

**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**

COMES NOW Citizens for the Protection of the Arbuckle-Simpson Aquifer, Jim Baker, Leonia Barger, Diane Barrett, Terry Beals, Retha Beals, Peggy Bell, Betty Sue Boyd, Leonard D. Briley, Donald J. Brittin, Michaeli Brunk, Kathryn Brunk, Bill Brunk, John P. Bruno, Jesse T. Bruno, Elaine Bruno, Esme Bruno, Lou Carlton, Darryl Carter, John H. Chrobot, Scott Clark, Derek L. Collins, Virginia Cooper, Joyce Crosby, Sandra L. Czajkowski, Claude V. Czajkowski, LaQuita Dayton, Sara Donaho-Jones, Joe S. Duncan, Jana L. Dutton, David Earsom, Eddie Easterling, Reg Easterling, Gloria Ellis, Janice Ellis, Kasy Fincher, Amy Ford, Thomas M. Forster, Dana Forster, Catherine L. Gardner, Jerry A. Gray, Pat Gray, James F. Herndon, Susan Ingram, Jamie Inman, Royce D. Jones, Dana Kelley, Wayne Kellogg, K. Wayne King, Austin LeMay, Ray Lokey, John D. Manning, Mike Martin, Mary Jo Massey, Cindy Matheny, Janet Mathis, C.I. Maxwell, Jr., Jimmy “J.J.” McGill, Timothy D. Metzger, Kenneth R. Meyers, Esther Miller, Darrell Morris, Marvin Munger, June Murphy, Larry Murphy, Mary Jane Nelson, Donald H. Nichols, Gary Paddack, Floy Parkhill, Curtis E. Perry, Stanley A. Rice, Jett Robbins, Reginald Robbins, Paula Rush, Patti Sanders, Donald Schroeder, Charles Shipley, John Sikes, Wayne A. Smith, Josh Talkington, Y. Steven Thompson, Helen H. Thompson, Rogelio Trevino, Wayne Walker, Gloria L. Webb, Danny Wells, Steve Wheeler, Dorena J. White, Glenna J. Wright, and Paul D. Young (herein collectively “CPASA”) and respectfully submit this response

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 TMAY, 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 TMAY 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 Mezell 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 Mezell 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.*

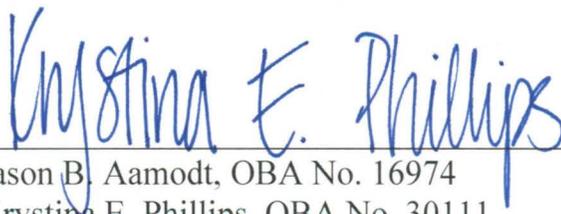
Similarly, in *Barnes v. University of Oklahoma*, the Oklahoma Court of Civil Appeals held that 75 O.S. § 313 was inapplicable to a university faculty member who had no final decision-making authority. 891 P.2d 614, 618 (Okla. Civ. App. 1995). There, a faculty member testified against a dental student 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.



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