

LEO v. OKLAHOMA WATER RESOURCES BOARD

2023 OK 96

Case Number: 118892

Decided: 10/03/2023

THE SUPREME COURT OF THE STATE OF OKLAHOMA

Cite as: 2023 OK 96, __ P.3d __

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

DEBBIE LEO DBA MILLER LAKE RETREAT LLC, LARINDA McCLELLAN, LOUISE REDMAN TRUST, WALTER MYRL REDMAN and KENNETH ROBERTS, Petitioners/Appellants/Cross-Appellees,
and
DALE JACKSON and JUSTIN JACKSON, Petitioners,
v.
OKLAHOMA WATER RESOURCES BOARD, Respondent/Appellee,
and
THE CITY OF OKLAHOMA CITY, OKLAHOMA, Respondent/Appellee/Cross-Appellant.

**ON APPEAL FROM THE DISTRICT COURT OF PUSHMATAHA COUNTY,
STATE OF OKLAHOMA****HONORABLE MICHAEL D. DeBERRY, DISTRICT JUDGE**

¶10 Debbie Leo d/b/a Miller Lake Retreat, LLC, Larinda McClellan, Louise Redman Trust, Walter Myrl Redman, and Kenneth Roberts (collectively, "Petitioners") appeal the district court's order affirming the Oklahoma Water Resources Board's (the OWRB) final order granting a permit to The City of Oklahoma City (the City) to divert stream water from the Kiamichi River in Pushmataha County, Oklahoma. The City filed a cross-appeal of the district court's order denying its motion to dismiss Petitioners' petition for judicial review for lack of subject matter jurisdiction. City contends that Petitioners' failure to name the City as a respondent in their petition for judicial review of the OWRB's order was a fatal, jurisdictional flaw under the Oklahoma Administrative Procedures Act, (OAPA). We hold that 75 O.S.2011, § 318(B)(2) requires that the agency (here, the OWRB) be named as a respondent in the caption of the petition for review for the district court to acquire jurisdiction to review a final agency order. However, Section 318(B)(2) of the OAPA does not require that the City be named as a respondent in the petition. Therefore, the district court's order finding it had jurisdiction to review the final agency order is affirmed. We further hold the district court properly applied the Four Points of Law in O.A.C. § 785:20-5-4, including using the OWRB's calculation of available stream water and evaluation of beneficial use, which was based on substantial evidence in the record, with no findings of prejudicial error. Therefore, the district court's order affirming the OWRB's order is affirmed.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

Kevin R. Kemper, Oklahoma City, Oklahoma, for Appellants/Cross-Appellees.

Sara D. Gibson, Oklahoma City, Oklahoma, for Appellee Oklahoma Water Resources Board.

Brian M. Nazarenus, Stacy L. Brownhill, Nazarenus Stack & Wombacher LLC, Greenwood Village, Colorado, for Appellee/Cross-Appellant the City of Oklahoma City.

KANE, C.J.:

¶11 The threshold issue on appeal is whether Petitioners/Appellants/Cross-Appellees Debbie Leo d/b/a Miller Lake Retreat, LLC, Larinda McClellan, Louise Redman Trust, Walter Myrl Redman, and Kenneth Roberts's (collectively, "Petitioners") failure to name Respondent/Appellee/Cross-Appellant The City of Oklahoma City as a respondent in their Petition for Judicial Review of the Respondent/Appellee Oklahoma Water Resources Board's (OWRB) order was fatal to their appeal under the Oklahoma Administrative Procedures Act (OAPA), 75 O.S.2011, § 318(B)(2). We hold that 75 O.S.2011, § 318(B)(2) requires that the agency (here, the OWRB) be named as a respondent in the caption of the petition for review for the district court to acquire jurisdiction to review a final agency order. However, Section 318(B)(2) of the OAPA does not require that the City be named as a respondent in the petition. Therefore, the district court acquired jurisdiction to review the OWRB's final order. As to the merits of this appeal, we hold: (1) this Court's decision in *Purcell v. Parker*, 2020 OK 83, 475 P.3d 834, is distinguishable from this case; (2) granting the City's stream water permit does not constitute an unconstitutional taking of Petitioners' water rights; (3) the district court properly denied Petitioners' requests to conduct limited discovery and testimony on administrative appeal pursuant to 75 O.S.2011, § 321; and (4) the district court properly applied the Four Points of Law in O.A.C. § 785:20-5-4, including the OWRB's calculation of available stream water and evaluation of beneficial use.

FACTS AND PROCEDURAL HISTORY

¶12 The City applied for a permit to divert stream water from the Kiamichi River in Pushmataha County, Oklahoma. Eighty-five individuals and entities, including Petitioners, protested the City's stream water permit application. After a hearing, the OWRB issued an Order granting the City's stream water permit on October 10, 2017. Petitioners¹ filed a Petition for Judicial Review in the District Court of Pushmataha County on November 8, 2017. The Petition for Judicial Review named only the agency, OWRB, as a respondent. The Petition for Review did not name the City as a respondent.

¶13 The City entered a special entry of appearance on November 16, 2017 and moved to dismiss the Petition for Judicial Review for lack of subject matter jurisdiction. The City argued that Petitioners had failed to join the City and other necessary parties, as required by the OAPA, 75 O.S.2011, § 318(B)(2).

¶14 Petitioners then filed an Amended Petition for Judicial Review on November 27, 2017, adding the City as an additional respondent in the caption of the case.

¶15 On December 4, 2017, the OWRB also filed a motion to dismiss the Petition for Judicial Review and the subsequent Amended Petition for Judicial Review for failing to meet the requirements of the OAPA, 75 O.S.2011, § 318(B)(2), and for failure to join all parties to the administrative proceeding below. Likewise, on December 20, 2017, the City moved to dismiss the Amended Petition for Judicial Review for lack of subject matter jurisdiction and because it was filed outside the thirty-day period for appealing a final agency order. See 75 O.S., § 318(B)(2).

¶16 The district court denied the City's and the OWRB's motions to dismiss on May 7, 2018, concluding that even though Petitioners' failure to name the City as a respondent in the style or caption of the petition for review was a fatal, jurisdictional flaw, pursuant to *Davis v. Oklahoma Employment Security Commission*, 2010 OK 45, 238 P.3d 922, the City and the OWRB would suffer no prejudice if Petitioners were allowed to amend their Petition for Judicial Review to include the City as a respondent.

¶7 On June 1, 2020, the District Court affirmed the OWRB's October 10, 2017 order granting the City the stream water permit. Petitioners appealed the June 1, 2020, order. The City filed a cross-appeal of the May 7, 2018, order denying its motion to dismiss for lack of subject matter jurisdiction. The Court retained this appeal on the OWRB's motion.

I. JURISDICTION OF THE DISTRICT COURT

¶8 We will first address the jurisdictional issue raised in the City's cross-appeal. The City argues Petitioners' failure to name the City as a respondent in their Petition for Judicial Review was fatal to their appeal under the OAPA, 75 O.S.2011, § 318(B)(2).

STANDARD OF REVIEW

¶9 Whether the district court has acquired jurisdiction in a proceeding for judicial review of an administrative order is a question of law. See *Edmondson v. Siegfried Ins. Agency, Inc.*, 1978 OK 45, ¶ 4, 577 P.2d 72, 73. This appeal requires us to interpret 75 O.S.2011, § 318. Statutory interpretation also presents a question of law. See *State ex rel. Okla. State Dep't of Health v. Robertson*, 2006 OK 99, ¶ 5, 152 P.3d 875, 877. The district court's legal rulings are subject to this Court's plenary, independent, and non-deferential reexamination under the *de novo* standard of review. *Id.*

ANALYSIS

Properly naming the respondent, pursuant to the OAPA, 75 O.S.2011, § 318(B)(2), is jurisdictional.

¶10 Judicial review of the OWRB's June 1, 2020, final order is available under 75 O.S.2011, § 318. The OAPA provides, in pertinent part:

[P]roceedings for review shall be instituted by filing a petition, in the district court of the county in which the party seeking review resides or at the option of such party where the property interest affected is situated, naming as respondents only the agency, such other party or parties in the administrative proceeding as may be named by the petitioner or as otherwise may be allowed by law, within thirty (30) days after the appellant is notified of the final agency order as provided in Section 312 of this title.

75 O.S.2011, § 318(B)(2). This Court has long said that the statutory, procedural requirements of the OAPA are mandatory and must be complied with before the district court can acquire jurisdiction to review a final agency order. See *Conoco, Inc. v. State Dep't of Health*, 1982 OK 94, ¶¶ 9-12, 651 P.2d 125, 127-29 (applying 75 O.S.1981, § 318(1)); see also *State ex rel. Okla. Employ. Sec. Comm'n v. Emergency Physicians, Inc.*, 1981 OK 82, ¶ 9, 631 P.2d 743, 745 (same for judicial review under the Oklahoma Employment Security Act (OESA), 40 O.S.1971, § 224(g)). It is well established that compliance with the time limits for filing a petition for judicial review of a final agency order is jurisdictional. See *Conoco*, 1982 OK 94, ¶ 11, 651 P.2d at 128.

¶11 This Court is now asked to determine whether properly naming the respondent(s) in the petition for judicial review, pursuant to 75 O.S.2011, § 318(B)(2), is also jurisdictional. We hold the respondent naming requirements for judicial review under the OAPA, 75 O.S.2011, § 318(B)(2), are jurisdictional.² Like the statutory time limit for filing the petition for review, the statutory provisions setting out what parties must be named in the petition for review are mandatory, procedural requirements that must be complied with before the district court can acquire jurisdiction to review a final agency order.

The OAPA, 75 O.S.2011, § 318(B)(2), requires that the agency be named as a respondent in the caption of the petition for judicial review.

¶12 The question then becomes: what parties must be named as respondents to comply with 75 O.S.2011, § 318(B)(2)?

¶13 Section 318(B)(2) clearly and unambiguously requires that the agency be named as a respondent in the petition for review. The language "filing a petition . . . naming as respondents only the agency," denotes the agency issuing the final order being appealed must be named as a respondent in the petition for judicial review.³ We hold that 75 O.S.2011, § 318(B)(2) requires that the agency be named as a respondent in the caption of the petition for review for the district court to acquire jurisdiction to review a final agency order. Petitioners named the OWRB as a respondent in the caption of the timely filed Petition for Judicial Review, satisfying this requirement.

The OAPA, 75 O.S.2011, § 318(B)(2) does not require that any other party of record in the administrative proceeding be named as a respondent in the petition for judicial review.

¶14 Next, we turn to the interpretation of the words "naming as respondents . . . such other party or parties in the administrative proceeding as may be named by the petitioner." 75 O.S., § 318(B)(2). The City argues that all parties of record in the administrative proceeding must be named as respondents in the petition for judicial review. Petitioners argue the statute requires only that the agency, the OWRB, be named as a respondent and naming other respondents is optional.

¶15 The City urges this Court to consider opinions of the Court of Civil Appeals, which analyzed the statutory language prior to the 2011 amendments to 75 O.S., § 318, in order to determine what the Legislature intended to accomplish by amending § 318 in 2011. In the cases relied on by the City, the Court of Civil Appeals took the position that, because 75 O.S.2001, § 318(C) required the petitioner to serve a copy of the petition on "all other parties of record" in the administrative proceeding, § 318(C) implicitly required that all parties of record in the administrative proceeding also be joined as parties in the district court action for judicial review. See *Okla. Found. for Med. Quality v. Dep't of Central Servs.*, 2008 OK CIV APP 30, ¶¶ 8-12, 180 P.3d 1, 3-4 (interpreting 75 O.S.2001, § 318(C)); *H & En, Inc. v. Okla. Dep't of Labor*, 2006 OK CIV APP 70, ¶¶ 10-11, 136 P.3d 1070, 1072 (same).

¶16 Opinions published by the Court of Civil Appeals have no precedential value and are merely persuasive. See *Skinner v. John Deere Ins. Co.*, 2000 OK 18, ¶ 19, 998 P.2d 1219, 1223-24; *Okla. Sup.Ct.R. 1.200(d)(2)*, 12 O.S.2023, ch. 15, app. 1. We are not persuaded by these decisions. First, the facts are distinguishable.⁴ Second, in those cases, the court interpreted a different version of the OAPA that did not contain the pertinent statutory language.⁵ Rather, we look to the actual text of 75 O.S.2011, § 318—the version of the OAPA that applies in this case.

¶17 The fundamental purpose of statutory construction is to ascertain and give effect to the intent of the Legislature. *Rickard v. Coulimore*, 2022 OK 9, ¶ 5, 505 P.3d 920, 923. To do this, we first look to the language of the statute. *Id.* If the statutory language is clear and unambiguous, this Court must apply the plain and ordinary meaning of the words. *Id.*; 25 O.S.2011, § 1. Only when the legislative intent cannot be determined from the statutory language due to ambiguity or conflict should rules of statutory construction be employed. *Id.*

¶18 In 2011, the Oklahoma Legislature amended the OAPA by adding the pertinent statutory language: "[P]roceedings for review shall be instituted by filing a petition . . . **naming as respondents only the agency, such other party or parties in the administrative proceeding as may be named by the petitioner or as otherwise may be allowed by law . . .**" 75 O.S.2011, § 318(B)(2) (emphasis added). Section 318(C) was also amended to add, *inter alia*, the emphasized language:

C. Copies of the petition shall be delivered in person or mailed, postage prepaid, to the agency and all other parties of record, and proof of such delivery or mailing shall be filed in the court within ten (10) days after the filing of the petition. **Any party not named as a respondent in the petition is entitled to respond within ten (10) days of receipt of service.** The court, in its discretion, may permit other interested persons to intervene.

75 O.S.2011, § 318(C) (emphasis added). Section 318(B)(2) and § 318(C) must be read together to determine what the Legislature intended when it amended subsections (B)(2) and (C) by adding this language.⁶ "Intent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each." *Keating v. Edmondson*, 2001 OK 110, ¶ 8, 37 P.3d 882, 886. The Court presumes that the Legislature expressed its intent and that it intended what it expressed. *Id.*

¶19 City argues the legal conclusions made in the COCA cases were unaffected by the 2011 amendments. Petitioners argue that the 2011 amendments to the OAPA were intended to make the naming requirements more lenient.

¶20 We presume the Legislature was aware of, and responding to, the interpretation of § 318(C) in the Court of Civil Appeals decisions. "When ascertaining legislative intent the Court must presume that when adopting the amendment, the legislature had knowledge of the law as it previously existed and had in mind the judicial construction which had been placed on that law." *Prettyman v. Halliburton Co.*, 1992 OK 63, ¶ 21, 841 P.2d 573, 580 (citations omitted). The language "naming as respondents only the agency, such other party or parties in the administrative proceeding as may be named by the petitioner or as otherwise may be allowed by law" was added to 75 O.S., § 318(B)(2) by legislative amendment in 2011. Section 318(C) was also amended in 2011 to add the language: "Any party not named as a respondent in the petition is entitled to respond within ten (10) days of receipt of service." 75 O.S.2011, § 318(C). These legislative amendments came after the COCA decisions that held all parties of record in the administrative proceeding must be joined as parties in the district court action for judicial review and such failure was a fatal, jurisdictional flaw. See *Okla. Found. for Med. Quality v. Dep't of Central Servs.*, 2008 OK CIV APP 30, ¶¶ 8-12, 180 P.3d 1, 3-4; *H & En, Inc. v. Okla. Dep't of Labor*, 2006 OK CIV APP 70, ¶¶ 10-11, 136 P.3d 1070, 1072. We agree with Petitioners that the Legislature intended to make the procedural requirements more lenient by requiring only the agency be named as a respondent in the petition for review.

¶21 The language "such other party or parties in the administrative proceeding as may be named by the petitioner" is clearly and unambiguously permissive. In this case, the City (the permit applicant) and 85 protestants were parties in the administrative proceeding. "[A]s may be named by the petitioner" allows Petitioners to pick and choose which, if any, of the parties in the administrative proceeding are named as respondents in the petition for judicial review. Optionality is supported by the language "[a]ny party not named as a respondent in the petition is entitled to respond within ten (10) days of receipt of service" in 75 O.S.2011, § 318(C) (emphasis added). This language clearly contemplates that, while § 318(C) requires that a copy of the petition for review be delivered or mailed to every party of record⁷ in the administrative proceeding, every party may not be named as a respondent in the petition for review.

¶22 We hold that 75 O.S.2011, § 318(B)(2) of the OAPA does not require that the City be named as a respondent in the petition.

Due process requires that all parties of record in the administrative proceeding be given notice and an opportunity to be heard in the judicial review proceeding.

¶23 Next, the City argues that the statutory language "naming as respondents . . . such other party or parties in the administrative proceeding . . . as otherwise may be allowed by law" requires that the City be named as a respondent. 75 O.S.2011, § 318(B)(2) (emphasis added). City argues "may," as used in this clause, does not create a permissive choice but, rather, connotes "possibility" and includes all parties required by law to be joined to the action. City contends that, as the recipient of the permit, it is a necessary and indispensable party to the judicial review proceeding and required by law to be joined and named as a respondent. The City argues it would be an unconstitutional interpretation of the statute to allow the Petitioners the option of excluding the City, whose property rights are being challenged and whose permit Petitioners seek to have rescinded, from the review proceeding.

¶24 It is undeniable that the City's interest, i.e., stream water permit, will be directly affected by the outcome of the judicial review proceeding. The City's application was the catalyzing event for the underlying administrative proceeding, and the City had the burden of proof in the administrative proceeding. However, one must bear in mind that this is not an original action in the district court. The district court is exercising its appellate jurisdiction under the OAPA. See 75 O.S., § 318; 12 O.S.2011, § 951. The OAPA applies, not the Oklahoma Pleading Code. Nonetheless, the statutory procedures must comport with the minimum standards of due process: notice and the opportunity to be heard.

¶25 Section 318(C) requires that the petitioner deliver or mail copies of the petition for review to "all other parties of record"⁸ in the administrative proceeding. Such parties then have ten days to respond to the petition for review. See 75 O.S.2011, § 318(C). While 75 O.S., § 318(B)(2) does not require that any parties of record to the administrative proceeding other than the agency be named as a respondent in the petition for review, all other parties of record in the administrative proceeding are entitled to notice and the opportunity to be heard, pursuant to 75 O.S., § 318(C). Here, it is undisputed that the City received a copy of the petition for review and had the opportunity to be heard.⁹

¶26 The district court found that Petitioners' failure to name the City was a fatal, jurisdictional flaw, but that they should be permitted to amend their petition to name the City as a respondent and, therefore, the district court acquired jurisdiction to review the OWRB's order. The district court's May 7, 2018, order denying the City's motion to dismiss for lack of jurisdiction reached the correct result but for the wrong reason. This Court is not bound by the district court's reasoning and may affirm on a different legal rationale. See *Hall v. GEO Grp., Inc.*, 2014 OK 22, ¶ 17, 324 P.3d 399, 406. We affirm the district court's order but do so on the basis that only the agency must be named as a respondent for the district court to acquire jurisdiction to review a final agency order under the OAPA, 75 O.S.2011, § 318(B)(2). The OAPA does not require that any other parties of record in the administrative proceeding be named as respondents in the petition for judicial review. All other parties of record in the administrative proceeding are, however, entitled to notice and the opportunity to be heard, which is satisfied by the requirements of 75 O.S.2011, § 318(C).

II. REVIEW OF THE OWRB'S ORDER GRANTING THE STREAM WATER PERMIT

¶27 Next, we must review the district court's order on administrative appeal affirming the OWRB's order granting the stream water permit in conjunction with Petitioners' remaining propositions of error, including: (1) whether *Purcell v. Parker*, 2020 OK 83, 475 P.3d 834, is distinguishable from the facts of this case; (2) whether granting the City's Permit constitutes an unconstitutional taking of the Petitioners' water rights; (3) whether the district court properly denied the Petitioners' requests for limited discovery during the administrative appeal; and (4) whether the district court properly affirmed the OWRB's order granting the City's stream water permit by correctly applying Oklahoma stream water law.

STANDARD OF REVIEW

¶28 OWRB decisions issuing or denying a stream water permit pursuant to 82 O.S.2011, §§ 105.1 through 105.32, are subject to judicial review under the OAPA. Appellate courts, including this Court, apply the same standard of review as the trial court to the administrative record. See *Farmacy, L.L.C. v. Kirkpatrick*, 2017 OK 37, ¶ 11, 394 P.3d 1256, 1259; *City of Tulsa v. State ex rel. Pub. Employees Relations Bd.*, 1998 OK 92, ¶ 12, 967 P.2d 1214, 1219. Title 75, § 322, provides:

(1) In any proceeding for the review of an agency order, the Supreme Court or the district or superior court, as the case may be, in the exercise of proper judicial discretion or authority, may set aside or modify the order, or reverse it and remand it to the agency for further proceedings, if it determines that the substantial rights of the appellant or petitioner for review have been prejudiced because the agency findings, inferences, conclusions or decisions, are:

- (a) in violation of constitutional provisions; or
 - (b) in excess of the statutory authority or jurisdiction of the agency; or
 - (c) made upon unlawful procedure; or
 - (d) affected by other error of law; or
 - (e) clearly erroneous in view of the reliable, material, probative and substantial competent evidence, as defined in Section 10 of this act [75 O.S., § 310], including matters properly noticed by the agency upon examination and consideration of the entire record as submitted; but without otherwise substituting its judgment as to the weight of the evidence for that of the agency on question of fact; or
 - (f) arbitrary or capricious; or
 - (g) because findings of fact, upon issues essential to the decision were not made although requested.
- (2) The reviewing court, also in the exercise of proper judicial discretion or authority, may remand the case to the agency for the taking and consideration of further evidence, if it is deemed essential to a proper disposition of the issue.
- (3) The reviewing court shall affirm the order and decision of the agency, if it is found to be valid and the proceedings are free from prejudicial error to the appellant.

75 O.S.2011, § 322. Under that standard, "an agency's order will be affirmed if the record contains substantial evidence in support of the facts upon which the decision is based, and if the order is otherwise free of error." *Scott v. Okla. Secondary Sch. Activities Ass'n*, 2013 OK 84, ¶ 26, 313 P.3d 891, 899. More specifically, the standard of review for findings and determinations made by the OWRB in its administrative proceedings is "that of substantial evidence and further that the findings should not be reversed unless they are clearly erroneous." *Kline v. State ex rel. Okla. Water Res. Bd.*, 1988 OK 18, ¶ 7, 759 P.2d 210, 214. In all cases, a reviewing court should avoid re-weighing the evidence or substituting its judgment for that of the agency's on factual matters. See 75 O.S.2011, § 322(1)(e).

ANALYSIS

This Court's decision in *Purcell v. Parker* is distinguishable from this case.

¶29 *Purcell v. Parker*, 2020 OK 83, 475 P.3d 834, was decided on October 6, 2020, and, at first glance, appears to have determined Petitioners first issue on appeal in this case: notice by publication is unconstitutional and the permit is invalid. However, the facts in this case are readily distinguishable. Here, the Petitioners had actual notice of the application and participated in the OWRB hearings and judicial review. There is an additional issue to address, including whether Petitioners have standing to challenge notice.

¶30 Petitioners assert that the Kiamichi River Basin generally encompasses LeFlore, Latimer, Pushmataha, Pittsburg, Atoka, and Choctaw counties. It does not include McCurtain County. The City's notice by publication purportedly followed the requirements of 82 O.S., § 105.11 and O.A.C. § 785:20-5-1 for Latimer, Pushmataha, Pittsburg, Choctaw, and McCurtain counties, but not for LeFlore and Atoka counties. In paragraphs 6 and 52 of the Final Order of October 10, 2017, the OWRB presumed that publication in local newspapers satisfied the constitutional protections of due process. There is a secondary issue of whether property owners in LeFlore and Atoka counties were entitled to notice at all. Petitioners rely on this Court's decision in *Purcell* that notice by publication is defective "if the affected landowners are known, or reasonably discoverable, notice provided by publication results in an unconstitutional exercise of jurisdiction and a denial of due process" and, therefore, the permit is invalid. See *Purcell*, 2020 OK 83, ¶ 24, 475 P.3d at 844 (citations omitted). Petitioners assert that the City could have identified and served each and every property owner in the Kiamichi River Basin using records from the county clerks.

¶31 The City responds that Petitioners do not have standing to challenge notice. Because they were represented at the OWRB hearing and in this action, Petitioners clearly had actual notice. While many of the Petitioners are riparian landowners, they have not demonstrated any cognizable economic harm from notice by publication. Petitioners implicitly rely on third party standing, but that also fails. See *Forest Oil Corp. v. Corp. Comm'n of Okla.*, 1990 OK 58, ¶ 19, 807 P.2d 774, 788 ("Generally, constitutional rights are personal and may not be asserted vicariously.").

¶32 The City also argues the District Court properly determined the City satisfied the 2017 notice requirements. According to the 2017 state statutes and regulations, notice only needed to be published in the county of the point of diversion (Pushmataha County) and within the adjacent downstream county (Choctaw County). The City published in other counties in excess of the statutory requirement. Oklahoma law, not the Settlement Agreement,¹⁰ governs the permitting decision. Also, there is no authority that Petitioners were entitled to notice of the Settlement Agreement.

¶33 The City argues *Purcell* is distinguishable. The *Purcell* decision does not indicate whether it applies to cases pending in the appellate pipeline. The City urges this Court not to apply *Purcell* here, arguing that retroactivity is not required because Petitioners received notice and participated extensively in the "truth determining process." The City argues it relied on the long-standing contrary statutory policy and applying *Purcell* would have a destabilizing effect. Because Petitioners lack standing to raise the notice issue, this is not a case of similarly-situated litigants who properly preserved the issue on appeal and would be left unprotected by the appellate process.

¶34 The standing and procedural posture in this case and *Purcell* are distinguishable. In *Purcell*, neighbors did not receive notice and did not timely protest or participate in the OWRB hearing. *Purcell*, 2020 OK 83, ¶¶ 5-6, 475 P.3d at 836-37. The *Purcell* neighbors discovered the OWRB meeting and were given five minutes to comment. *Id.* ¶¶ 7-8, at 838. The *Purcell* neighbors filed a declaratory judgment action. *Id.* It was not an appeal from an administrative agency's final order. *Id.* ¶ 14, at 841. Here, Petitioners timely protested and fully participated in the OWRB proceedings and judicial review. Petitioners participated in the permitting process for four years. The integrity of the truth determining process was protected.

¶35 The OWRB responds that it is difficult to understand how Petitioners' constitutional rights to notice and opportunity to be heard were violated when they were *aware* of the application and participated in the administrative proceedings and during judicial review. We agree. Notice to all property owners within the Settlement Agreement area is not required by law or due process. The Settlement Agreement applies to all counties in the Kiamichi River Basin, but state law and the OWRB's notice procedures do not -- they only require notice in the county of the proposed diversion and the downstream county because it is those appropriative and domestic riparian users who may be impacted by a new diversion even though the existing rights of those water users remain unchanged. Petitioners lack standing. We hold the facts in *Purcell* are distinguishable from this case.

Granting the City's stream water permit does not constitute an unconstitutional taking of Petitioners' water rights; instead, it is a proper exercise of the State's police powers.

¶36 Appropriative and riparian rights are coexistent, prevailing water law in Oklahoma. See 82 O.S.2011, § 105.1A; 82 O.S.2011, § 105.2. An "appropriative right" means the right to take a specific quantity of water by direct diversion from a stream and to apply such water to a specific beneficial use. See O.A.C. § 785:20-1-2. A "riparian right" means the right of an owner of land adjoining a stream or watercourse to use water from that stream for reasonable purposes. Riparian rights are limited to domestic use and pre-1963 vested rights. See 82 O.S.2011, § 105.1A; 82 O.S.2011, § 105.2(D).

¶37 Before taking final action on a stream water permit application, the OWRB determines from the evidence four points of law ("Four Points of Law") pursuant to O.A.C. § 785:20-5-4(a):

- (1) *Unappropriated water is available in the amount applied for* [82:105.12(A)(1)] (as set forth in 785:20-5-5(a) and (b));

(2) *The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use. In making this determination, the Board shall consider the availability of all stream water sources and such other relevant matters as the Board deems appropriate, and may consider the availability of groundwater as an alternative source* [82:105.12(A)(2)] as set forth in 785:20-5-5(c);

(3) *The proposed use does not interfere with domestic or existing appropriate uses* [82:105.12(A)(3)] as set forth in 785:20-5-5(d); and

(4) *If the application is for the transportation of water for use outside the stream system wherein the water originates,* [82:105.12(A)(4)] the provisions of Section 785:20-5-6 are met.

O.A.C. § 785:20-5-4(a) (emphasis in original). If the OWRB determines these Four Points of Law and the applicable provisions of Chapter 20 of the regulations 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); 82 O.S.2011, § 105.12(A).

¶38 When the OWRB granted the City's Permit, it was a proper exercise of the state's police power. The granting of the City's Permit does not abolish the domestic riparian and appropriative uses of others. In fact, the evidence presented at the hearing before the OWRB shows there is unappropriated water in the Kiamichi River and Sardis Lake on an average annual basis in excess of the City's Application, even after existing appropriate uses and domestic riparian uses are considered.¹¹ During the administrative hearing, Petitioners offered no evidence of a better method for calculating unappropriated water or specific evidence as to how their rights may be harmed by the granting of the stream water application. In fact, none of the Petitioners presented any quantification of their riparian rights to rebut the City's showing of non-interference. Instead, they argue general harm without any specific supporting evidence, which is not sufficient.

¶39 The Oklahoma Legislature provided the OWRB with the authority to complete studies of water systems and to issue permits for appropriation of water under the state's police powers. See 82 O.S., § 105.1 et seq. The state may control the flow of all nonnavigable streams and it may reserve to itself or grant to private parties the right to utilize such streams for power and other purposes. The statutes provide the Board's guidelines for regulation, including requirements for notice, approval by the Board, and reversion of water to the public due to non-use. In its effort to protect the public interest in water, the Legislature has provided for the OWRB's involvement in all aspects of stream water use, including appropriation of stream water.

¶40 The Oklahoma Legislature has also provided the district courts with the authority to adjudicate water rights. *Id.* If the Board determines that an adjudication of water rights is in the best interest of those using a particular stream, the Board may institute a suit in the district courts on behalf of the state. See 82 O.S.2011, § 105.6. However, this is not a prerequisite to the granting of a water use permit. Moreover, the statutes also contain a provision for the domestic riparian and existing appropriate users to seek remedy for interference in the district court. See 82 O.S.2011, § 105.5. In this regard, Petitioners are not left without recourse should any future interference with their water rights occur because of the City's permit. Section 105.5 provides that if any interference with the water rights occurs, any domestic riparian and existing appropriate user can seek remedy for interference in the district court. See 82 O.S., § 105.5.

¶41 We hold the statutes are clear -- the OWRB has the authority to issue the permit for appropriation of stream water and such a determination is within the scope of the state's police powers and not a taking of a protected property interest. The June 1, 2020, order granting the City's Permit, accounted for riparian and existing appropriate uses before granting the stream water permit, and the district court properly found that the City and the OWRB were in substantial compliance with all Federal and State laws and regulations.

**The district court properly denied Petitioners' request to conduct limited
discovery and testimony on administrative appeal
pursuant to 75 O.S.2011, § 321.**

¶42 Petitioners argue they were denied the opportunity to conduct official discovery and bring evidence of "alleged irregularities in procedure before the agency, not shown in the record," that had been discovered after the final October 10, 2017, OWRB hearing. See 75 O.S.2011, § 321. Specifically, Petitioners allege that counsel for Petitioners was told by sources that at least one state official had privately intervened with scholars at Oklahoma State University (OSU) to delay publication of research about stream flow data and related environmental concerns about the Kiamichi River. Even though scholars and others denied that this had ever occurred, counsel for Petitioners asked the district court for limited discovery on the issue to see whether there were any irregularities in the process which marred the decision-making process.

¶43 Judicial review of agency decisions "shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs." 75 O.S.2011, § 321. The only exception allowing courts to look beyond the administrative record is limited to witness testimony regarding alleged irregularities in procedures which are not otherwise shown in the administrative record. See, e.g., *Seely v. Okla. Horse Racing Comm'n*, 1987 OK CIV APP 61, ¶ 11, 743 P.2d 685, 691 (holding the district court properly refused to allow evidence of horse racing testing procedure irregularities where the evidence was not raised during the administrative proceeding); *Baggett v. Webb*, 1976 OK 176, ¶¶ 3, 22, 557 P.2d 433, 433-36 (holding the district court should have allowed testimony as to alleged irregularities where the administrative hearing was not recorded or transcribed). Furthermore, the exception regarding procedural irregularities is discretionary on the part of the reviewing court, provided that actual evidence of irregularities is properly tendered to the court. See 75 O.S.2011, § 321 ("testimony thereon may be taken in the court") (emphasis added). We hold there was no actual evidence of irregularities presented to the court.

¶44 Petitioners generally allege that the OWRB was under pressure to grant the City's Permit from earlier litigation as resolved by the Settlement Agreement. However, Petitioners did not present any specific evidence of irregularities in the procedure. For example, the Petitioners did not submit any affidavits from the alleged "sources" who had informed Petitioners about the alleged state official who privately intervened with scholars at OSU and allegedly delayed publication of research about stream flow data and related environmental concerns about the Kiamichi River. Instead, Petitioners mistakenly believed that mere allegations of irregularities entitle them to conduct discovery in hopes of finding irregularities. We hold the district court properly denied Petitioners' requests for discovery and testimony on administrative appeal because Petitioners' general allegations of procedural irregularities failed to meet the exception for allowing additional testimony outside of the administrative record pursuant to 75 O.S., § 321.

¶45 The District Court, in its Order of June 1, 2020, concluded:

In reviewing the record, the Court determines that there appears to be no evidence of political whim or pressure on the OWRB's ruling and the Court finds there is a presumption of correctness in their ruling that cannot be overruled by the Court.

Order, June 1, 2020, at ¶ 34.

¶46 In this case, Petitioners allege that "after the OWRB decision in October of 2017, counsel for the Petitioners was told by sources that at least one state official privately had intervened with scholars at Oklahoma State University to delay publication of research about stream flow data and related environmental concerns about the Kiamichi River." Appellants' Brief-in-Chief, at 14. Petitioners later contend that the "U.S. Department of Interior had refused to allow an expert employed by the U.S. Geological Survey at Oklahoma State University to testify."¹² *Id.* at 15.

¶47 We agree with the City's argument that the DOI's denial was unrelated to any action by the OWRB or the City, and the District Court had no jurisdiction to reverse or otherwise challenge the *Touhy* decision by the United States. See C.F.R. § 2.281(a); *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). We likewise agree that a *Touhy* decision made pursuant to federal law cannot constitute a "procedural irregularity" contemplated by 75 O.S.2011, § 321.

¶48 As an additional alleged error of law, the Petitioners argue for the first time in their Brief-in-Chief on appeal that the OWRB was under pressure to grant the City's Application from earlier litigation as resolved by the Settlement Agreement. 75 O.S.2011, § 316 specifies the procedure for raising an undue influence issue:

Any party may request the disqualification of a hearing examiner or agency member, on the ground of his inability to give a fair and impartial hearing, by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded.

Notably, this Court has repeatedly rejected appellate claims of partiality where the complaining party never sought disqualification at the administrative proceeding under 75 O.S.2011, § 316. See, e.g., *Lowrey v. Hodges*, 1976 OK 132, ¶ 23, 555 P.2d 1016, 1024; *Robbins v. Okla. Alcoholic Bev. Control Bd.*, 1969 OK 202, ¶ 19, 461 P.2d 610, 613.

¶49 Here, Petitioners never sought disqualification during the administrative proceeding. Likewise, Petitioners did not promptly file an affidavit pursuant to 75 O.S., § 316 -- which is mandatory. See *Robbins*, 1969 OK 202, ¶ 19, 461 P.2d at 613 (The prompt affidavit requirement is one of "substance and not merely of form" and is a mandatory step for an appellant seeking disqualification during the administrative proceeding.). As a result, Petitioners failed to properly raise an issue of undue influence and the district court did not err in denying Petitioners' requests for discovery on administrative appeal in this regard.

¶50 Moreover, even if Petitioners had properly raised the issue of undue influence, there is no evidence in the record to support Petitioners' claims that the Board was under undue pressure. In fact, the opposite is true. The Board members heard argument from each party at the Board meeting prior to the vote. The Board members also all had access to review the recording of four days of testimony and one day of public comment prior to the vote. In sum, there is no evidence to support, or otherwise contemplate, that the Board was unduly influenced in making its decision.

¶51 Lastly, Petitioners assert the hearing examiner erred during the administrative proceeding by excluding evidence of environmental concerns, including a letter from the U.S. Fish and Wildlife Service ("FWS") dated April 10, 2017, that raised concerns about the effects of the City's proposed Permit on species of conservation concern. The City argues that Oklahoma stream water law does not contemplate consideration of environmental purposes, such as instream flow, for streams like the Kiamichi River that have not been designated as a "scenic river area" or "Outstanding Resource Waters." Importantly, the record on appeal clarifies that the hearing examiner did not grant or deny the City's pre-hearing motion in limine to exclude the FWS April 10, 2017, letter, but rather held that "the letter itself will have to be undergirded with additional information if anyone wants to use it specifically as evidence." (citation omitted).

¶52 We agree with the City that to the extent the hearing examiner excluded evidence regarding environmental concerns, the hearing examiner did so pursuant to his/her authority of a judicial nature to marshal the relevancy of evidence and testimony. See 75 O.S., § 250.3(8); 82 O.S., § 1085.10; O.A.C. §§ 785:4-7-5(b); *Tulsa Classroom Teachers Ass'n v. State Bd. of Equalization*, 1979 OK 136, ¶ 5, 601 P.2d 99, 101-02.

¶53 The City complied with all discovery and evidentiary requirements during the administrative hearing -- including responding to multiple rounds of Petitioners' written discovery requests and producing over one hundred documents. In the district court on the petition for review, the City opposed additional discovery requests and admission of evidence in line with the general rule that judicial review of agency orders is "confined to the record" pursuant to 75 O.S.2011, § 321. We affirm the district court's order denying Petitioners' request for additional discovery on administrative appeal as the record contains substantial evidence in support of the facts upon which the decision was based and the order is otherwise free from error.

The district court's order affirming the OWRB's order granting the City's stream water permit was free from prejudicial error.

¶54 Before taking final action on a stream water permit application, the OWRB must determine from the evidence presented, pursuant to O.A.C. § 785:20-5-4(a) whether:

- (1) *Unappropriated water is available in the amount applied for;*
- (2) *The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use;*
- (3) *The proposed use does not interfere with domestic or existing appropriative uses;*
- (4) *If the application is for the transportation of water for use outside the stream system wherein the water originates, the provisions of Section 785:20-5-6 are met.*

O.A.C. § 785:20-5-4(a) (emphasis in original). If the Board determines from the record that the elements are satisfied, the Board *shall* approve the permit. See 82 O.S., § 105.12(A)(5). Petitioners argue the OWRB and the district court erred by improperly calculating the available stream water and evaluating beneficial use; thus, the Board did not properly apply the Four Points of Law in O.A.C. § 785:20:5-4. We address each of Petitioners' allegations of error in turn below.

1. The district court and the OWRB correctly determined there is sufficient unappropriated water available in the amount applied for to satisfy the first point of law.

¶55 Petitioners argue the OWRB's order was in error because the City did not demonstrate that the Kiamichi River Model satisfied the first point of law, including the use of the Belzoni gauge to determine the flows in the Kiamichi River. Petitioners argue the OWRB and the district court failed to follow Oklahoma law for calculating available stream water under the first point of law. See O.A.C. § 785:20-5-5(a)(1). More specifically, Petitioners take issue with the Kiamichi River Model because they allege it improperly applies historical or outdated data from the Belzoni gauge.

¶56 The City on the other hand, argues the Kiamichi River Model meets its burden under the first point of law. It argues the Kiamichi River Model uses the variables and logic statements specifically tailored to the elements required by O.A.C. § 785:20-5-5(a)(1), which includes the model's raw data showing: precipitation, evaporation, flow records, stream gauge measurements, runoff, lake elevations, and storage capacity for the Southeast System's five reservoirs. The City contends the Kiamichi River Model appropriately applies the statutory formula for measuring available stream water, and that unappropriated water is available in the amount for which the City applied. To support this conclusion, the City's expert testified at length how the Kiamichi River Model demonstrated that 115,000 acre-feet per year ("AFY")¹³ is available considering the mean annual precipitation run-off, the mean annual flow, and stream gauge measurements, and prioritizing domestic uses, and existing appropriations. Additionally, the Kiamichi River Model considered the Red River Compact pursuant to O.A.C. § 785:20-5-5(a)(1), a 20,000 AFY set aside in Sardis Lake pursuant to O.A.C. § 785:20-5-5(b)(3), and a proposed lake level management plan pursuant to O.A.C. § 785:20-5-5(b)(3)(iv).

¶57 The City's engineering expert also testified that he carefully selected the Belzoni gauge for the important variable flow data because it provided forty-five years of varying historical data between 1926 and 1971, which predated the 1982 construction of Sardis Lake and because it showed how the Kiamichi River basin existed under natural stream conditions.

¶58 The OWRB reviewed the Kiamichi River Model and found it "satisfied OWRB stream water rules and statutes for permitting in the basin." Based on the record and the substantial evidence presented, we agree. Ultimately, the OWRB concluded: "[T]he Board finds that unappropriated water is available at the diversion point and in the amounts applied for by the applicant." In all cases, a reviewing court should avoid re-weighing the evidence or substituting its judgment for that of the agency's on factual matters. See 75 O.S.2011, § 322(1)(e). We will not re-weigh the evidence or substitute our judgment for that of the agency on factual matters in this case and find no evidence of prejudicial error as to Petitioners first allegations of error.

2. The district court and the OWRB properly concluded the City intends to put the water to "beneficial use" as evaluated under the Four Points of Law.

¶59 Petitioners allege the OWRB should have considered an additional element of "environmental issues, impacts upon economic activity, and more" as part of "beneficial use" under the Four Points of Law. Under Oklahoma stream water law, "beneficial use" is a factor that must be determined before a permit can be issued. See 82 O.S., § 105.12(A)(4)(B).¹⁴ When reviewing the beneficial uses for this purpose, the Board applies the definition from O.A.C. § 785:20-1-2, which defines beneficial use as:

[T]he use of such quantity of stream or groundwater when reasonable intelligence and reasonable diligence are exercised in its application for a lawful purpose and as is economically necessary for that purpose. Beneficial use include but are not limited to municipal, industrial, agricultural, irrigation, recreation, fish and wildlife. . . .

¶60 The City argues the definition of beneficial use applies only in the context of an appropriative permit. It argues the definition of beneficial use does not create a non-consumptive instream flow requirement. See O.A.C. § 785:20-1-1; O.A.C. § 785:20-1-2. We agree with the City. While an applicant may apply for a permit to appropriate water for a fishing pond or to water wildlife, general protection of environmental flows is not one of the statutory elements to be determined by the Board. See 82 O.S., § 105.12.

¶61 Next, Petitioners cite to *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*, 1990 OK 44, 855 P.2d 568, to support their position that the Board is required to consider non-consumptive flows to protect wildlife and recreation. However, the decision in *Franco-American Charolaise* does not impact the result in this case, as it does not create a general requirement that water be left in a stream for fish and wildlife.

¶62 In conclusion, the hearing examiner did not err by excluding evidence from the United States Fish and Wildlife Service because environmental impacts are not a statutory or common law element to be considered by the OWRB when considering an application for stream water permit. In the same regard, the hearing examiner also did not err by not incorporating the testimony of Dr. Caryn Vaughn, Ph.D., regarding her work studying endangered mussels in the Kiamichi River. Importantly, Dr. Vaughn admitted she did not conduct an instream flow study and she did not offer an opinion on what a proper environmental flow would be based on if conducted by others.¹⁵ Furthermore, even if environmental impacts were a statutory element, Petitioners offered no evidence at the hearing to show that the granting of the Application would impact the area. Instead, the OWRB order addresses the factors related to the use of the stream system of origin and found that adequate water is available for future needs within the basin for municipal, industrial, domestic and other beneficial uses that do not interfere with domestic or existing appropriate uses pursuant to 82 O.S., § 105.12.

¶63 The district court properly affirmed the OWRB's order which correctly applied the Four Points of Law found in O.A.C. § 785:20-5-4. The OWRB's decision to grant the stream water permit under the terms contained in the order is based on substantial evidence in the record and contains no clear error that would prejudice the Petitioners.

CONCLUSION

¶64 We hold the district court had jurisdiction to review the OWRB's final order granting a stream water permit to the City and the district court's order denying Petitioners' challenge to the stream water permit is affirmed.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

CONCUR: Kane, C.J., Rowe, V.C.J., Winchester, Edmondson, Gurich, and Darby, JJ.

CONCURS IN PART; DISSENTS IN PART: Kauger, J. (by separate writing);

CONCUR IN RESULT: Combs and Kuehn (by separate writing), JJ.

KAUGER, J., concurring in part/dissenting in part:

¶1 My dissent is directed to the failure to provide compliance with constitutional notice requirements. Notwithstanding any factual differences between *Purcell v. Parker*, 2020 OK 83, 475 P.3d 834, and this cause, *Purcell* is instructive and controlling regarding the necessity of proper notice. Even if statutory notice provisions are complied with, the notice given must also comply with constitutional due process requirements. It appears this was not done in this cause, and thus, this administrative proceeding and subsequent district court review, were invalid from the beginning.

¶2 The majority opinion notes, in ¶30 that:

Petitioners assert that the Kiamichi River Basin generally encompasses LeFlore, Latimer, Pushmataha, Pittsburg, Atoka, and Choctaw counties. It does not include McCurtain County. The City's notice by publication **purportedly** followed the requirements of 82 O.S., § 105.1 and O.A.C. §785:20-5-1 for Latimer, Pushmataha, Pittsburg, Choctaw, and McCurtain counties, **but not for LeFlore and Atoka counties**. In paragraph 6 and 52 of the Final Order of October 10, 2017, the OWRB **presumed** that publication in local newspapers satisfied the constitutional protections of due process. . . (Emphasis supplied).

The City notice by publication purportedly followed statutory requirements for some, but not all of the landowners affected, and the OWRB presumed that this was satisfactory? It cannot be.

¶3 In *Purcell*, we very clearly explained that, even when statutory notice procedures were properly followed, the procedures must accord with fundamental due process. When a landowner's property interest is involved in the proceeding, notice by publication is insufficient when the actual whereabouts of the landowners are known or can be reasonably ascertainable. Anything less results in an unconstitutional exercise of jurisdiction insofar as the interest of the owner is affected. This applies to administrative proceedings as well as court proceedings. In this cause, even if some landowners did not receive any actual notice, but participated as a result of notice by publication, at least two counties were omitted from any notice whatsoever. No determination was made concerning who any of the actual landowners were, and whether they could have been given actual notice.

¶4 In *Cate v. Archon Oil Co., Inc.*, 1985 OK 15, 695 P.2d 1352, we addressed the constitutionality afforded pre-procedural due process required when an oil and gas lease of real property is being sold at a sheriff's sale. The statute at issue in *Cate* only required notice by publication. There, we recognized that notice by publication postings are designed primarily to attract prospective purchasers, and are unlikely to reach those who have an interest in the property. If the actual whereabouts of the parties are known, failure to afford personal notice to those who have an interest or estate in real property sought to be sold in satisfaction of a judgment results in an unconstitutional exercise of jurisdiction insofar as the interest of the owner is affected. We stated that:

- 1) Notice is a jurisdictional requirement and fundamental element of due process;
- 2) Due process requires adequate notice, a realistic opportunity to appear at a hearing, and the right to participate in a meaningful manner before one's rights are irretrievably altered;
- 3) The right to be heard is of little value unless adequate notice is given; and
- 4) Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of an action, and lack of notice constitutes a jurisdictional infirmity.

¶5 Similarly, in *Dulaney v. Okla. State Dept. of Health*, 1993 OK 113, 868 P.2d 676, we addressed notice and the opportunity for an individual proceeding in the context of a landfill permit. We recognized that adjacent landowners had constitutional rights sufficient to require the application of due process, and were entitled to notice and an opportunity to be heard. We said that:

¶18. . . The use and control of fresh water is a matter of publici juris, and of immediate local, national, and international concern. No commodity affects and concerns the citizens of Oklahoma more than fresh groundwater. . . These landowners' water-related property interest alone requires that they be given notice and an opportunity to participate in a hearing whose outcome could affect their constitutionally protected rights. . . .

¶6 In *Harvey R. Carlile Trust v. Cotton Petroleum*, 1986 OK 16, 732 P.2d 438, a case involving standards of adequate notice in spacing proceedings before the Corporation Commission, we held, concerning notice by publication, that it is not reasonably calculated to provide actual knowledge of instituted proceedings. It is an inadequate method to inform those who could be notified by more effective means such as personal service or mailed notice. Mail service is an inexpensive and far more efficient mechanism to enhance the reliability of notice than either publication or posting. When a party's name and address are reasonably ascertainable from sources available at hand, communication by mail or other means certain to insure actual notice is deemed to be a constitutional prerequisite in every proceeding which affects either a person's liberty or property interests.

¶7 We held that the face of an administrative proceeding must affirmatively show a diligent but unsuccessful effort to reach the affected party by better process. Courts may not presume publication service alone to be constitutionally valid when the judgment roll or record of an administrative proceeding fails to show that the means of imparting better notice were diligently pursued but proved unavailable.

¶8 Under nearly forty years of our jurisprudence, the proceedings at issue here should be invalidated from the beginning. If you know how to find them, you have to tell them.

KUEHN, J., Concurring in Result:

¶1 I concur in the result reached by the Court. However, the Court squanders an opportunity to clarify the law on water rights. The parties cite *Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, [1990 OK 44, 855 P.2d 568](#), as pertinent to the issues presented. The analysis in *Franco-American*, however, has been abrogated by amendments to the relevant statutes. I believe *Franco-American* was wrongly decided in the first place, but regardless, any doubts over its interpretation of law have since been dispelled by a clear expression of legislative intent. It is time to officially overrule *Franco-American*, declare the current statutes constitutional, and clear the waters for all Oklahomans.

¶2 The water-law battle between the Court and the legislature began in 1990, after this Court issued its decision in *Franco-American*. In 1963, our legislature reformed our State's water code.¹ As in many other States, riparian rights to water were replaced with a prior-appropriations system.² In *Franco-American*, this Court determined the 1963 statutes did *not* abrogate the common-law riparian system, and therefore, limiting common-law riparian rights would constitute an impermissible taking of personal property without just compensation.³ In a fractured opinion, the majority found that the exercise of the State's police power to protect waters from waste, and to protect the general public, cannot extend to abrogate the riparian right to the normal flow or the normal underflow of the stream.⁴ The holding preserved common-law riparian rights and declared that a riparian owner is entitled to *reasonable* use -- not just *domestic* use -- of water.⁵

¶3 In 1993, the legislature responded to *Franco-American* with amendments to the water code. If the question posed by *Franco-American* was, "Did the legislature really mean to replace riparian law with an appropriations system?", then the 1993 statutory amendments provide a resounding "Yes." The remaining holding of *Franco-American* -- that the State's police power cannot extend to a riparian right without it being an unconstitutional taking -- should also be moot with the abrogation of riparian law.

¶4 Despite the 1993 amendments, this Court has passed on overruling *Franco-American*.⁶ Be that as it may, the Oklahoma Water Resources Board (OWRB) administers water rights through an appropriation system consistent with existing law. [82 O.S. §105.9](#).⁷ Moreover, under [60 O.S. §60](#) -- in existence before *Franco-American* was decided -- riparian rights are limited to *domestic* use (not *reasonable* use), and water not needed for domestic purposes "becomes public water and is subject to appropriation for the benefit and welfare of the people of the State."⁸

¶5 *Franco-American* should be overruled. Even if that decision had been a sound interpretation of the water code as it existed in 1990, the 1993 amendments dispel any doubt about legislative intent. Second, the current statutes, [60 O.S. § 60](#), [82 O.S. § 105.1A](#) and § 105.2, are constitutional. Article 2 § 24 of the Oklahoma Constitution provides that "private property shall not be taken or damaged for public use without just compensation." The administrative code requires the OWRB to determine the Four Points of Law when determining water rights under the statutes cited above.⁹ Within the Four Points, it must be determined that the riparian *domestic* use is not harmed. If it is, no permit. If it is not, then there logically has been no improper "taking" of private property. Once a riparian owner has reaped the benefits of all domestic use, and first-in-time, first-in-right appropriated owners prove *their* needs and those needs are met, *only then* is there "unappropriated water." That water belongs to the citizens of Oklahoma.

¶6 The legislature has a right to use its police powers to protect the welfare of its citizens, including their need for a natural resource as fundamental as water. It makes no sense to argue that a riparian or appropriated owner has a right to be compensated for *unappropriated* water. Imagine a landowner who dams a natural lake or tributary, and charges whatever compensation they desire for that natural resource they have in abundance? Citizens and towns, especially those without monetary resources, would suffer tremendously. "Property often comes in the form of a bundle of entitlements, but the 'destruction of one strand of the bundle is not viewed as a taking because the aggregate must be viewed in its entirety.'"¹⁰

¶7 We presume that statutes are constitutional. *Lee v. Bueno*, [2016 OK 97](#), ¶ 7, [381 P.3d 736](#), 739. The OWRB has followed the appropriations system since 1993. The statutes are within the State's police powers, and the administrative system that determines water rights of Oklahomans to issue permits is consistent. I would take this opportunity to clarify that *Franco-American* is not good law.

FOOTNOTES

KANE, C.J.:

¹ Petitioners Dale Jackson and Justin Jackson are not parties to this appeal.

² Similarly, we have long held that the codefendant naming requirements for judicial review under the Oklahoma Employment Security Act (OESA) are jurisdictional. *See, e.g., Davis v. Okla. Employ. Sec. Comm'n*, [2010 OK 45, 238 P.3d 922](#); *Okla. Employ. Sec. Comm'n v. Carter*, [1995 OK 74, 903 P.2d 868](#); *Edmondson v. Siegfried Ins. Agency, Inc.*, [1978 OK 45, 577 P.2d 72](#).

³ Even prior to the addition of this language in 2011, the Court of Civil Appeals held that the agency is a necessary party and must be named as a respondent in the petition for judicial review. *See Klopfenstein v. Okla. Dep't of Human Servs.*, [2008 OK CIV APP 16, ¶ 10, 177 P.3d 594](#), 596 (interpreting [75 O.S.2001, § 318\(B\)-\(C\)](#)); *Transwestern Pub., L.L.C. v. Langdon*, [2004 OK CIV APP 21, ¶¶ 7-8, 84 P.3d 804](#), 806 (same).

⁴ In *Klopfenstein v. Oklahoma Department of Human Services*, [2008 OK CIV APP 16, ¶ 4, 177 P.3d 594](#), 596, and *Langdon*, [2004 OK CIV APP 21, ¶ 3, 84 P.3d 805](#), the agency was not named as a respondent. In *Foundation*, [2008 OK CIV APP 30, ¶¶ 3-4, 180 P.3d 2](#), and *H & En*, [2006 OK CIV APP 70, ¶¶ 4-6, 136 P.3d 1071](#), a party of record in the administrative proceeding (not the agency) was not named as a respondent and that party was not served a copy of the petition as required by [75 O.S.2001, § 318\(C\)](#).

This case is clearly distinguishable from *Foundation* and *H & En*. The City is a party of record in the administrative proceeding (not the agency issuing the final agency order) that was not named as a respondent, and the City was served with a copy of the petition.

⁵ The prior version of the OAPA that applied in the COCA decisions provided, in pertinent part:

2. . . . [P]roceedings for review shall be instituted by filing a petition . . . within thirty (30) days after the appellant is notified of the final agency order as provided in Section 312 of this title.

C. Copies of the petition shall be served upon the agency and all other parties of record, and proof of such service shall be filed in the court within ten (10) days after the filing of the petition. The court, in its discretion, may permit other interested persons to intervene.

[75 O.S.2001, § 318\(B\)\(2\)](#), (C).

⁶ *See supra* note 5.

⁷ "[A]ll other parties of record" refers to the parties in the administrative proceeding. As used in the OAPA, "party" means "a person or agency named and participating, or properly seeking and entitled by law to participate, in an individual proceeding . . ." [75 O.S. Supp.2013, § 250.3\(14\)](#).

⁸ *See supra* note 7.

⁹ No objection was made as to service of the petition for review, and the City entered a special appearance to contest jurisdiction.

¹⁰ The City originally filed an application with the Oklahoma Water Resources Board (OWRB) for a permit to appropriate stream water from the Kiamichi River and Sardis Lake in 2007. This process resulted in extensive litigation in federal court. After five years of settlement negotiations related to this litigation and while the application to appropriate stream water was pending, in 2016, the City signed a historic Settlement Agreement ("Settlement Agreement") with the State of Oklahoma, the Choctaw Nation of Oklahoma, and the Chickasaw Nation, which was subsequently approved by the United States Congress. The Settlement Agreement, among other things, contains the consent of the Choctaw and Chickasaw Nations to the City's permit application to the OWRB, subject to the terms of the Settlement Agreement. In January 2017, the City filed its second amended permit application -- which is the subject of this appeal.

¹¹ The OWRB estimates domestic riparian uses generously assuming the following: (1) household uses 6 AFY; (2) a household is 160 acres (based on original homesteads); and (3) the intensity of household use is over the entire watershed upstream of the proposed diversion point, rather than simply the lands riparian to the stream. See O.A.C. § 785:20-5-5(a)(2).

¹² Based on a review of the record on appeal, the City argues in their Combined Answer Brief and Brief-in-Chief on Cross Petition that it believes the Petitioners are referring to these two encounters as the same event. In Petitioners' June 29, 2018, Motion to Compel Discovery, Petitioners insinuated (but did not directly allege) that an OWRB official had affected the U.S. Department of Interior's ("DOI") decision to deny Petitioners' *Touhy* request for the testimony of Dr. Shannon Brewer, a U.S. Geological Survey employee affiliated with Oklahoma State University. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

¹³ One acre-foot is the volume of water that would cover one acre of land to a depth of one foot, and is equivalent to 43,560 cubic feet, or 325,851 gallons. See O.A.C. § 785:20-11-6.

¹⁴ 82 O.S. 2011, § 105.12(A)(4)(B) provides:

A. In order to protect the public welfare of the citizens of Oklahoma and before the Oklahoma Water Resources Board takes final action on the application, the Board shall determine from the evidence presented whether: . . .

4. If the application is for the transportation of water for use outside the stream system wherein the water originates, the proposed use must not interfere with existing or proposed beneficial uses within the stream system and the needs of the water users therein. In making this determination, the Board shall utilize the review conducted pursuant to subsection B of this section; and . . .

B.1. In the granting of water rights for the transportation of water for use outside the stream system wherein water originates, pending applications to use water within the stream system shall first be considered in order to assure that applicants within the stream system shall have all of the water required to adequately supply their beneficial uses.

2. The Board shall review the needs within the area of origin every five (5) years to determine whether the water supply is adequate for municipal, industrial, domestic, and other beneficial uses.

(emphasis added).

¹⁵ The OWRB order did acknowledge Dr. Vaughn's testimony but concluded Petitioners' environmental contentions "either are not supported by the record, not supported by law, or are beyond the scope of the Board's jurisdiction in this proceeding, and therefore should be not addressed by the Board."

KUEHN, J., Concurring in Result:

¹ 60 O.S. § 60.

² "Oklahoma has employed two different systems for managing the use of natural flowing water: common law riparianism and prior appropriations. The riparian doctrine operates to "confer[] upon the owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his land." In contrast, the prior appropriations doctrine does not require a water user to own riparian land and determines rights by appropriation permits acquired on a "first in time, first in right" basis. Evident inconsistencies between the two systems led the Oklahoma legislature to attempt to limit common law riparian rights in promotion of an appropriations system." Gary D. Allison, Franco-American Charolaise: The Never Ending Story, 30 Tulsa L.J. 1, 59 (1994).

³ *Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd.*, 1990 OK 44, 855 P.2d 568.

⁴ *Id.*

⁵ *Id.* ¶ 2, 855 P.2d at 571.

⁶ See H. Cole Marshall, Clear As Mud: How Heldermon v. Wright Missed an Opportunity to Clarify Oklahoma's Murky Water Law, 61 Okla. L. Rev. 843 (2008); Gary D. Allison, Oklahoma Water Rights: What Good Are They?, 64 Okla. L. Rev. 469 (2012).

⁷ H. Cole Marshall, Clear As Mud: How Heldermon v. Wright Missed an Opportunity to Clarify Oklahoma's Murky Water Law, 61 Okla. L. Rev. 843, 856 (2008).

⁸ *Id.*

⁹ Okla. Admin. Code 785:20-5-4 states:

" (a) **Elements of statute.** Before taking final action on the application, the Board shall determine from the evidence presented whether:

- (1) Unappropriated water is available in the amount applied for [82:105.12(A)(1)] (as set forth in 785:20-5-5(a) and (b));
- (2) The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use. In making this determination, the Board shall consider the availability of all stream water sources and such other relevant matters as the Board deems appropriate, and may consider the availability of groundwater as an alternative source [82:105.12(A)(2)] as set forth in 785:20-5-5(c);
- (3) The proposed use does not interfere with domestic or existing appropriative uses [82:105.12(A)(3)] as set forth in 785:20-5-5(d); and
- (4) *If the application is for the transportation of water for use outside the stream system wherein the water originates*, [82:105.12(A)(4)] the provisions of Section 785:20-5-6 are met."...

¹⁰ Allison, *supra* note 2, at 56 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) and *Keystone Bituminous Coal Assn. v. DeBenedictus*, 480 U.S. 470, 497 (1987)).

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Oklahoma Court of Civil Appeals Cases

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2004 OK CIV APP 21, 84 P.3d 804.	TRANSWESTERN PUBLISHING, L.L.C. v. LANGDON	Discussed at Length
2006 OK CIV APP 70, 136 P.3d 1070.	H & EN, INC. v. OKLAHOMA DEPARTMENT OF LABOR	Discussed at Length
2008 OK CIV APP 16, 177 P.3d 594.	KLOPFENSTEIN v. OKLAHOMA DEPT. OF HUMAN SERVICES	Discussed at Length
2008 OK CIV APP 30, 180 P.3d 1.	OKLAHOMA FOUNDATION FOR MEDICAL QUALITY v. DEPARTMENT OF CENTRAL SERVICES	Discussed at Length

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1988 OK 18, 759 P.2d 210, 59 OBJ 528.	Kline v. State, ex rel. Oklahoma Water Resources Bd.	Discussed
1990 OK 44, 855 P.2d 568, 61 OBJ 1114.	Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.	Discussed at Length
1990 OK 58, 807 P.2d 774, 61 OBJ 1765.	Forest Oil Corp. v. Corporation Com'n of Oklahoma	Discussed
1992 OK 63, 841 P.2d 573, 63 OBJ 1359.	Prettyman v. Halliburton Co.	Discussed
1993 OK 113, 868 P.2d 676, 4 OBJ 2845.	Dulaney v. Oklahoma State Dept. of Health	Discussed
2001 OK 110, 37 P.3d 882, 72 OBJ 3672.	KEATING v. EDMONDSON	Discussed
1995 OK 74, 903 P.2d 868, 66 OBJ 2223.	Oklahoma Employment Sec. Comm. v. Carter	Discussed
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2014 OK 22, 324 P.3d 399.	HALL v. THE GEO GROUP, INC	Discussed
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1976 OK 176, 557 P.2d 433.	BAGGETT v. WEBB	Discussed
1978 OK 45, 577 P.2d 72.	EDMONDSON v. SIEGFRIED INS. AGCY., INC.	Discussed at Length
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2020 OK 83, 475 P.3d 834.	PURCELL v. PARKER	Discussed at Length
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1969 OK 202, 461 P.2d 610.	ROBBINS v. OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BD	Discussed at Length
2022 OK 9, 505 P.3d 920.	RICKARD v. COULIMORE	Discussed
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1982 OK 94, 651 P.2d 125.	Conoco, Inc. v. State Dept. of Health	Discussed at Length
1998 OK 92, 967 P.2d 1214, 69 OBJ 3242.	City of Tulsa v. State ex rel. Public Employees Relations Board	Discussed
1985 OK 15, 695 P.2d 1352.	Cate v. Archon Oil Co., Inc.	Discussed
1986 OK 16, 732 P.2d 438, 57 OBJ 998.	Harry R. Carille Trust v. Cotton Petroleum Corp.	Discussed

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