

**BEFORE THE OKLAHOMA WATER RESOURCES BOARD
STATE OF OKLAHOMA**

IN THE MATTER of Determining the Maximum)
Annual Yield for the Arbuckle-Simpson)
Groundwater Basin underlying parts of Murray,)
Pontotoc, Johnston, Garvin, Coal and Carter)
Counties)

PROTESTANT’S RESPONSE BRIEF

Protestants Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc., Charles Roos, Paul Warren, Bill Clark, John Sparks and Floyd Bergen (Protestants) hereby submit this brief in response to the “Motion to Admit Evidence” and the “Brief of the City of Ada in Opposition to the Five Year Implementation Period of the Proposed Tentative Determination of Maximum Annual Yield of Groundwater from the Arbuckle-Simpson Groundwater Basin” filed herein by the City of Ada.

In its motion to admit, Ada acknowledges that the evidence it seeks to admit pertains to the “Rulemaking part of the hearing.” Notably, however, neither the City of Ada’s brief nor any of the other briefs filed in this matter provide a scintilla of legal authority for the OWRB to combine rulemaking with a Maximum Annual Yield (MAY) hearing. Protestants would therefore again submit that, for the reasons set forth in their Brief in Chief, as well as those in Proposition III of Protestants OKAA and TXI Response Brief, which is hereby adopted, all such rulemaking information should be excluded as constituting improper APA rulemaking. Ada’s Motion to Admit should be denied for the additional reason that the City has provided no good reason for failing to tell its story at the hearing.

PROPOSITION

ADMISSION OF THE CITY OF ADA'S BRIEF WOULD CONSTITUTE AN END RUN AROUND THE HEARING EXAMINER'S PREHEARING ORDER AND THE OKLAHOMA ADMINISTRATIVE PROCEDURE ACT

Ada's Motion to Admit Evidence constitutes nothing more than a subterfuge aimed at placing an untested and unverifiable version of the facts before the Hearing Examiner, and even more importantly, the "Administrative Head," *i.e.* Board Members, of the OWRB. Mr. Shew's rationale for not presenting Cody Holcomb as a witness at the hearing is suspect on its face. First, it was made amply apparent at the prehearing conference that the hearing would likely last more than one day. Not only did the hearing examiner on several occasions indicate that would be the case, any reasonable person upon assessing the level of interest and the number of parties signing up to participate could see that the hearing would not be completed in one day.

Second, Mr. Shew made no request to have Mr. Holcomb testify on the first day of the hearing, which request, if made, would most likely have been honored by the hearing examiner. For reasons unknown, he made no such request.

Third, while Mr. Shew claims that there was no one else to cover for him at the Bankruptcy hearing, it is noteworthy that he makes no such claim for the MAY hearing. This is undoubtedly because any such claim to that effect would be bogus. There are obviously other attorneys, such as the Ada city attorney, who could have covered the MAY hearing. In fact, since Mr. Holcomb's testimony admittedly was to pertain only to rulemaking, there was no real need for Mr. Shew, or any other attorney for that matter, to even be present. This fact is exemplified by the presentation made by Lewis Parkhill, Mayor of Tishomingo, who appeared without benefit of any counsel whatsoever.

The City of Ada's brief makes no pretext of presenting legal argument, but rather very simply provides a story line prepared and submitted by Ada's attorney. The reason for this approach is unclear, but what is clear is that by presenting Ada's plea for a twenty-year phase-in this fashion, Mr. Shew made sure that no representative of the City of Ada would be subjected to cross-examination regarding any of the so-called facts set forth in this Brief. A number of questions would undoubtedly have been asked of whoever served as Ada's spokes person had the City of Ada played by the rules set forth by the hearing examiner. Questions such as:

1. Who is the "expert" advising Ada as to the \$300 per acre price for water? Have any purchases been made for that price? How many acres?
2. Does Ada have an agent purchasing Arbuckle-Simpson water rights? If so, who is it? How is that person being compensated?
3. Why did Ada accept a donation of groundwater valued at \$1,500 per acre when you claim the value is \$300 per acre?
4. What is the status of Ada's effort to purchase water rights? Where is the documentation for such purchases?
5. What are the major components of the City's revenue stream? How do Ada's water rates compare with other Oklahoma communities? How much money do Ada's recent financial reports reflect the City as having on hand?
6. Does Ada provide water to any Rural Water Districts? If so, how many? Who are they? How much are they charged for water? What is Ada's cost for the water, *i.e.*, what is Ada's profit margin for each 1000 gallons sold to a Rural Water District?
7. What are the "many other water related infrastructure issues" that would cost "an estimated \$24,900,000" in addition to the cost of obtaining additional water rights?

8. What would be the breakdown of anticipated costs as between MAY related expenses and expenses that are going to be incurred by the City with or without the MAY being implemented?

9. How much of the financial burden Ada is facing is being brought about by the proposed two-tenths of an acre foot maximum annual yield?"

10. Who determined that acquiring additional Arbuckle-Simpson groundwater rights was the most viable option for the City?

11. Who determined the three groundwater acquisition options?

12. Who prepared the comparison between the three options?

13. Who prepared the charts attached to the City of Ada's brief as exhibits 1, 3, 4, 5, and 6?

By Ada choosing to not have a representative available to testify at the hearing, Protestants were denied their statutory right to cross-examine that representative and thus the Hearing examiner and the OWRB cannot ascertain the probative value of Ada's contentions, all in derogation of the provisions of 75 O.S. § 310.

Ada's Motion to admit should be denied because it is nothing more than a thinly disguised attempt to allow Mr. Shew to present questionable information and his personal version of history without fear of contradiction or correction.

CONCLUSION

In conclusion, Protestants object to any oral comments or documents pertaining to rulemaking being included in the MAY hearing record, whether they were submitted during the hearing or subsequent thereto. Article I Oklahoma Administrative Procedures Act provisions pertaining to rulemaking procedures are not the same as, and are not compatible with, Article II

requirements for individual proceedings mandated for MAY hearings by 82 O.S. §1020.6A. For all the above and foregoing reasons Protestants request the Hearing Examiner to deny the City of Ada's Motion to Admit Evidence and exclude all Rulemaking matters from the MAY record.

Respectfully submitted,

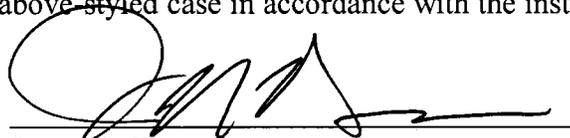


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CERTIFICATE OF SERVICE

I certify that prior to 5 p.m. on the 14th day of June, 2012, I e-mailed or mailed a copy of this document to all parties of record in the above-styled case in accordance with the instructions of the hearing examiner.



James R. Barnett