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.

CPASA'S RESPONSE IN OPPOSITION TO PROTESTANTS' MOTION TO RECUSE/DISQUALIFY HEARING EXAMINER AND TO STAY PROCEEDING AND BRIEF IN SUPPORT

in opposition to Protestants Oklahoma Farm Bureau Legal Foundation, Oklahoma Aggregates Association, Environmental Federation of Oklahoma, TXI, and the Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc.'s (herein collectively “Protestants”’) Motion to Recuse/Disqualify Hearing Examiner and to Stay Proceeding and Brief in Support (herein “Protestants’ Motion”). In opposition to Protestants’ Motion, CPASA states:

**ARGUMENT AND AUTHORITIES**

I.  *The OWRB Did Not Participate In The Arbuckle-Simpson Aquifer Maximum Annual Yield Hearing As A Party.*

Oklahoma law requires the Oklahoma Water Resources Board (herein “OWRB”) to set a tentative maximum annual yield for a groundwater basin or subbasin and hold hearings at centrally located places within the groundwater basin or subbasin area. See 82 O.S. § 1020.6(A). At such a hearing the OWRB

shall present evidence of the geological findings and determinations upon which the tentative maximum annual yield has been based. *Any interested party shall have the right to present evidence in support or opposition thereto.*

82 O.S. § 1020.6(A) (emphasis added).

Importantly, Oklahoma statute does not classify the OWRB as an interested party; rather, the OWRB is simply to present evidence upon which it based its tentative maximum annual yield.

Oklahoma statutes also require tentative maximum annual yield hearings to “be conducted pursuant to Article II of the Administrative Procedures Act.” 82 O.S. § 1020.6(A). Article II of the Administrative Procedures Act (herein “APA”) governs hearings before a state agency (as opposed to rulemaking procedures of a state agency). Thus, in order for the OWRB to satisfy its statutory requirement to “present evidence of the geological findings and determinations” upon which it based the TMA Y, the OWRB called witnesses to enter evidence into the administrative record.
Protestants mistakenly construe the OWRB's role as participation by a party. Specifically, Protestants' erroneously assert "the OWRB participated as a party to the proceeding, calling witnesses, cross-examining witnesses, calling rebuttal witnesses and presenting evidence." Protestants’ Motion, ¶ 2. In reality, the OWRB performed its statutory duty in the only way available—through witnesses at the hearing. However, this does not somehow transform the OWRB into a "party."

The OWRB’s status as a non-party is further solidified by its post-hearing conduct. Protestants correctly note that the OWRB did not file any post-hearing briefs. See Protestants’ Motion, ¶ 3. However, the OWRB did not “decline” to file any post-hearing brief; rather, the OWRB, as a non-party, had no reason to file a post-hearing brief. Protestants’ argument that the OWRB is a party in the TMA Y proceeding is unsupported by statute and is further diminished by the OWRB’s action in this case.

II. Section 313 Of Oklahoma Statute Title 75 Is Inapplicable To Communications By The Hearing Examiner.

Agency members or employees assigned to render a final decision are prohibited from communicating with any person or party regarding an issue of fact or with any party or his representative, except upon proper notice and opportunity for all parties to the proceeding to participate. See 75 O.S. § 313. Here, however, Hearing Examiner Meazell is not the final decision maker. Only the nine (9) member Board can make the final determination as to the maximum annual yield of groundwater from a basin or subbasin by issuing a final order containing findings of fact and conclusions of law. See 82 O.S. § 1020.6(C). Any claim that Examiner Meazell participated in ex parte communications is clearly contrary to well-established law.
Moreover, such communications between hearing examiners and OWRB staff is common practice. Indeed, James R. Barnett—one of the attorneys signing Protestants’ Motion—successfully defended the OWRB against a similar claim in Lowrey v. Hodges. See Lowrey v. Hodges, 555 P.2d 1016 (Okla. 1976). In Lowrey, appellees claimed the hearing examiner in an Article II individual proceeding was not neutral because of statements he made as to the probability of the Board’s granting the permit application and because he took an active role in questioning witnesses. Id. at 1022. The Oklahoma Supreme Court disagreed with appellees’ contentions based upon the following excerpt from the administrative transcript:

Q. Now is that a comment by you before you hear the evidence in the case?

A. No, sir. I just say it probably will be. Now I’m not saying that it’s definite. I haven’t studied all the facts yet, and certainly I would study all of them before we make any recommendations then we will have a conference with the Director and the other people at the Water Resources Board before we do any recommending. (Emphasis added).

Id. at 1023.

Ultimately, the court found that none of appellees’ arguments against the hearing examiner could be deemed prejudicial. In so finding, the court held that the nine (9) member “Board approached this matter in great detail and the final findings and decision were left to the Board itself after arguments of counsel.” Id.

Similarly, in Barnes v. University of Oklahoma, the Oklahoma Court of Civil Appeals held that 75 O.S. § 313 was inapplicable to a university faculty member who had no final decision-making authority. 891 P.2d 614, 618 (Okla. Civ. App. 1995). There, a faculty member testified against a dental student at an expulsion hearing, despite admitting to talking to potential witnesses about the case. The court affirmed the trial court’s finding that the university did not
violate 75 O.S. § 313 because the record clearly showed the faculty member “was not a member of the Board and had no decision-making or fact-finding responsibilities.” *Id.*

Here, only the nine (9) member Board has the authority to make the final determination of the maximum annual yield for the Arbuckle-Simpson Groundwater Basin. *See* 82 O.S. § 1020.6(C). Hearing Examiner Meazell can make a recommendation to the Board, but has no final decision-making authority. Moreover, as at least one of Protestants’ counsel is aware, communications between hearing examiners and OWRB staff are common—and proper—occurrences during the course of an Article II administrative proceeding.

WHEREFORE, for the foregoing reasons, CPASA respectfully requests Protestants’ Motion be denied.

Respectfully submitted this 26th day of November, 2012.

Jason B. Aamodt, OBA No. 16974
Krystina E. Phillips, OBA No. 30111
THE AAMODT LAW FIRM
1723 S. Boston Avenue
Tulsa, OK 74119
Telephone: (918) 347-6169
Facsimile: (918) 398-0514
ATTORNEYS FOR CPASA

5
CERTIFICATE OF MAILING

I hereby certify that on the 26th day of November, 2012, a true and correct copy of the foregoing instrument was deposited in the United States mail, to the following persons, postage prepaid, first class:

Bill Holley
City of Sulphur
600 W. Broadway
Sulphur, OK 73086

Edward T. Tillery
210 W. Grant Ave
Pauls Valley, OK 73075

Marla Peek
Oklahoma Farm Bureau
2501 N. Stiles
Oklahoma City, OK 73105

Tommy Kramer
215 N. 4th
Durant, OK 74701

Richard Day
3284 State Highway 1 W
Roff, OK 74865

Jim Rodriquez
Oklahoma Aggregates Association
3500 N. Lincoln
Oklahoma City, OK 73072

George Matthews
426 Westchester
Ada, OK 74820

Gary Kinder, City Engineer
City of Ada
231 S. Townsend
Ada, OK 74820

D. Craig Shew
Box 1373
Ada, OK 74821-1373

James Dunegan
City Manager, City of Durant
P.O. Box 578
Durant, OK 74702

Jerry L. Tomlinson, Mayor
City of Durant
P.O. Box 578
Durant, OK 74702

Guy Sewell
1100 E. 14th St.
Ada, OK 74820

Dave Roberson
P.O. Box 235
Sulphur, OK 73086

Lewis Parkhill, Mayor
City of Tishomingo
409 S. Mickle
Tishomingo, OK 73460

C.I. Maxwell, Jr
4500 Highway 7 West
Tishomingo, OK 73460

Cody Holcomb
Ada Public Works Authority
231 S. Townsend
Ada, OK 74820

Kelly Hurt
P.O. Box 299
Allen, OK 74825

Jonathan Gourley
901 NW 37th Street
Oklahoma City, OK 73118
Jona Tucker  
Nature Conservancy of Oklahoma  
31700 CR 3593  
Stonewall, OK  74871

Gary J. Montin  
P.O. Box 202  
Connerville, OK  74836

Bill Brunk  
P.O. Box 280  
Fittstown, OK  74842

Thomas J. Enis  
100 N. Broadway  
Oklahoma City, OK  73102

Joseph Morrow  
23475 CR 3500  
Roff, OK  74865

Bruce Noble  
National Park Service  
Chickasaw National Recreation Area  
1008 W. 2nd St.  
Sulphur, OK  73086

Kevin Blackwood  
P.O. Box 2352  
Ada, OK  74821

Fred Chapman  
Chapman Properties  
P.O. Box 1754  
Ardmore, OK  73401

Dick Scalf  
P.O. Box 851  
Ada, OK  74820

Shannon Shirley  
2370 N. Daube Ranch Rd.  
Mill Creek, OK  74856

Chuck Roberts  
21745 CR 3510  
Fitzhugh, OK  74843

Ronnie Wartchow  
26440 CR 3520  
Roff, OK  74865

Carolyn Sparks  
P.O. Box 502  
Sulphur, OK  73086

Charles Morrow  
24044 Highway 1 West  
Roff, OK  74865

Velta Winegard  
Winegard Water Corporation  
10371 CR 1620  
Fitzhugh, OK  74843

Paul Warren  
P.O. Box 60  
Mill Creek, OK  74856

Julie Aultman  
P.O. Box 1209  
Ardmore, OK  73402

Jerry Lamb  
12160 CR 1690  
Roff, OK  74865

James T. Johnson  
J.B. Johnson  
1133 Fletcher Rd.  
Sulphur, OK  73086

Charles Roos  
7955 CR 1670  
Roff, OK  74865

Carl Adcook  
1035 Republic NW  
Ardmore, OK  73401
Joyce Allgood
717 4th SE
Ardmore, OK 73401

Dean Arnold
3900 N. Deadman Springs Rd
Milburn, OK 73450

Deborah Arnold
3900 N. Deadman Springs Rd
Milburn, OK 73450

Mark Atkins
7481 Mesquite Ridge
Sanger, TX 76266

Patricia Baker
147 Mark Rd.
Lone Grove, OK 73443

Dayna Baker
601 L. St. NE
Ardmore, OK 73401

Kenneth J. Bylsma
407 Ash
Ardmore, OK 73401

Dorothy Bertino
18440 CR 3864
Ada, OK 74820

Norma Chaney
1160 W. Webb Rd
Tishomingo, OK 73460

Estee Brunk
5610 Merrimac
Dallas, TX 75206

Robert Brunk
5610 Merrimac
Dallas, TX 75206

Jill Clark
1908 7th NW
Ardmore, OK 73401

Jean Drew
2232 Clover Leaf Pl
Ardmore, OK 73401

Johny P. Bryant
2201 Oakglen Dr.
Ardmore, OK 73401

Ronnie Conner
806 N. Washington # 5
Ardmore, OK 73401

Michael Castellow
201 Country Club Rd
Ardmore, OK 73401

James Butler
620 Ast NW # 1
Ardmore, OK 73401

Kenneth Copeland
57 Wistaria
Lone Grove, OK 73443

Betty Crabtree
23011 Indian Meridian Rd.
Pauls Valley, OK 73075

Tracy Campbell
2021 4th NW # 83
Ardmore, OK 73401

Josh Davidson
692 Spring Hope Rd
Ardmore, OK 73401

Jon Collins
460 Willowridge
Ardmore, OK 73401
Howard Drew
2232 Clover Leaf Pl
Ardmore, OK 73401

Amanda Copeland
57 Wisteria
Lone Grove, OK 73443

Tammie Durbin
337 Lakeside Rd.
Ardmore, OK 73401

Dan Elkins
1301 Division
Sulphur, OK 73086

Arlinda Elkins
1301 Division
Sulphur, OK 73086

Judy G. Fisher
PO Box 234
Fittstown, OK 74842

Kathy Eye
236 S. Pichens Rd.
Madill, OK 73446

Gabe Green
5601 Bullet Prairie
Tishomingo, OK 73460

James Gallgher
3302 Rancho Ln
Ardmore, OK 73401

Paul Hall
11815 Wistinson Rd.
Mill Creek, OK 74856

Darrell Gipson
612 Sunset Rd
Ada, OK 74820

Mike Harris
2004 7th N.W.
Ardmore, OK 73401

Retha Rousey
1470 Enterprise
Ardmore, OK 73401

James Rowland
8834 Egypt Rd.
Milburn, OK 73450

Jason R. Girard
713 Ash NW
Ardmore, OK 73401

Gary Good
409 10th NW
Ardmore, OK 73401

Carin Salazar
416 P st. NE
Ardmore, OK 73401

Pat Gray
7100 E. Egypt Rd
Millburn, OK 73450

Rhoda Grayham
1020 8th NE
Ardmore, OK 73401

Gary Greene
5601 Bullet Prairie
Tishomingo, OK 73460

Justin Grines
306 G St. SE
Ardmore, OK 73401

Paul Hall
11815 Wistinson Rd.
Mill Creek, OK 74856
Vicki Harbert  
2502 E. Harbert Rd  
Tishomingo, OK 73460

Ebony McDonald  
1914 Knox Rd Apt 807  
Ardmore, OK 73401

Mark Hughes  
337 Lakeside Rd.  
Ardmore, OK 73401

Richard K. Muller  
6642 N. Dogwood Road  
Ardmore, OK 73401

Mike Harris  
2004 7th N.W.  
Ardmore, OK 73401

Virgil M. Mowbray  
1220 Beverly  
Ardmore, OK 73401

Sharon Keith  
5256 Myall Rd.  
Ardmore, OK 73401

Walter E. Mullendore  
8003 Joan T. White Rd.  
Fort Worth, TX 76120

Talon Hyatt  
2719 N. Shearer Rd.  
Mill Creek, OK 74856

Doris Murray  
606 N. Kemp  
Tishomingo, OK 73460

Michael Long  
8905 Hwy 7E  
Wapanucka, OK 73441

Roy David Mullens  
41255 E. Co. Rd 1510  
Pauls Valley, OK 73075

Elizabeth Kennedy  
2158 Hwy 77 S  
Davis, OK 73030

Norma L. Paschall  
PO Box 1133  
Ardmore, OK 73401

Ellen T. Innis  
1501 Persimmon Ln  
Ardmore, OK 73401

Rhonda Newton  
205 Country Club Rd.  
Ardmore, OK 73401

Rosemary McBee  
23695 Woflerest Way  
Wister, OK 74966

Luanne Snodgrass  
91 Overland Rt.  
Ardmore, OK 73401

John Kimbrough  
607 W. Kemp  
Tishomingo, OK 73460

Ed Perryman  
404 Eastwood Circle  
Ardmore, OK 73401

Brenda Jones  
1623 W. Broadway Place  
Ardmore, OK 73401

Lucille J. Norman  
1400 W. OTT Lane  
Pontotoc, OK 74820
Winifred Kasco
320 Bsr SW
Ardmore, OK 73401

Jeanie Upson
924 Sioux
Ardmore, OK 73401

Christiane Robinson
1378 8th NW
Ardmore, OK 73401

Mary Silverman
1200 Holly
Ardmore, OK 73401

Claudia F. Spalding
3801 So. Wiley Rd.
Milburn, OK 73450

E.J. Shipman
3073 E. Hwy 22
Tishomingo, OK 73460

Donnel Somers
34237 E. CR 1650
Wynnewood, OK 73098

James H. Stevens
627 W 21
Ada, OK 74820

Larry Wood
1412 Sunny Ln.
Ardmore, OK 73401

Benji
602 1/2 W. Tishomingo
Sulphur, OK 73086

Rosalyn Tiner
PO Box 178 3005 US Hwy 70
Wilson, OK 73463

David R. Spalding
3801 So. Wiley Rd.
Milburn, OK 73450

Richard Powell
1415 Holt
Ardmore, OK 73401

Catherine Pendergraft
4727 Cass Lane
Connerville, OK 74836

Barbara J. Stevens
627 W 21
Ada, OK 74820

Phyllis Perry
19601 Woodridge Dr.
Newalla, OK 74857

Rosemary Poythress
515 8th NW
Ardmore, OK 73401

Jerry Summers
701 s. Turner
Ada, OK 74820

Mark T. Presley
8 10 SE
Ardmore, OK 73401

Audrey Pruitt
615 sd NW
Ardmore, OK 73401

John M. Thompson III
819 Bixby
Ardmore, OK 73401

Yvonne Pruitt
500 S. Highland
Ada, OK 74820
Anna Vines
86 Laurel
Lone Grove, OK 73443

Ellen Spraggins
118 P NE
Ardmore, OK 73401

Tom Locke
906 Oaktree Ln
Ardmore, OK 73401

Mark Lumry
10707 Evans Rd
Marietta, OK 73448

Harold D. Pruitt
615 2nd Ave NW
Ardmore, OK 73401

Norma J. Mantzke
28 T & C Circle
Ardmore, OK 73401

Debra McCurry
1 Overland Rt.
Ardmore, OK 73401

Lois J. Rasseo
320 B SW
Ardmore, OK 73401

Martha Kimbrough
607 W. Kemp
Tishomingo, OK 73460

Zeno McMillan
7995 South Lone Cedar Road
Mannsville, OK 73447

C.D. Robertson Jr.
8900 OK Hwy 7E
Wapanucka, OK 73461

Beverly McMillan
5487 Myall Rd.
Ardmore, OK 73401

F. Lovell McMillin
814 Wood n Creek Rd
Ardmore, OK 73401

Heather McGee
9801 Silver Lake Drive
Oklahoma City, OK 73162

I hereby further certify that on the 26th day of November, 2012, a true and correct copy of the foregoing instrument was electronically transmitted to the following persons via electronic mail:

Anissa Campbell
afmaher@owrb.ok.gov

Jason Aamodt
jason@aamodt.biz

Krystina Phillips
krystina@aamodt.biz

Christine Marler
christy@aamodt.biz

Michelle Davis
michelle@aamodt.biz

Peter Fahmy
peter.fahmy@sol.doi.gov

Alan Woodcock
alan.woodcock@sol.doi.gov

Mark Walker
mark.walker@crowedunlevy.com
Scott Butcher
scott.butcher@crowedunlevy.com

Mike Woffard
mwoffard@dsda.com

James Barnett
jbarnett@dsda.com

Peter Burck
peter_burck@fws.gov

Kerry Graves
kerry_graves@fws.gov

Donald Chaffin
dchaffin@fischleulplaw.com

Kyle Murray
kyle.murray@ou.edu

Bill Flanigan
bflanigan@txi.com

David Ocamb
david.ocamb@sierraclub.org

Shon Aguero
shon.aguero@landmarkbank.com

Woody Alexander
bonnenwoody@yahoo.com

Sandra Alexander
skywalk@brightok.net

Anna Baker
annaandwayne@cableone.net

Wayne Baker
mbaker61@hotmail.com

Terry Barnes
t@losdos.org

Michelle P. Bass
mdass_2001@yahoo.com

Terry Bell
terry@sokradio.com

Kara Berst
karajamae@yahoo.com

Stacey Blackwood
staceyinez05@yahoo.com

Nathaniel Bright
bright.nathaniel@gmail.com

Gary Burdine
colgaryburdine@yahoo.com

Karen Butler
sueopsahl@yahoo.com

Linda Byrd
linda.byrd@chickasaw.net

Stephanie Carson
stephanie.carson@chickasaw.net

Tim Carson
tim.carson@chickasaw.net

Cecil Carter
ccarter@mscok.edu

Patricia Castellow
patcastellow@yahoo.com

Fred Chapman
fajrchapman@yahoo.com

Connie Chrobot
beemabros@gmail.com

Florence Coble
florence.coble@yahoo.com
Ava Converse
converse@oge.com

Ronald Cooper
coopjob@yahoo.com

Melissa Davis
momof3boys@yahoo.com

Steve A. Deen
sdeen@paeinc.net

Terry K. Deen
tdeen@paeinc.net

Mark K. Deen
mdeen@paeinc.net

Denver Donaho
ddonaho@cableone.net

Bob Donaho
donahoattorney@brightok.net

Nancy Dromgold
jndrom@wildblue.net

Jennifer Dunbar
jennydun@msn.com

Sandra Esleres
s_riquel@hotmail.com

Roy Ewing
txdicedealer@yahoo.com

Kasy Fincher
kasy_fincher@yahoo.com

David Gainey
gainey@brightok.net

Jennifer Gallagher
secretteacher@gmail.com

Cheryl Whitman
chery.lenn@yahoo.com

LaDonna Wilbanks
hallofgold@yahoo.com

Amber Williams
amwilliams79@sbcglobal.net

Angela Williams
rangediva@hotmail.com

Johnny Wilson
copwilson369@yahoo.com

Amy Wisran
amywisran@gmail.com

Joel Wixon
jwisian@gmail.com

Charlie Wright
innkeeper@sulphurspringsinn.com

Jeffery Vick
jvick@ga-inc.net

Cody Wainscott
cody.wainscott@chickasaw.net

Travis Thom
tathom@cableone.net

John David Smith
johnd61@brightok.net

Priscilla Stevens
priscillastevens@gmail.com

Janis Stewart
electionlady1@yahoo.com

Dawn Summers
dsummers@paeinc.net
Michael Summers
msummers31@sbcglobal.net

Melissa Shawn
mel.long@att.net

S. L. Sherrell
slsherrell@gmail.com

Brent Shields
brentshields@chickasaw.net

Carl Schneider
prepjrjay@hotmail.com

Abbie Schneider
abbiea@hotmail.com

Barry Shrader
fishingcowboyblue@yahoo.com

Fred Shrader
fred@oilspecialist.com

Ann Schroeder
dahome@att.net

Brenda Rolan
brenda.rolan@chickasaw.net

Robin Ross
robinross1086@yahoo.com

Kerri Rousey
krousey4@yahoo.com

Whitney Ruelle
whityruce@gmail.com

John C. Pope
relaxing.vacation@yahoo.com

Donna Pope
popedonna@rocketmail.com

Josh Presely
josh.presley@chickasaw.net

Audrey Pruitt
harprv@prodigy.com

Harold Pruitt
harpu@prodigy.net

Winifred Rasto
blessedbudah@yahoo.com

Adalene Rhodes
adalene_rhodes@yahoo.com

James Rhodes
jprhodes@tsbcglobal.net

Sherri Owens
sowens@bancfirst.com

Sarah Newton
swelden05@hotmail.com

Mark Newton
mnewt@gmail.com

Jane Murphy
lannymurphy@att.net

Shawna Murphy
shawnamurphy@adaok.com

Richard A. Murray
richard_murray1@att.net

Pat Neasbitt
bob.pat@sbcglobal.net

Randy Neasbitt
randyneasbitt@yahoo.com

Sarah Miracle
sarah.miracle@sbcglobal.net
Jane Mowbray
jamowbray@swbell.net

Edra J. Mullendore
edrajm@netzero.net

Thalia Miller
tjm545@gmail.com

Tammy Merrell	
tmerrell@arbucklebank.net

Chris McCurry
chris_murray@hotmail.com

Janet Mathis
janet.mathis@att.net

Tisha Lester
jtlester@arbuckleonline.com

John Krittenbrick
johnkrittenbrick@att.net

Agnes Lane
mlanesandsons@yahoo.com

Betty Leggiero
bettycole.50@att.net

Dawnita Kennedy
d.kndy74@yahoo.com

Jim Johnson
jim.johnson@chickasaw.net

Deanna Johnson
shlyrain@yahoo.com

Kimberly Johnson
kimberlyjohnson06@yahoo.com

George W. Johnson
mrjpiano@hotmail.com

Gary Joiner
gary.joiner@chickasaw.net

Billy D. Howell
billy1645@aol.com

Jim Hunter
jimhunter45@hotmail.com

Luther Harbert
harbert_ranch@hughes.net

Melissa Heid
oheido@cableone.net

Craig Garone
cngarone@hotmail.com

Stacey Gibney
Stacey.gibney@chickasaw.net

Charlene Goodson
goodsoncharlene@yahoo.com

Kenneth Meyers
kmeyers@ou.edu

Krystina E. Phillips

16