



BEFORE THE OKLAHOMA WATER RESOURCES BOARD
STATE OF OKLAHOMA

In the Matter of the Application of)
the City of Oklahoma City for a) Permit Application No. 2007-0017
Regular Permit to Divert Stream Water)
in Pushmataha County, Oklahoma)

**RESPONSE TO ENTRY OF APPEARANCE AND NOTICE
OF INTERESTED PARTY AND APPLICATION PROTEST**

City of Oklahoma City, Applicant, respectfully moves the Hearing Examiner to deny the Kiamichi River Legacy Alliance (“KRLA”)’s motion for “Entry of Appearance and Notice of Interested Party and Application Protest.” In support thereof, Applicant presents as follows.

I. BACKGROUND

In August 2016, the State of Oklahoma, the Choctaw Nation of Oklahoma, the Chickasaw Nation, and Applicant signed a settlement agreement concerning use of the Sardis Reservoir in the Kiamichi River Basin of Southeast Oklahoma, attached as **Exhibit A** (“Settlement Agreement”)¹. Section 6 of the Settlement Agreement included provisions for lake level release restrictions, bypass flow requirements, water conservation requirements, and a set-aside of conservation storage capacity for local use. On December 16, 2016, the U.S. Congress approved the Settlement Agreement pursuant to the omnibus “Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, § 3608, 130 Stat. 1796 (2016),” attached as **Exhibit B** (“Settlement Act”).

On January 10, 2017, Applicant filed its second amended permit application to the State of Oklahoma Water Resources Board (“OWRB”) in conformance with section 6 of the Settlement Agreement, attached as **Exhibit C** (“Application”). The Application acknowledged

¹ Copies of the Exhibits are available by going to this link: <https://rcalaw.sharefile.com/d-s8d171d6f36b4e44a>. If you are unable to access the Exhibits via the link, please contact us and we will provide you with hard copies.

that Applicant's proposed use "shall conform with all requirements specified in the Settlement Agreement." The Application specified that the permit would provide a right to 115,000 acre feet per year, to be taken from five potential points of diversion along the Kiamichi River in the general vicinity of Moyers Crossing in Pushmataha County, Oklahoma, at a diversion rate not to exceed 250 cubic feet per second. The water would be used for municipal purposes by Applicant and Applicant's current and future wholesale and retail water customers and other public water supply entities in Oklahoma. The Application's exhibits provided a projection of Applicant's future population and a proposed schedule of beneficial use. *See* O.A.C. §§ 785:20-5-5(c)(2); 785:20-9-2(a).

In February and March 2017, Applicant provided public notice of its Application in "Notice of Application to Use Stream Water – Application No. 2007-0017" ("Notice"), attached as **Exhibit D**. The Notice was published in several local publications, attached as **Exhibit E**. The Notice alerted the public that protests had to be received no later than 30 days of the date of last publication of the Notice, i.e., by April 10, 2017.

In March and April 2017, eighty-four protests were filed in response to the Application. A summary of the protests is attached as **Exhibit F** and the protests themselves are attached in alphabetical order as **Exhibit G**. The majority of the protests followed one of six form templates and lacked personal detail or elaboration on their reasons for concern. Nearly all of the protests alleged one or more scripted, generic concerns, such as "Recreation/Hunting/Fishing," "Endangered Species," "Loss of Water for Drinking/Rural and City," "Loss of Land Due to Damming," "Loss of Community/Schools," "Wildlife Habitat," and "Loss of use of land." Many of the protests also alleged risk of harm to underground water aquifers and recreational and environmental purposes. Ten of the Protestants asserted land ownership adjacent to the Kiamichi

River: Donald Dawson, Tom Garrett, Imogene Hairrell Harris, Denise Hilton, Frank Hilton, Rebecca Hoel, Dale Jackson, Justin Jackson, Diane Smith, and Wendy Sprague. The other seventy-four Protestants did not assert any such interest. None of the Protestants asserted ownership of a streamwater permit from the OWRB.

On April 27, 2017, the Hearing Examiner ordered a Pre-Hearing Conference set for June 28, 2017. The Hearing Examiner tentatively scheduled a formal evidentiary hearing for the week of August 21, 2017, in compliance with the Settlement Agreement's deadline for this hearing of September 6, 2017.

On June 6, 2017, KRLA formed as an entity. *See* Okla. Secretary of State, Filing No. 3612620471.

On June 17, 2017, Kevin Kemper submitted the Entry of Appearance and Notice of Interested Party and Application Protest. Kemper contemporaneously submitted a "Motion for Pre-Hearing Continuance and to Set Formal Evidentiary Hearing," which the Hearing Examiner has since denied.

II. LEGAL AUTHORITY

Whether a party has a right to contest an administrative action is largely a question of law. *Heritage Village Apts., Ltd. v. Oklahoma Hous. Fin. Agency*, 18 P.3d 1085, 1086 (Okla. Civ. App. 2000).

To become a party and "to facilitate reasonable notice to the applicant," all OWRB permitting protests must contain the information set forth in O.A.C. § 785:4-5-4(b) and be filed with the OWRB, and a copy must be provided to the applicant, "*within the time period stated in the notice.*" O.A.C. § 785:4-5-4(c) (emphasis added). A person who fails to provide a copy of

the protest with the applicant within the time period stated “may not be considered a party unless otherwise determined by the Hearing Examiner.” *Id.*

Any interested person may file a written protest, objection or comment to any permit application. O.A.C. § 785:4-5-4(a); *see also* 75 O.S. § 309; 82 O.S. § 1085.2. However, persons signing “form letters, multiple letters containing substantially similar or duplicate text or information, or persons signing written submittals in petition format containing multiple signatures,” may not be considered parties to a proceeding unless certain requirements are satisfied. O.A.C. § 785:4-5-4(a). Protests must contain (1) the interested person’s contact information; (2) the application to which the protest relates; (3) “[s]pecific information to show how approval of the application, petition or action proposed may directly and adversely affect legally protected interests of the person filing the protest”; and (4) a statement of relief sought. O.A.C. § 785:4-5-4(b); *see also* Notice.

An entity seeking party status in a proceeding has the burden to establish its standing. *Okla. Educ. Ass’n v. State ex rel. Okla. Legislature*, 158 P.3d 1058, 1062 (Okla. 2007) (finding that education association failed to show associational standing on behalf of students). An association has standing to seek redress for injury on behalf of its members when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Id.* at 1063. For associational members to have standing to otherwise sue in their own right, they must have a “direct, immediate and substantial” interest in the controversy and a “personal stake in the outcome.” *Id.* In this respect, an association’s members’ injuries must be to their own legal rights and not those of others. *Id.*

Before taking final action on an application, the OWRB determines from the evidence whether (1) unappropriated water is available in the amount applied for; (2) the applicant has a present or future need for the water and use to which the applicant intends to put the water is a beneficial use; (3) the proposed use does not interfere with domestic or existing appropriative uses; and (4) if the application is for the transportation of water for use outside the stream system wherein the water originates, that certain provisions are met. O.A.C. § 785:20-5-4(a); *see* O.A.C. § 785:20-5-5 (factors relating to statutory elements for application approval); *see also* 82 O.S., §§ 105.1 *et seq.*, 1085.2; OWRB, Oklahoma Comprehensive Water Plan Executive Report 30 (2012) (“OWRB Executive Report”) (explaining these factors and their burdens in more detail). If the OWRB determines that these four elements and the applicable provisions of Chapter 20 have been established, then the OWRB “*shall approve the application by issuing a permit to appropriate water.*” O.A.C. § 785:20-5-4(b) (emphasis in original).

III. ARGUMENT

KRLA’s motion for Entry of Appearance and Notice of Interested Party and Application Protest should be denied because KRLA filed months after the deadline, lacks associational standing, and would make the proceeding inefficient and confusing.

1. KRLA Filed Nearly Ten Weeks Late

KRLA’s motion was filed sixty-eight days (nearly ten weeks) after the April 10 deadline provided by the Notice. The Notice provided KRLA’s members with thirty days to seek legal representation or form an association. Instead, these Protestants waited for over three months from the date the Notice was published to form KRLA, and then waited nearly another two weeks to file this motion. Because KRLA failed to timely file its protest, KRLA may not be

considered a party unless otherwise determined by the Hearing Examiner. *See* O.A.C. § 785:4-5-4(c).

2. KRLA Lacks Associational Standing

KRLA lacks standing to seek redress for its alleged members. First, KRLA failed to meet its burden of establishing that any of its members have standing in their own right. *See Okla. Educ. Ass'n v.*, 158 P.3d at 1063-64. Indeed, it is Applicant's position that three of KRLA's members – Debbie Leo, Larinda McClellan, and Kenneth Roberts – do not have standing based on their individual protest letters.² *See* Exhibits F and G. These three Protestants did not assert any specific information showing how approval of the application would directly and adversely affect their legally protected interest. *See* O.A.C. §§ 785:4-5-4(b)(3). Rather, they alleged scripted, generic, unspecific concerns that are not factors related to the statutory elements for application approval. *See* O.A.C. §§ 785:20-5-4(a); 785:20-5-5. Moreover, they did so in duplicative form templates. *See* O.A.C. §§ 785:4-5-4(a). Thus, KRLA has failed to meet the first prong of the test for associational standing.

Second, KRLA failed to meet its burden of showing that “the interests it seeks to protect are germane to the organization's purpose” because KRLA did not state its organizational purpose in its motion. *See Okla. Educ. Ass'n v.*, 158 P.3d at 1063. Thus, KRLA has failed to meet the second prong of the test for associational standing.

Third, KRLA failed to meet its burden of showing that its claims do not require the participation of its individual members. *See Okla. Educ. Ass'n v.*, 158 P.3d at 1063. The OWRB

² Applicant plans on moving to dismiss many of the Protestants for lack of standing under O.A.C. § 785:4-5-4. Applicant also intends to request discovery and conduct interrogatories on a limited number of Protestants to confirm whether they have legally protected property interests that provide a basis for standing under O.A.C. § 785:4-5-4(b)(3).

Rules require protests to assert “specific information” showing how the petition may “directly and adversely affect legally protected interests of the person filing the protest.” O.A.C. § 785:4-5-4(b)(3). KRLA’s so-called “combined statement of specific harm” should not be allowed to substitute for the participation of KRLA’s individual members. In fact, instead of explaining how its claims do not require the participation of its members, KRLA asserts that “each individual retains his or her rights as an individual party before the OWRB, though they also now speak through KRLA.” Thus, KRLA has failed to meet the third prong of the test for associational standing.

3. Adding KRLA Would Make the Proceeding Inefficient and Confusing

Contrary to KRLA’s assertion that adding it as a party will “provide efficiency and focus in arguments and evidence for OWRB,” adding KRLA would make this proceeding inefficient and confusing.

First, KRLA’s members consist entirely of Protestants who have *already* filed protest letters in response to the Notice. Adding KRLA would not present the OWRB with any new reasons to deny the permit. Rather, to reiterate, KRLA asserts that its individual members would “retain his or her rights as an individual party before the OWRB, though they also now speak through KRLA.” Thus, adding KRLA would inject unduly repetitious and cumulative evidence into the proceeding in violation of O.A.C. § 785:4-7-5(b) (“Evidence and testimony which is clearly irrelevant, immaterial, incompetent or unduly repetitious or cumulative may be excluded or limited.”).

Second, KRLA’s members consist of Protestants who assert a specific, legally protected interest as required by O.A.C. § 785:4-5-4(b), and Protestants who do not assert any specific, legally protected interest. KRLA claims to “incorporate the Protests already provided to the

OWRB as a combined statement of specific harm that would occur to KRLA, its constituent members, and all of southeastern Oklahoma.” But “combined statement of specific harm” is an oxymoron – each individual Protestant claims harms unique to him or herself.

For example, Applicant acknowledges that two of the Protestants who are alleged members of KRLA – Tom Garrett and Justin Jackson – claim land ownership adjacent to the Kiamichi River that may constitute riparian water rights and thus legally protected interests. *See* 82 O.S. § 105.2; *Franco-American Charolaise, Ltd. v. Okla. Water Resources Bd.*, 855 P.2d 568 (Okla. 1990) (recognizing riparian and appropriative rights as coexistent, prevailing law in Oklahoma); *see also id.* at 573 (“Riparian rights arise from land ownership, attaching only to those lands which touch the stream.”). If further discovery shows that Garrett and Jackson indeed possess a protected water right, then they would have a legally protected interest under sections 785:20-5-4(a)(3) and 785:20-5-5(d)(2) of the Oklahoma Administrative Code. However, as previously explained in the associational standing argument above, based on their protests, the other three Protestants who are alleged members of KRLA – Debbie Leo, Larinda McClellan, and Kenneth Roberts – do not have standing. *See* Exhibits F and G.

KRLA’s attempt to combine many Protestants with different, unique interests, would muddy the issues before the OWRB and make it challenging to distinguish who has standing. Instead of allowing KRLA to shoehorn all concerned persons across Southeast Oklahoma into a single, generic group, the Hearing Examiner should deny KRLA’s motion for party status and follow the careful guidelines for party status defined by O.A.C. § 785:4-5-4(b).

IV. CONCLUSION

Because KRLA filed months after the deadline, lacks associational standing, and would make the proceeding inefficient and confusing, its motion for Entry of Appearance and Notice of Interested Party and Application Protest should be denied.³

WHEREFORE, Applicant respectfully requests that the Hearing Examiner deny KRLA's motion for Entry of Appearance and Notice of Interested Party and Application Protest and find that KRLA is not a party to this proceeding.

Respectfully submitted this 22nd day of June, 2017.

RYLEY CARLOCK & APPLEWHITE

By: 

Brian M. Nazareus, #16984

ATTORNEY FOR APPLICANT CITY OF
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³ Applicant takes no position on any entry of appearance Kevin Kemper wishes to file on behalf of individual Protestants.

Certificate of Service

The undersigned certifies that on this 22nd day of June, 2017, a true and correct copy of the foregoing **RESPONSE TO ENTRY OF APPEARANCE AND NOTICE OF INTERESTED PARTY AND APPLICATION PROTEST**, with all exhibits, was filed and served via regular U.S. Mail, and via e-mail to those who provided e-mail addresses, to the following:


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