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	)

RESPONSE BRIEF OF PROTESTANTS
OKLAHOMA AGGREGATES ASSOCIATION & TXI

Oklahoma Aggregates Association (OKAA) and TXI submit this Response Brief:

I.
There is no competent evidence to establish the applicability of the tentative MAY to the Western and Central Aquifers.

1. The evidence put forth to establish the legal or factual validity of the tentative MAY is fatally flawed and legally insufficient to support the establishment of an MAY for any of the three Arbuckle-Simpson aquifers. In particular, none of the parties to this proceeding has provided any competent and relevant evidence whatsoever to establish the scientific validity or appropriateness of applying the 0.2 acre-foot per acre Maximum Annual Yield to the Western Aquifer or the Central Aquifer. To the contrary, the Protestants, through witnesses including Dr. Eileen Poeter as well as Dr. Kyle Murray of the Oklahoma Geological Survey, have testified that the Western and Central Aquifers have not been characterized adequately to justify OWRB action to establish the Maximum Annual Yield. The geological characteristics of those Aquifers differ significantly enough from the Eastern Aquifer--in the four major respects stated in Dr. Murray's proposal and outlined in the initial brief of Protestants OKAA and TXI—so that the MAY proposed by the OWRB should not and cannot be applied to them. The cross-examination of these experts revealed no facts to support a different conclusion, and the OWRB did not offer any evidence to refute them. It is incumbent upon the Hearing Examiner and the agency to make

a finding that there is no reliable, material, probative, and substantial competent evidence to justify the application of the tentative MAY to the Western or Central aquifers.

II.

Considerations of potential future studies do not justify the imposition of the arbitrary limitation proposed by the OWRB.

2. One of the most appalling statements made and repeated by advocates of the 0.2 acre-foot per acre limitation in this hearing is to the effect that the OWRB study represents the "best science available" and, if the OWRB so restricts the landowners' use of Arbuckle-Simpson water, the agency might go back and make it right sometime in the next ten years by conducting another, better study. This is a callous response to landowner pleas for relief from the OWRB's demonstrably arbitrary proposal. The time and money it took to do the study has been offered by the OWRB many times to establish its worthiness, but the expenditure of time and money is no evidence that the process or results were any good from a technical standpoint. This is particularly so considering the way the model was flawed, the data misused, and the basis for the work as well as their results was ignored by the preparation of the tentative order by the OWRB staff. This was done in favor of a capricious and politically driven back-calculation of the MAY from an Equal Proportionate Share, which was chosen by them without explanation.

3. When confronted with these facts, the response of the OWRB and other proponents of the standard amounts to, "Well, it's okay, because in ten years there will be another shot at this and maybe we'll get it right then. In the meantime, you landowners that survive that long will just have to live with this." It would be hard to imagine a more cynical position for the government to take in an attempt to justify an unconstitutional taking. The OWRB cannot legally adopt a scientifically unsupportable MAY today, or ten years from now, or at any time so

long as our state and federal constitutions remain in place, alongside the requirements listed in Title 82 for the issuance of an MAY as cited in our initial brief.

4. Some of the proponents of the 0.2 acre-foot per acre limitation, including the City of Ada, nevertheless are urging the OWRB not to apply it to them for many years to come, if ever. Others, including the director of CPASA, testified that they want the MAY to be set low so that people living in the ASA cannot use the water under the land they own—not even, according to testimony at the hearing, in amounts sufficient to support the local rural water district, and not enough to continue the existing and traditional ranching operations in the area. But these particular interests, many of whom do not live or operate in the ASA, want the 0.2 limit to be put in place so that *they* can take and use the water for their own private purposes or special interests once it reaches the surface.[1] None of these interests expressed any desire to wait ten years to have their claims recognized. There is no basis for requiring landowners and other users of water from the ASA to undergo a taking of their rights by the government now, on the theory that the mistake might be corrected later.

5. There is no provision for a ten-year moratorium that would be equally applied to anyone seeking a surface water use permit for water from the streams and springs emanating from the ASA. The OWRB itself testified that there is nothing to prevent the OWRB from permitting the taking of every drop of water from Pennington Creek and the Blue River, even to the point of harming or destroying the fish habitat that was the supposed basis of the OWRB's definition of "natural flow". This makes the entire ASA regulatory scheme questionable from an

[1] See Amy Ford's statements claiming that anything greater than a 0.2 MAY would jeopardize her desire to take the water for the operation of her own ranch located as far away as Bryan County. Another such was put forth by the U.S. Fish and Wildlife Service, which would have the OWRB pick it as a "winner" in order to facilitate the operation of its fish hatchery in Pennington Creek, even while it may not have the rights to the water it is currently taking there. This while denying the rural water district and area ranchers, not to mention industries and individuals, from using the water they need in their own long-standing activities and operations in the area.

equal protection standpoint, but it especially belies the excuse that a more worthy study might fix the problem a decade hence.

III.

The Hearing Examiner's *de facto* ruling against the Motion in Limine of these Protestants is a violation of the Administrative Procedures Act and the Constitution.

a. Protestants are entitled to examine and cross-examine anyone who propounds evidence that would be admitted into the record of this hearing.

6. These parties filed a Motion in Limine with the Hearing Examiner at the Pre-hearing Conference on May 9, 2012, **Exhibit A**.[2] Among other things, these parties requested the Hearing Examiner to exclude any "evidence" propounded by non-parties or by any persons that would not be subject to cross-examination. The Motion may never have been explicitly ruled upon by the Hearing Examiner, but the record of an Individual Proceeding under the APA must include such a ruling. Title 75 Okla. Stat. § 309 F. 1. and 4. Instead, the Hearing Examiner has issued a Post-hearing Order on Notice and Scheduling which contains the following statement:

> "Should a party wish to provide additional evidence with an initial brief, that party must also submit a motion to admit the evidence, which shall include a showing why that evidence could not have been provided during the hearing."

As it was anticipated in our Motion, this ruling strictly violates the most rudimentary elements of due process as against anyone who would wish to challenge such evidence, and is a strict violation of the provision of the APA at Title 75 Okla. Stat. § 310, which states:

> "A party may conduct cross-examination required for a full and true disclosure of the facts." Title 75 Okla. Stat. §310/ 3.

b. The National Park Service cannot be allowed to create new "facts" after the hearing and offer them to the Hearing Examiner in the guise of comments.

[2] This motion was unopposed and no response brief in opposition to it has been filed by any party.

7. Not surprisingly, a number of persons have attempted to take advantage of the Hearing Examiner's Post-hearing Order in this regard. In particular, the National Park Service, without even moving for approval to do so, has attempted to offer not only additional evidence but *newly generated evidence, constructed after the close of the hearing.* "Preliminary Comments of the National Park Service" submitted to the Hearing Officer May 31, 2012. *See esp.* p. 4 in which the attorneys for the NPS, without even offering it in an affidavit, describe material "calculated from model output files submitted by Dr. Poeter". These could only have been prepared after the close of the hearing, and they are contained in a document that purports to be merely comments on rulemaking. This is a blatant attempt to prejudice the Hearing Examiner while avoiding the scrutiny that examination and cross-examination of the preparer of that material should undergo. Further, from a pure credibility standpoint, the "evidence", if that's what it is, was created by a person or persons who did not even notice the flaws in the model in the first place, especially respecting the failure to include the necessary calculations around the effects of the unconfined layer in the Eastern Aquifer. There can be no clearer example of why cross-examination in such a situation should not only be required but demanded by the Hearing Examiner. There also could be no clearer example of why the Protestants repeatedly argued against the Hearing Examiner mixing the processes of the Individual Proceeding and the taking of comments on OWRB proposed rulemaking.

c. The statements offered as "evidence" by the City of Ada should be excluded from consideration by the Hearing Examiner and from the record of the hearing.

8. The City of Ada has moved for the addition of evidence in the record after the close of the hearing by propounding the excuse that it could not have offered the testimony of its Acting City Manager at the hearing because its attorney was not available on day two of the hearing. The City in its motion and attached Affidavit and brief did not explain why it failed to

account for the Hearing Examiner's statement at the May 9 Pre-hearing Conference that the room for the hearing was being reserved for a second consecutive day (May 15-16) in case the hearing would go a second day. The effect of admitting this "evidence" would be to prevent the scrutiny afforded by cross-examination and for which the Protestants have a right to conduct under the above-cited section of the APA.

d. It is incumbent upon the Hearing Examiner to protect the constitutional and statutory rights of the Protestants to a lawful procedure. The Hearing Examiner must exclude "evidence" or any form of statement propounded as "factual" that was offered after the close of the hearing on May 16.

9. Therefore, all of the "evidence" put forth by any party after the close of the hearing on May 16 should be excluded from the record and must be ignored by the Hearing Examiner and the OWRB. This is the only way that the Constitutional rights and the cited statutory rights of the Protestants can be protected.

10. It is sometimes stated that the strict rules of evidence do not apply in administrative hearings. However, the Oklahoma statutes and case law do not use this point as an excuse to deny the right of cross-examination. The point is found in a case in which the evidence in question was offered in the context of a legislative-type hearing, not an Individual Proceeding affecting individual rights, and even then the Court took pains to note that the evidence that was allowed into the record was itself *subject to rebuttal. Muskogee Gas and Elec. Co. v. State*, 1920 OK 6, 186 p. 730, ¶ 21. The other case, citing *Muskogee Gas*, is *McDonald's Corp. v. Oklahoma Tax Commission*, 1977 OK 74, 563 P.2d 635. In that instance, the evidence in question was in *testimony* for which cross-examination was available. We can find no case in which an Oklahoma appeals court has allowed "after-hearing evidence" to be introduced into an administrative hearing or to be captured in the record with no chance of cross-examination by opposing parties.

11. To the contrary, the Oklahoma Supreme Court has held since the adoption of the APA that parties must be afforded a "full and fair hearing *on all points at issue*." *Corporation Com'n v. Oklahoma State Personnel Bd.*, 1973 OK 94; 513 P.2d 116, ¶ 14. To issue an order upon the allowance of evidence without affording the opportunity to examine and cross-examine the person propounding such evidence is "made upon unlawful procedure" and reversible error. Title 75 Okla. Stat. § 322 (c).

12. When considering the late offering of the National Park Service in particular, it is telling to note that the APA states that the record of the hearing can include "evidence or data submitted to the hearing examiner . . . *provided all parties have had access to such evidence*." Title 75 Okla. Stat. § 309 F. 7. In this case, these Protestants do not have access to the National Park Service's evidence that it claims to have generated regarding the Park Service's inputs to the model, which were only done after the close of the hearing, in its submittal styled "Preliminary Comments." In any event, without the right to examine witnesses and cross-examine, the "access" to that evidence would be an exercise in futility in regard to protection of Protestant's rights to a full and fair hearing. This right to access evidence is in addition to, and not in contravention of, the right of examination and cross-examination which the APA specifically provides in Title 75 Okla. Stat. §310.

13. One of the essential duties incumbent upon the administrative law judge and the agency itself is to adopt findings of fact and to issue its order based only upon "reliable, material, probative and substantial competent evidence". Title 75 Okla. Stat. § 322 (e). The inclusion of the word "probative" in the statute defining the allowable evidence cannot be considered an accident. The first definition of "probative" is "serving to test or try", Merriam Webster's Collegiate Dictionary, Eleventh Edition, and in Dictionary.com, "serving or designed for testing

or trial".[3] If it is not served up for testing, evidence may be initially thought to be reliable and competent, but without the opportunity for cross-examination, there is no way to discern its veracity, and there is no basis for the Hearing Examiner to adopt a finding of fact based upon such a one-sided offering. Until it is available for testing by all the parties, evidence is not probative, and thus is not admissible under the APA.

14. The adoption of findings of fact based only upon probative evidence—evidence that can be tested by the other parties—is not something the government can choose to ignore. Findings of fact based solely upon probative evidence are not just required by the APA but are constitutionally mandated, according to our State Supreme Court, and in expounding upon this requirement the Court has eloquently stated why this is the case:

> "It is fundamental that an absence of required finding is fatal to the validity of administrative decisions even if the record discloses evidence to support proper findings. Findings of an administrative agency acting in a quasi-judicial capacity should contain a recitation of basic or underlying facts drawn from the evidence sufficiently stated to enable the reviewing court to intelligently review the decision and ascertain if the facts upon which the order is based create a reasonable basis for the order. The protection afforded by findings assures that justice is administered according to facts and law, and not through Star Chamber techniques. The crux of the matter is that democracy implies respect for the elementary rights of the person...a democratic government must practice fairness—and *fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. Jackson v. Independent School Dist. No. 16 of Payne County*, 1982 OK 74, 648 P.2d 26.

15. Protestants OKAA and TXI reiterate every argument and point of law contained in their initial brief. In summary the tentative MAY is unsupported by the evidence at the hearing and its issuance would be arbitrary, capricious, and a violation of the constitutional and statutory rights of the landowners and users of water in the Arbuckle-Simpson, including those of these Protestants.

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[3] The secondary definition of "probative" in each source is a synonym of the word "evidence" itself, but besides not being the primary definition, the application of only that secondary definition would make the term "probative" completely redundant as it is used in Section 322 of the Oklahoma APA.

WHEREFORE, for all the reasons stated in the hearing, and in the initial and response briefs of these Protestants and of the other Protestants in the hearing, the OKAA and TXI again request that the tentative MAY be rejected.

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.

Michael C. Wofford

EXHIBIT
A

MATTER OF DETERMINING THE MAXIMUM ANNUAL YIELD FOR THE ARBUCKLE-SIMPSON GROUNDWATER BASIN

Motion in Limine

Oklahoma Aggregates Association (OKAA) having entered its appearance at the Hearing on the Oklahoma Water Resources Board's MATTER OF DETERMINING THE MAXIMUM ANNUAL YIELD FOR THE ARBUCKLE-SIMPSON GROUNDWATER BASIN, OKAA enters its motion for continuance of the hearing from May 9 to a date to be set by the hearing examiner at least 90 days after the conclusion of the pre-hearing conference, and in support thereof states:

1. The hearing examiner's notice of pre-hearing conference at paragraph 2. entitled "Prehearing conference" states: "Only recognized "parties" will be allowed to participate in the Hearing by presenting formal evidence and legal argument."

2. However, at paragraph 3. entitled "Hearing" the same notice states: "There will also be an opportunity for those not recognized as parties to submit other oral or written comments for the record." There is no basis in law for this type of proceeding. Title 82 Okla. Stat. §1020.6 states that participation in the hearing is limited to those who are a "party", and they shall present "evidence" in support or opposition to the tentative order. There is no provision for adding to the record of the hearing matters not in evidence.

3. The same statute goes on to state that the proceeding is governed by the provisions of the Administrative Procedures Act. Title 75 Okla. Stat. § 309 F. limits participation in an APA hearing to "parties", and limited the record to "evidence".

4. Title 75 Okla. Stat. § 310 states that "a party may conduct cross-examinations required for a full and true disclosure of the facts; ..." Any attempt by the OWRB or hearing examiner to make an extension of this process to include in the record anything other than evidence introduced by parties, or to allow statements or comments in the proceeding for which cross-examination would not be allowed would deny to the OKAA and the other parties the most rudimentary elements of substantive and procedural due process and equal protection in violation of the Constitution of the United States, the Constitution of Oklahoma, and the protections for parties inherent in the processes specified in the Administrative Procedures Act itself.

WHEREFORE, OKAA requests the hearing examiner to issue an order at the prehearing conference limiting the matters to be heard in the Hearing of this Matter to evidence and legal argument of parties and providing for cross-examination of any person or entity that proposes to enter any evidence into the Hearing or the record of same.

Respectfully submitted,

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Certificate of Hand Delivery

Counsel delivered or made available copies of this Motion to those who initially identified themselves as parties to the hearing at the pre-hearing conference in Ada, Oklahoma on May 9, 2012.

Michael C. Wofford