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	))))

ORDER ON EVIDENTIARY MATTERS FOLLOWING REMAND

This proceeding concerns the Oklahoma Water Resources Board's (OWRB or "the Agency" or "the Board") administrative proceeding to determine the maximum annual yield (MAY) of fresh groundwater that may be used from, and allocated to each acre of land over, the Arbuckle-Simpson Groundwater Basin. A full statement of the procedural background for this matter is set forth in the Proposed Findings of Fact, Conclusions of Law, and Board Order issued contemporaneously herewith. However, it should be noted that a pre-hearing conference (the Pre-Hearing Conference) took place on May 9, 2012, and a full evidentiary hearing (the Hearing) took place on May 15-16, 2012.

During the time that the Hearing Examiner had the MAY determination under consideration, she received, unsolicited, a memorandum drafted by one of the witnesses in the matter, Scott Christensen that had been provided to Board staff. The Hearing Examiner disregarded the Christensen memorandum in preparing a proposed order.

A proposed order was provided to the parties on December 27, 2012. Thereafter, various Protestants challenged, among other things, the Christensen memorandum and sought a Writ of Mandamus in the Supreme Court of Oklahoma. Pursuant to the Court's mandate in *Arbuckle-Simpson Aquifer Protection Fed'n of Okla. v. OWRB*, 2013 OK 29, the Hearing Examiner placed the Christensen memorandum in the record and issued an order providing the parties an opportunity to file responses to the material in the memorandum.

Various Protestants, as well as Citizens for the Protection of the Arbuckle-Simpson Aquifer ("CPASA"), filed responses. The parties also filed several motions following the Court's remand. This Order considers the parties' responses to the Christensen memorandum and sets forth the Hearing Examiner's rulings on the parties' motions.

The Christensen memorandum essentially directs the reader to the record concerning (a) natural flow; (b) model calibration to streamflow; (c) streamflow depletion; (d) storage coefficient; and (e) data availability and review. In their response, Protestants challenge only one matter addressed in the Christensen memorandum: that Scott Christenson et al., *Hydrogeology and simulation of groundwater flow in the Arbuckle-Simpson aquifer, south-central Oklahoma,* Sci. Invs. Report 2011-5029

[hereinafter USGS Report], was "subjected to rigorous report and technical review processes before being approved." (Christensen Mem. at 2) Protestants' arguments are as follow. First, they suggest that the fact of peer review was not raised at the Hearing, i.e., that it was new evidence presented for the first time in the Christensen memorandum. Petitioners are factually incorrect. At the Hearing, Mr. Christensen himself testified that the USGS peer review process did not identify any issues with his methodology. (Christenson Test. (6) at 00:21:50 – 22:46.)

Protestants dedicate the majority of their Response to (a) raising questions about the robustness of the USGS peer review process; and (b) providing argument in support of their position that the USGS model was not properly developed. As to the robustness of the peer review process, Protestants should have used their opportunity for cross-examination at the Hearing itself to explore the issue once it was raised. Protestants may not rectify their failure to do so at the Hearing by attempting to raise such questions in their Response.

Second, Protestants attempt to introduce new evidence, in the form of an Affidavit by Dr. Poeter (who was a witness at the Hearing), to support their argument that the USGS Report was based on flawed modeling. CPASA has moved to strike the Affidavit. Protestants make no showing why this Affidavit should be admitted into the record; their only arguments are that their witness was surprised by (a) Mr. Christensen's testimony at the hearing and (b) the assertion regarding peer review in the Christensen memorandum. That their witness was surprised is an insufficient reason to re-open the record, particularly given the wealth of evidence Protestants already submitted during the Hearing itself.[1] Nor is the fact of peer review sufficient to justify additional evidence, given that peer review was raised at the Hearing and could have been explored there. In sum, Protestants have failed to make any showing to support re-opening the record to add yet more evidence; thus, the Hearing Examiner hereby GRANTS CPASA's Motion to Strike Exhibit B (the Poeter Affidavit) from the record.[2]

Protestants also filed two motions following the remand. In their Motion to Strike or for Reconsideration, they argue that certain post-Hearing evidence on which CPASA purported to rely should not be made part of the record. With respect to footnotes 1-5 of CPASA's Response in Opp'n to CSIG's Br. In Opp'n of the Tentative Maximum Annual Yield Determination ("CPASA's Post-Hearing Brief"), Protestants are correct that this

[1] In the weeks immediately following the Hearing, the Hearing Examiner also gave the parties the opportunity to file for leave to submit additional evidence before closing the Record. Protestants filed no such motion for leave.

[2] Elsewhere in their filings, Protestants mention that material they sought to be stricken from the record remains on the OWRB website. Because this is an administrative record that may under proper circumstances be appealed to the courts, materials for which a motion to strike is granted are not removed from the record, but rather are disregarded for decisionmaking purposes. Should any of the parties ultimately appeal, notations are made in the index to the record to specify which materials were not stricken and therefore not considered.

information should have been explored during the Hearing itself; as CPASA explains, those footnotes were included to demonstrate bias and motive during the Hearing. CPASA makes no showing why it was unable to present such evidence at the Hearing itself. Thus, the Motion to Strike is hereby GRANTED IN PART with respect to these footnotes.

Protestants challenge references to Mr. Smith's testimony not in the record from the Hearing, but CPASA has agreed that those portions of its brief may be removed. Thus, the Motion to Strike is hereby DENIED AS MOOT as to Mr. Smith's evidence.

Protestants also challenge CPASA's proposed findings of fact and conclusions of law, which CPASA submitted in its response briefing rather than its initial briefing following the Hearing. CPASA clearly submitted those materials in response to Protestants' own proposed findings of fact. Even if CPASA might have been better advised to develop these materials for an initial brief, Protestants fail to demonstrate how they are prejudiced by those materials remaining in the record. Thus, the Motion to Strike is hereby DENIED IN PART as to the proposed findings of fact and conclusions of law that CPASA submitted with its Post-Hearing Brief.

Finally, Protestants submitted a Motion for Production of Post-Hearing Communications Between the Hearing Examiner and OWRB Staff. Specifically, Protestant seeks disclosure of an attachment to an email communication between OWRB Counsel Jerry Barnett and the undersigned. In support of its Motion, Protestants rely on 75 O.S. § 310(4). That section of the Oklahoma Administrative Procedures Act provides that an agency may rely on the staff's technical expertise in connection with individual proceedings. Indeed, it was upon this portion of the APA that the Oklahoma Supreme Court relied in holding that the Hearing Examiner's post-Hearing communications with Board staff were permissible.

Protestants argue that an additional clause of § 310(4), which provides that where notice is taken of technical or scientific facts within the agency's expertise, the parties must be notified of the material noticed and be provided an opportunity to contest those materials. This argument, however, is misplaced for two reasons. First, it is true that the Board must notify the parties when it takes judicial notice of facts within its specialized knowledge. *See Arbuckle-Simpson*, 2013 OK 29, para. 8. Here, the Hearing Examiner has already entertained motions relating to judicial notice; the record speaks for itself in this regard, and Protestants do not challenge any of the materials the Hearing Examiner has already taken notice of.

Second, Protestants conflate staff assistance in interpreting the record with "notice" as contemplated by § 310(4). As emphasized by the Supreme Court of Oklahoma, the agency is not considered a party to this proceeding, nor are communications with agency staff within the ex parte prohibition of 75 O.S. § 313. *See Arbuckle-Simpson*, 2013 OK 29, paras. 6-7. There is good reason for this approach: the agency itself is responsible for holding the proceeding. *Id.* Logically, the agency's efforts in doing so are distinguishable from judicially noticeable facts. Moreover, the

legislature has recognized that agency deliberations are distinct from judicially noticeable facts by providing for the confidentiality of such materials as work product and personally created materials developed prior to taking action on a matter. *See* 75 O.S. §§ 24A.5(1), A.9. For these reasons, Protestants' Motion for Production of Post-Hearing Communications Between the Hearing Examiner and OWRB Staff is hereby DENIED.

Alternatively, Protestants' Motion may be understood as a challenge to the Board's response to Protestants' Open Records Act request. The Hearing Examiner lacks jurisdiction to resolve such a dispute; to the extent Protestants challenge the Board's response to the Open Records Act request, Protestants' Motion for Production of Post-Hearing Communications Between the Hearing Examiner and OWRB Staff is hereby DENIED.

So ordered, this 3rd day of October, 2013.

Emily Hammond Meazell