent Arthur Wedel, Major County, #1972-215

J. Consideration of and Possible Action on Applications for Term Permits to Use Stream Water: None

K. Consideration of and Possible Action on Applications for Regular Permits to Use Stream Water:

1. Avard Regional Rail Park Authority, Woods County, #2017-059



amount, and that the same process is used for each permit, regardless of the amount [of water] for the permit. Therefore, he said, there was no change in the proposed rule.

Regarding proposed fees for well driller and pump installer licensing fees (785:5-1-11), Mr. Wilkins stated staff received four individual comments, which he addressed stating, Mr. Andy Barrett (Whitetail Services) felt the proposed fees for out-of-state licenses was overly complex and too expensive; Mr. Robert Keyes (Associated Environmental Industries) commented the fee structure was complex and renewals should be simplified; Mr. John Julian (Canadian Water Well) commented the proposed out-of-state fees were too expensive causing struggling companies to close business; and, Mr. Louis Novotny (Great Plains Probing Service) commented the in-state fees were too high. Staff agreed the current fee structure is complex, and proposed to separate the initial application fee structure from the renewal fee structure, combine certain firm fees and eliminate additional operator certification fees. Changes in the fee structure will lessen the impact on smaller firms being based on the number of operators with a firm. Staff has met several times with the Well Drillers Advisory Council and is strongly in favor of the proposed increase in fees as the last increase was in 2010. Currently, fees cover 50% of the cost of the program and the increase will cover up to 75%-80% but is only salary and travel; the increase does not include covering administrative or legal costs. He added the increase is comparable with surrounding states. He explained the Council also supported the increase to out-of-state licenses as there are different compliance issues with out-of-state drillers, and compared to other states, Oklahoma drillers pay comparable fees in other states; Oklahoma's fees are in the middle in regard to out-of-state driller costs.

#### Subchapter 1. General Provisions

- 785:5-1-6. Stream water permit application and administration fees [AMENDED]
- 785:5-1-10. Groundwater application and administration fees [AMENDED]
- 785:5-1-11. Well driller and pump installer licensing fees [AMENDED]
- 785:5-1-16. Fees required in other matters [AMENDED]
- 785:5-1-21. Documentation Reviews Related Water Trapped in Producing Mines [NEW]

1. Questions and discussion by Board Members. There were no questions by Board members.
2. Vote on whether to approve recommended amendments as presented or as may be revised after discussions. Mr. Drake moved to approve the proposed amendments to Chapter 5, and Mr. Darby seconded. Chairman Stallings called for the vote.

AYE: Melton, Darby, Castillo, Drake, Drummond, Muller, Landess, Stallings  
NAY: None  
ABSTAIN: None  
ABSENT: Allen

#### B. Rules Amendments Recommended for Adoption in Chapter 25 – Dams and Reservoirs

1. Summary – Mr. Wilkins stated the agency received no timely comments regarding the proposed rules to Chapter 25, and no changes have been made to the original proposed language.

#### Subchapter 1. General Provisions

- 785:25-1-3. Violations and penalties [AMENDED]
- Subchapter 3. Responsibility, Classification and Design Standards
- 785:25-3-2. Owner's responsibility [AMENDED]
- 785:25-3-6. Minimum spillways performance standards [AMENDED]
- Subchapter 5. Applications and Approval of Construction
- 785:25-5-4. Additional report information [AMENDED]
- Subchapter 7. Post Approval Actions
- 785:25-7-7. Emergency action plans [AMENDED]
- Subchapter 9. Actions after Construction

- 785:25-9-1. Inspections of dams [AMENDED]
- 785:25-9-3. Correction of deficiencies (not creating imminent peril) [AMENDED]
- 785:25-9-5. Correction of deficiencies creating imminent peril [AMENDED]
- Appendix A. Jurisdiction of Board by Size and Hazard Classification [REVOKED]
- Appendix A. Jurisdiction of Board by Size and Hazard Classification [NEW]
- Appendix B. Minimum Spillway Performance Standards [NEW]

2. Questions and discussion by Board Members. There were no questions by Board members.

3. Vote on whether to approve recommended amendments as presented or as may be revised after discussions. There being no questions, Chairman Stallings asked for a motion to approve Chapter 25 rules. Mr. Drummond moved to approve Chapter 25, and Mr. Melton seconded. Chairman Stallings called for the vote.

AYE: Melton, Darby, Castillo, Drake, Drummond, Muller, Landess, Stallings  
 NAY: None  
 ABSTAIN: None  
 ABSENT: Allen

C. Rules Amendments Recommended for Adoption in Chapter 30 – Taking and Use of Groundwater

1. Summary – Mr. Wilkins stated the proposed changes regarding the use of groundwater particularly regard setting up a framework for permitting marginal water permitting. Comments were received from one group, the Petroleum Alliance of Oklahoma, and Bud Ground attended the formal hearing in January, and he had three main comments. First, while not opposed to metering of water volume used in the marginal quality wells, they requested the metering records be kept by the company for the life of the permit and only submitted at the request of the Board as with other state permits. The OWRB staff acknowledged that document submission when requested is a common practice and amended the proposed language for 785:30-5-10(c) to not require new records be submitted, but retained for the duration of the permit and submitted only upon request. The Board does not require metering of any other water use in the state, but does for marginal quality.

Subchapter 3. Permit Application Requirements and Processing

785:30-3-1. General application requirements [AMENDED]

Subchapter 5. Groundwater Permits

785:30-5-5. Contents of permits [AMENDED]

785:30-5-7. Cancellation or suspension of permits [AMENDED]

785:30-5-9. Annual reports of water use [AMENDED]

785:30-5-10. Marginal water permits [NEW]

Appendix D. Identified Springs that Emanate From a Sensitive Sole Source Groundwater Basin [REVOKED]

Appendix D. Identified Springs that Emanate From a Sensitive Sole Source Groundwater Basin [NEW]

1. Questions and discussion by Board Members. Mr. Melton asked if there is any tracking of water use otherwise, and Mr. Wilkins answered the water use report is required, and is required to be metered and would most likely be more accurate usage as now use can be calculated or estimated. Mr. Melton moved to approve.

Chairman Stallings asked if staff had accommodated Mr. Ground's other comments. Mr. Wilkins continued with the second request regarding 785:30-5-10(d) and (e) and stated staff revised the term, "sufficient information" to "hydrologic information" which is more open, and also removed "to be determined by the Board." The third comment regarded the volume of water to be correlated to the amount of land dedicated to the permit. He said marginal quality wells will be more technically challenging and



more costly to develop and the comment was to incentivize use of marginal water rather than fresh groundwater and requested the allocation be raised to four acre-feet of water to each acre of land dedicated that overlies that formation. Staff has agreed, and the rule is revised to reflect four acre feet.

Mr. Wilkins stated that concluded the presentation on the proposed changes to Chapter 30.

Mr. Drummond asked what would be the circumstances the Board would ask for the records. Mr. Wilkins responded if there had been a complaint by the public, or issues with groundwater levels.

2. Vote on whether to approve recommended amendments as presented or as may be revised after discussions. Chairman Stallings acknowledged Mr. Melton's earlier motion and asked if he would like to reaffirm the motion; Mr. Melton stated he would reaffirm the motion. Ms. Castillo seconded the motion. There were no other questions or discussion, and Chairman Stallings called for the vote.

AYE: Melton, Darby, Castillo, Drake, Drummond, Muller, Landess, Stallings

NAY: None

ABSTAIN: None

ABSENT: Allen

#### D. Rules Amendments Recommended for Adoption in Chapter 35 – Well Driller and Pump Installer Licensing

1. Summary – Mr. Wilkins stated staff received comments from Mr. Robert Keyes, Associated Environmental Industries, regarding the current two-year license for the well driller and pump installer licensing program, suggested converting that to an annual license. The change would require four hours of education every year, rather than eight hours every two years allowing for one year there would not have training. Mr. Wilkins stated staff did not disagree; however, the system had been set up to renew one half of the license--400 drillers and 800 operators-- each year, dividing in half the burden on the operators as well as to OWRB staff. If the renewal process could be streamlines\automated it might be that licenses could be renewed annually. There are no changes as a result of Mr. Keyes' comment.

Subchapter 3. Licensing and Certifications

785:35-3-1.2. Military service occupation, education and credentialing [NEW]

Subchapter 11. Plugging and Capping Requirements for Wells and Test Holes

785:35-11-1. Plugging and capping requirements for groundwater wells, fresh water observation wells, heat exchange wells and water well test holes [AMENDED]

1. Questions and discussion by Board Members. There were no questions by Board members.

3. Vote on whether to approve recommended amendments as presented or as may be revised after discussions. Chairman Stallings stated he would entertain a motion to approve if there were no questions.

Mr. Muller moved to approve the proposed rules for Chapter 35, and Ms. Castillo seconded.

AYE: Melton, Darby, Castillo, Drake, Drummond, Muller, Landess, Stallings

NAY: None

ABSTAIN: None

ABSENT: Allen

## 5. SPECIAL CONSIDERATION

A. Consideration of and Possible Action in the Matter on Application for Regular Permit to Use Stream Water No. 2016-0033, Arbuckle Aggregates, LLC, Johnston County:

1. Summary – Mr. Kent Wilkins stated to the members that this is an application for a regular permit to use streamwater by Arbuckle Aggregates in Johnston County. He provided a brief history of the application:

Application was submitted in 2016 requesting a regular permit to use 250 acre-feet of stream water with two points of diversion on Mill Creek for the purpose of mining and industrial uses. A pre-hearing conference was held June 30, 2017, and a hearing held October 11 and December 18, 2017. The original proposed findings of fact, conclusions of law, and Board order and were presented to the Board on December 6, 2018. The Board remanded the order back to the hearing examiner for the limited purpose of reviewing the facts and law regarding interference with domestic and appropriative users as set out in the proposed streamwater permit conditions. The findings of fact from the original proposed order related to notice availability of streamwater, present and future need for streamwater and beneficial use, and are within the order before the Board today. The parties were contacted and a prehearing conference was held followed by a subsequent hearing May 6-7, 2019, with evidence presented by the parties regarding interference. The hearing examiner's order, Section 27, "The evidence presented in the administrative hearings, taken as a whole, fails to demonstrate the Arbuckle's proposed diversion will interfere with domestic or existing appropriative uses for downstream water users in Mill Creek. The evidence demonstrated that interference is possible; however, it is difficult to find a scenario where interference would be impossible under any condition in any stream in Oklahoma. Based on a detailed review of the previous record and the information presented by the parties at the second hearing which was more precise and focused on the issue of interference, there is not sufficient evidence suggesting interference with downstream users is probable." Furthermore, the hearing examiner stated there is not sufficient evidence suggesting the standard prohibition of interference will be insufficient to prevent Arbuckle from interfering with stream water rights of downstream users. Therefore, the record showed the application has met the five points of streamwater law: appropriated water is available in the amount applied for, there is a present or future need for the water, the applicant intends to put the water to beneficial use, the proposed use will not interfere with domestic or existing appropriative uses, and use of water occurs inside the stream system and therefore will not interfere with existing beneficial uses by removing water from the basin. Staff, therefore, recommends approval of the application.

2. Discussion and presentation by parties. The applicant was represented by Ms. Elizabeth Nichols, Mr. Pete Dawson, and Mr. Geoff Canty. The protestants are represented by Ms. Krystina Phillips and Mr. Dean Couch. Chairman Stallings allowed Ms. Nichols ten minutes to present to the Board, and following her Ms. Phillips and Mr. Couch are allowed ten minutes (together) to present argument to the Board.

Ms. Elizabeth Nichols, representing Arbuckle Aggregates (Arbuckle), addressed the members and stated she appeared before the Board on December 6, 2018, for the initial discussion of the application, which was sent back to discuss the issue of interference. She asked that she be allowed five minutes now and five minutes to respond to the comments of the protestors. She said the application has been pending for two years and three months, the application was originally submitted in 2016, and she reviewed the hearing proceedings and subsequent orders that included special conditions, and during this period, the Board has approved 2,200 acre-feet of stream water on this same stream system. Arbuckle Aggregates has only asked for 250 acre-feet of water from this stream system, or 10% of what the Board has approved since this permit has been pending. She said Arbuckle proved there is no presumed interference and she referred to paragraph 28, page 9 of the proposed order that states, "The interference suggested by the Protestants is speculative at best" and Arbuckle listened to the Board's concern about interference for downstream domestic users, and now has a proposal for self-imposed condition on its permit, and she distributed a handout. Ms. Nichols explained the "red light/green light system" on Arbuckle's use of the water in the stream system, utilizing only information that was admitted into evidence during the hearing and relying on the protestant's expert Dr. Deeds' memorandum, and based on that information, all of the protestor's water equals 720 acre-feet or one cfs, and Dr. Deed's own opinion that 90% of the time, there is that much water flowing in Mill Creek. Domestic water use, based on the protestant's expert, is 480 acre-feet which is less than one cfs. Through the admitted evidence, Mill Creek watershed increases in size and flow below the Arbuckle Aggregates withdrawal point, so the water availability increases further down the watershed. There is currently a USGS streamgage below the Arbuckle Aggregates proposed withdrawal point and only two appropriated users below the USGS gage; the red light/green-light systems proposes a threshold for Arbuckle Aggregates to only pump when the USGS gage is at least at one cfs which provides for all the domestic downstream users

and the protestors. Arbuckle Aggregates would commence pumping when the gage is at 1.5 cfs or above at a pumping rate of 220 gpm or .5 cfs and as the stream flow increases, then Arbuckle may increase the pumping rate to maintain at least one cfs. Ms. Nichols said the document provided scenarios of when is a red light/green light situation, and when the USGS gage approaches one cfs, that is a red light condition, and Arbuckle will cease pumping. She ended her comments and asked for the remaining five minutes to be used for addressing the protestant's comments.

Chairman Stallings asked if the protestants had been provide a copy of the proposal, and Ms. Nichols answered they had not, but were aware of the red light/green light system over the three years of discussions.

Chairman Stallings asked Ms. Phillips if she would split or use the full ten minutes; she stated she would speak for the majority of the time.

Ms. Krystina Phillips, addressed the members and said she represented the Citizens for the Protection of the Arbuckle Simpson Aquifer (CPASA), as well as Mr. Eric Chapman, a downstream senior water right holder, as well as Ms. Shannon Shirley, and Mr. Reginald Robbins who are downstream riparian domestic users of Mill Creek downstream of Arbuckle Aggregates proposed site. She will refer to all those she represents collectively as "CPASA." Ms. Phillips requested the Board decline to adopt the second proposed Board order and instead adopt CPASA's proposed order attached as "Exhibit 1" to its Exceptions, which is provided in the Board's meeting packet at page 5034. There were two reasons she requested the Board adopt CPASA's order: (1) complies with the Board's existing precedent as it relates to special conditions on surface water permits, and (2) promotes agency efficiency and provides certainty for all parties in the proceeding. She said in the deliberations of the Board in the first consideration of this application, there was concern of what precedential impact these conditions might have and she reviewed the Board's records and identified numerous instances when the Board already established special conditions on surface water permits. Questions to (OWRB) staff during the second formal hearing about negative consequences that resulted from special conditions, and the answer was, none; therefore, the Board can rest easy there is no negative consequence from special conditions applied based on the other permits. A list of instances were special conditions had been placed are included in CPASA's Exceptions (page 5017), similar to this case, particularly noting the *Masquelier* matter where she said the Board looked beyond the average annual availability and looked at the number of interference complaints, and she read from page 5018, "a key question..." is not whether the amount of water is available over a year's time, but if withdrawal will interfere with others' use in shorter time periods. Ms. Phillips said the first and second proposed orders agree that Mill Creek does not flow consistently but the Board's method of determining water availability does not take into account those inconsistent flows, and both orders find that interference is likely to occur, although the second order adds it is still too speculative. She discussed the facts of the *Masquelier* case and the required amount of water necessary to satisfy the downstream users and is similar to CPASA's request today...7.3 cfs is necessary to satisfy to downstream appropriated and domestic users downstream from the Arbuckle Aggregates site. She said they are requesting a red light/green light situation at 7.3 cfs which scales upward as the flow increases so that Arbuckle can continue increasing its amount of diversion while still protecting these existing uses. She reminded the members they are statutorily obligated to protect the senior private property interests. She said CPASA's Exhibit 1 allows the Board to protect these uses, authorizes Arbuckle Aggregates its full requested amount, and provides certainty to the parties about when diversion can and cannot occur, and provides increased efficiency to the Board. Ms. Phillips talked about the number of complaints regarding Mill Creek regarding staff time, energy and costs and this special condition will save time for the OWRB to not deal with complaints. She said the record shows there is no clear delineation what constitutes interference, and she cited as an example an instance of Ms. Shirley's complaint that while there was water although not at the pump, OWRB would not agree that was interference. She said the second order should not be approved as the order is inconsistent with the Board's precedence, is inconsistent with the Board's first proposed order, and is inconsistent with itself, and as a result, CPASA respectfully requests the Board adopt Exhibit 1 found on page 5031.

Mr. Drake asked if the history of the Mill Creek area that is undependable, there may be water today and may not be water tomorrow, but when someone comes to look, there may be water. Ms. Phillips stated

that is correct and spoke to the average annual calculation used by the Board's -- on the first day there could be 1,000 cfs is zero, but on average -- using the OWRB calculation -- there is 100 acre-feet available for appropriation, and typically there is not 100 acre-feet available at the diversion point. When there is precipitation, Mill Creek runs fast, when there is no precipitation, there is hardly a trickle, she said. Mr. Drake asked about springs, and Ms. Phillips said there are some springs, the base flow of Mill Creek is low, and when it flows, it is after precipitation.

Ms. Castillo referenced the instances of special conditions in the Exceptions, and asked if those are the only four that she found. Ms. Phillips said those are the only four she found leading up to the time of the second hearing; the information came from other water law attorneys helping her identify the cases, and is what is contained in the record. She noted the Washita River permit is actually two, and regard not only quantity restrictions but temporal restrictions, or can occur only during certain times of the year. Regarding Ms. Shirley's complaints of interference, Ms. Castillo asked if those were substantiated by staff's investigations or by the hearing examiner. Ms. Phillips answered the hearing examiner does not determine whether interference had occurred, but when in the instances when staff investigated, that fell in the gray area. Ms. Shirley contended she was interfered with due to upstream diversions, but the OWRB did not find as such, and Ms. Phillips added it is included in the Exceptions that it is not limited to Mill Creek and is not the only instance where people have been frustrated by the OWRB not declaring interference; Arbuckle Aggregates' own expert mentioned a city in Oklahoma that had sought an injunction in an interference complaint. Ms. Castillo said the parties disagree on the red light/green light system, and she asked if the parties had met for informal discussion to try and reach agreement before asking the Board's consideration. Ms. Phillips stated its CPASA's preference to reach an amicable resolution and had reached out to Arbuckle Aggregates at least once, but was unsuccessful. She added that if you stood in one cfs of flow, you would not get your ankles wet, and Ms. Shirley testified that would not meet her domestic needs and the record does not reflect that one cfs is sufficient.

Mr. Muller referenced Ms. Phillips' comment about the Board could rest easy as there would be no adverse precedential setting by imposing restrictions on the permit, but if the Board puts restrictions on the permit, he asked if in the future would protestants then say the Board had set a precedence to require restrictions. Ms. Phillips stated that it would depends upon the facts presented and this is a unique situation with a decade's worth of USGS gage data and knowing what the typical flow of Mill Creek. The interference complaints was sufficient in the *Masquelier* permit . She would not make promises for the future but that her protests will always be based on the facts as presented. Mr. Muller asked: because there is data, does anyone know the gage reading of the cfs flow on the date Ms. Shirley's complaint was investigated? Ms. Phillips answered that was not submitted as evidence in the record, Arbuckle has requested a maximum diversion rate of 2500 gpm, and there was a diversion of 2500 gpm at the time Ms. Shirley experienced interference.

There were no other questions by Board members.

Chairman Stallings invited Ms. Nichols to respond. Ms. Nichols stated the testimony regarding the comments about the OWRB investigation of Ms. Shirley's complaint of interference, the testimony and evidence do not support that is in a gray area. She said Ms. Phillips suggested it is a concern that they have regarding OWRB's definition of interference and how they do investigations -- what they are asking for is a policy change or rules change that further defines interference. If the inference was their concern about Mill Creek, or concern about upstream users and clients receiving water, then why was there no protest for the 2200 acre-feet of water downstream from Arbuckle Aggregates which were for mining operations; the applicant is asking for 250 acre-feet. She said the *Masquelier* case that was brought up in the second hearing related to an upstream user building a dam, and as far as there was an implication of gray area related to the determination of interference, Mr. Kent Wilkins was the inspector. Ms. Nichols stated there was no discussion on the record in evidence that was a gray area for the OWRB. She said there is a finding of no interference; the condition in this permit will make Arbuckle Aggregate's permit junior to every other subsequent permit that is submitted without condition. She stated they are asking for 250 acre-feet and will provide self-imposed conditions of red light/green light to provide protection for the downstream users.

Mr. Melton asked why this is the first time the other parties have seen, or haven't met to work things out. Ms. Nichols said the information on the sheet (proposal) was contained in the hearing and the one cfs had been discussed at the hearing. It was not presented as a proposal because they believe the conditions based on the OWRB of no interference was sufficient. To address the Board's concern at the last meeting, they are proposing the self-imposed conditions; providing the extra level of protection. She said it has been offered through the course of the three years and two months, but not as a formal, written document. Mr. Drummond asked if there is any middle ground between the protestants request for 7.3 cfs and the applicant's 1.5 cfs. Ms. Nichols said to address all of the water use of the protestors, including domestic use, is one cfs; 7.3 cfs is not based on actual water users; the hearing examiner found, taken as a whole, the protestants failed to show any interference (paragraph 27). The applicant is concerned that every subsequent permit that does not have a condition will be senior, which is not the way Oklahoma Water Law is written.

Mr. Melton asked Mr. Wilkins about the finding the day referred to, that Ms. Shirley said there was no water, and the OWRB said there was water. Mr. Wilkins answered he was the field investigator, and the Director made the decision; he did go a number of times in a timely manner and the flow was different each time -- a reduced flow in summer when water is needed, and the last time there was a full pool of water which level covered the pump, and she could have pumped at that time. He reported what he saw, and was documented with photographs; the Director made a decision that was not interference at that time. Mr. Melton asked the staff recommendation, and Mr. Wilkins stated the staff recommended the order as drafted by the hearing examiner. Mr. Drummond asked if the Board could add the red light/green light proposal, and who monitors the red light/green light. Mr. Wilkins answered that has been accepted in the past, either by parties agreeing or the applicant voluntarily agreeing to self-imposed conditions, which if placed on the permit, the OWRB would be responsible for enforcing the condition. The gage shows real time cfs, but an investigation would be needed regarding pumping which would be done upon a complaint of interference.

Ms. Castillo asked if the Board may look at water quality or is there some water. Ms. Gibson responded there is no statutory definition of interference, the OWRB permitting program is a water quantity program and does not take into account water quality issues unless there is a Scenic Rivers or special condition.

Mr. Drake stated he had a high regard and respect for the OWRB staff and hearing judges. He said he is not scientist but does know the creek is not dependable.

Chairman Stallings stated that on the agenda is an item allowing to move to executive session. Mr. Muller stated he believed deliberations in executive session could be helpful and healthy at arriving at the best decision the Board could make as a conclusion should be brought after three years of hearings and testimony in both directions.

3. Possible Executive Session. As authorized by the Oklahoma Open Meeting Act in Section 307(B)(8) of Title 25 of the Oklahoma Statutes, an executive session may be held for the purpose of “[e]ngaging in deliberations or rendering a final or intermediate decision in an individual proceeding pursuant to Article II of the Administrative Procedures Act”.

(a) Vote on whether to hold Executive Session. Before it can be held, the Executive Session must be authorized by a majority vote of a quorum of members present and such vote must be recorded.

Mr. Muller moved to enter an Executive Session, and Ms. Castillo seconded.

Chairman Stallings noted a raised hand in the audience, General Counsel Gibson stated the person is represented by an attorney.

Chairman Stallings called for the vote.

AYE: Melton, Darby, Castillo, Muller, Landess, Stallings

NAY: Drake, Drummond

ABSTAIN: None

ABSENT: Allen

(b) Designation of person to keep written minutes of Executive Session, if authorized. Ms. Schooley was designated to keep written minutes.

(c) Executive Session, if authorized. Chairman Stallings announced the Board would convene the Executive Session following a five minute break. The Board entered Executive Session at 10:50 a.m.

4. Return to open meeting and possible vote or action on any matter discussed in the Executive Session, if authorized.

At 11:15 a.m., Mr. Melton moved to return to open meeting, and Mr. Darby seconded. Chairman Stallings called for the vote.

AYE: Melton, Darby, Castillo, Drake, Drummond, Muller, Landess, Stallings

NAY: None

ABSTAIN: None

ABSENT: Allen

5. Vote on whether to approve the Proposed Order as presented or as may be amended, or vote on any other action or decision relating to the Proposed Order.

Chairman Stallings stated the Board is now in regular session, and yielded to Mr. Muller. Mr. Muller stated that after hearing from two hearing examiners over the course of a year, and the evidence presented the Board has agreed to some restriction of a minimum flow set. He said one hearing examiner recommended a minimum flow of 8 cfs, the last recommend one of zero cfs, no restrictions; the applicant offered one cfs and the Board wanted to set a minimum cfs of two cubic foot per second. He asked Ms. Gibson to read the Board's decision.

Ms. Gibson stated that in addition to the standard condition that the applicant shall not interfere with domestic or senior uses, the Board proposes:

(1) when the USGS gage 7331200 is recording a flow below 2 cfs (two cubic feet per second) Arbuckle Aggregates shall not withdraw water at the diversion point;

(2) when the USGS gage 7331200 is recording a flow of at least 2 cfs (two cubic feet per second) Arbuckle Aggregates may divert water up to the maximum pumping rate, and

(3) if the existing Mill Creek USGS gage is removed, Arbuckle Aggregates will implement a replacement measurement system that meets Board approval.

Mr. Muller stated he would make that motion. Mr. Drummond seconded the motion. Chairman Stallings called for the vote.

AYE: Melton, Darby, Castillo, Drake, Drummond, Muller, Landess, Stallings

NAY: None

ABSTAIN: None

ABSENT: Allen

B. Consideration of and Possible Action on Items Transferred from Summary Disposition Agenda, if any. There were no matters transferred from the Summary Disposition Agenda.

## 6. NEW BUSINESS

Under the Open Meeting Act, this agenda item is authorized only for matters not known about or which could not have been reasonably foreseen prior to the time of posting the agenda. Chairman Stallings noted there had been discussion about not having a March meeting. Ms. Cunningham stated the past several years the Board had cancelled the March meeting. Ms. Gibson stated no motion is needed, the meeting date is March 17, during Spring Break, and typically staff will wait until closer to the meeting to determine if there is a matter that needed to be heard before recommending cancelling the meeting.

There were no New Business items for the Board's consideration.

**7. ADJOURNMENT**

There being no further business, Chairman Stallings adjourned the meeting of the Oklahoma Water Resources Board at 11:20 a.m. on February 18, 2020.

**OKLAHOMA WATER RESOURCES BOARD**

\_\_\_\_\_/s/\_\_\_\_\_  
Robert L. Stallings, Jr., Chairman

\_\_\_\_\_  
Stephen B. Allen, Vice Chairman

\_\_\_\_\_  
Charles Darby

\_\_\_\_\_  
F. Ford Drummond

\_\_\_\_\_  
Robert L. Melton, Sr.

\_\_\_\_\_  
Jennifer Castillo

\_\_\_\_\_  
Matt Muller

\_\_\_\_\_  
Suzanne V. Landess

***ATTEST:***

\_\_\_\_\_/signature stamp/\_\_\_\_\_  
Bob Drake, Secretary

(SEAL)

Members voted to approved the February 18, 2020, meeting minutes at the April 21, 2020, Board meeting which was held via videoconference and were not present to sign the document.