

**IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA**

FILED

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CAROLINE M. WEAVER
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**Andrea Cochran, Gerald Cochran, Louanna)
Cochran, William Cochran, Melissa)
Foreman, Suzanne Maupin, and Viola)
Powell,)**

Plaintiffs,)

v.)

Case No. CJ-2019-36

**The Oklahoma Water Resources Board,)
An Agency of the State of Oklahoma,)**

Hon. Barry Denney

Defendants,)

and)

Chau Tran and Donna Nguyen)

Interested Parties.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

REGARDING PLAINTIFFS' REQUESTED TEMPORARY INJUNCTION

FINDINGS OF FACT

1. This instant matter arises as part of a civil action in which Plaintiffs: Andrea Cochran; Gerald Cochran; Louanna Cochran; William Cochran; Melissa Foreman; Suzanne Maupin; and Viola Powell, ask the Court to enjoin the Oklahoma Water Resources Board (herein "OWRB") from issuing any additional Provisional Temporary Permits (herein "PTPs") to Chau Tran & Donna Nguyen for the withdrawal and use of groundwater – for utilization within the poultry industry – within Section 18, Township 20N, Range 23EIM, in Delaware County, Oklahoma until and unless Plaintiffs are provided an

opportunity to remonstrate against such PTPs. Plaintiffs contend that their real property interests entitle them to such process.

2. On May 24, 2019, Plaintiffs filed a *Motion for Preliminary Injunction*. A hearing on Plaintiffs' Motion was held on September 6, 2019. Not finishing on September 6th, the hearing was continued until September 12, 2019. Not finishing on September 12th, the hearing was continued until November 13, 2019, at which time it was concluded.

3. This Order pertains solely to Plaintiffs' request for a preliminary injunction.

4. "Any person intending to use groundwater shall make application to the [OWRB] for an appropriate permit," 82 O.S. § 1020.7, though landowners have the right to take and use groundwater for domestic purposes without the need of a permit or application, *id.* § 1020.3. The OWRB is an agency of the state charged with administering the water rights of the state and, as a part of this, is responsible for permitting of groundwater for non-domestic purposes. This case does not involve Tran & Ngugen's use of groundwater for domestic purposes. As such, a permit is required.

5. A "Temporary Permit" is a long-term authorization by the OWRB to put groundwater to beneficial use for other than domestic purposes. *Id.* § 1020.11(B). Temporary Permit Applications are subject to specific notice and hearing requirements, such proceedings governed by the Oklahoma Administrative Procedures Act. *Id.* § 1020.7.

6. PTPs are a short-term permit, issued at the discretion of the OWRB's Executive Director and effective for a period of not more than ninety (90) days. *Id.* § 1020.10. The OWRB is the agency responsible, and with jurisdiction, to issue such permits. The OWRB does not provide notice or an opportunity for a hearing by those

potentially affected by PTP applications. Even after receiving a protest or objection on a PTP application, the OWRB will not allow a hearing of any interested parties who filed the objection or protest.

7. Chau Tran and Donna Nguyen (herein "Tran & Nguyen") own a parcel of approximately 72 acres within the S ½, N ¼, of Section 18 Township 20N, Range 23EIM, in Delaware County, Oklahoma. 1. Commencing around the last part of 2017 or early 2018, Tran & Nguyen began construction on a commercial poultry farm within their Section 18 parcel. Tran & Nguyen's poultry operation has a capacity of greater than 300,000 birds, , and is herein referenced as Tran & Nguyen's "CAFO" or "poultry CAFO".

8. On December 7, 2017 Tran & Nguyen submitted an application to the OWRB for a Temporary Permit to annually withdraw and use 50 acre-feet of groundwater for use within their CAFO, said permit application styled as App. No. 2017-583. Tran & Nguyen represented to the OWRB that groundwater was the only available water source for their chicken CAFO, specifically stating that rural water was not available at the site. Tran & Nguyen further represented to the OWRB that they could not operate their poultry CAFO without a groundwater permit from the OWRB.

9. Tran & Nguyen provided notice of their Temporary Permit application to use groundwater, through newspaper publication and by notifying certain neighbors, as required by Section 1020.8 of Title 82 of the Oklahoma Statutes and Section 785:30-3-4 of the Oklahoma Administrative Code. Plaintiffs received notice of Permit App. No. 2017-583.

10. The Court accepts and finds that Tran & Nguyen own 72 acres within the S ½, N ½, of Section 18 Township 20N, Range 23E1M, in Delaware County, Oklahoma upon which they have constructed a poultry CAFO. As owners of the land, Tran & Nguyen have the legal right to use the groundwater contained thereunder, subject to reasonable local, state, and federal regulation.

11. The Court finds that the only source of water available to Tran & Nguyen is groundwater. The Court further finds that access to groundwater is critically important to Tran & Nguyen being able to operate their poultry CAFO – without adequate water, Tran & Nguyen cannot operate their CAFO. Tran & Nguyen began construction of the CAFO without having the legal ability to access groundwater for use within their CAFO and, moreover, Tran & Nguyen knew or should have known – at the time they commenced construction of their CAFO – they lacked the ability to access water for it.

12. Plaintiffs are a group of individuals residing in rural Delaware County, Oklahoma, immediately East – across County Road 560 – from Tran & Nguyen’s poultry CAFO.

13. Though the evidence does not indicate that Plaintiffs own lands through which Saline Creek passes (nor does the record indicate that Plaintiffs do not own lands through which Saline Creek passes), the Court finds that Plaintiffs have a personal interest in Saline Creek which is sufficient to establish Plaintiffs’ standing regarding the ecological well-being of Saline Creek.

14. The Court further finds that Plaintiffs would be irreparably harmed by the pollution of Saline Creek.

15. The only source of water available for Plaintiffs' homes is groundwater, rural water is unavailable. Plaintiffs contend that if the groundwater beneath their homes becomes contaminated, then their sole source of domestic water is contaminated. Similarly, if the groundwater beneath their homes is depleted, then their sole source of domestic water is depleted. Plaintiffs would not be able to use, or reside within, their homes if Plaintiffs lacked access to adequate, potable water, and the Court further finds that groundwater is the only feasible source of potable water for Plaintiffs.

16. Plaintiffs received no notice regarding Tran & Nguyen's poultry CAFO before construction on it began. However, Plaintiffs did receive notice of Tran & Nguyen's long-term Temporary Permit Application with the OWRB. Desiring to protect their water, Plaintiffs submitted a timely protest with the OWRB to the Temporary Permit Application.

17. On or about March 26, 2018, Plaintiffs lodged what was titled as "Protest, Objection, and Comment to Permit Application No. 2017-583." In their protest, Plaintiffs voiced concern that Tran & Nguyen's proposed use of groundwater – within Tran & Nguyen's poultry CAFO – flows across Plaintiff's property, and that it might pollute the surrounding lands, might deplete the groundwater, might contaminate the groundwater, might cause pollution to groundwater and surface waters, does not constitute a beneficial use, and might lead to waste of water. Plaintiffs noted it was not clear what all the uses of water would be within Tran & Nguyen's poultry CAFO but that Plaintiffs were concerned Tran & Nguyen's use of water would impair Plaintiffs' ability to access groundwater as they, and their families, had done for decades. Further, Plaintiffs voiced their objection regarding Tran & Nguyen's close proximity to Plaintiffs' homes and expressed their fear

that Plaintiffs' air, water, and land would become polluted as a result of Tran & Nguyen's water usage and operations.

18. Oklahoma Water Resources Board acknowledged that Plaintiffs' protest to 2017-583 raises the issues of waste of water and pollution.

19. The OWRB Hearing Examiner presiding over long-term Permit App. No. 2017-583 has found that Plaintiffs' protest "appear[s] to contain the information required by Section 785:4-5-4(b) of the Oklahoma Administrative Code ("OAC")."

20. The Court finds that Plaintiffs submitted a timely, valid protest to the OWRB regarding the withdrawal and use of groundwater for utilization in Tran & Nguyen's poultry CAFO. The Court further finds that, within their protest, Plaintiffs raised issues within the OWRB's jurisdiction and responsibility including, but not limited to, the issues of: waste of water; beneficial use of water; and pollution.

21. Because Tran & Nguyen's Temporary Permit App. 2017-583 was protested (by Plaintiffs), it must proceed through formal hearing before it can be issued by the OWRB.

22. Despite Plaintiffs' March 2018 protest to Temporary Permit App. No. 2017-583, Tran & Nguyen continued building their CAFO and by mid-2018, Tran and Nguyen had a fully-constructed chicken farm yet, according to their own representations, were unable to operate their farm because they lacked the legal right to access water for its operation. Adequate water is a necessary and indispensable input in chicken farming and, upon the evidence presented, Tran & Nguyen could not operate their poultry CAFO without a groundwater permit from the OWRB.

23. As of the last date of this hearing – November 13, 2019 – the OWRB had not taken formal, final action on 2017-583, though an administrative hearing had been set.

24. The long-term Temporary Permit App. No. 2017-583 is not at issue before this Court but is, instead, a matter being considered by the OWRB pursuant to applicable administrative procedure. This court is only concerned with whether a Temporary Injunction should be entered preventing OWRB from entering any more PTPs without providing the Plaintiffs notice and an opportunity to be heard.

25. In the summer of 2018, Tran & Nguyen represented to the OWRB that they would face economic hardship if they could not access groundwater during the administrative pendency of long-term Permit App. No. 2017-583. So that Tran & Nguyen could withdraw groundwater during the protested long-term permit proceeding, for use within their newly-constructed CAFO, Tran & Nguyen applied for a PTP which would allow the withdrawal of groundwater from the same wells, for the same purpose, to the same people, and for use in the same place as the protested long-term Temporary Permit App. No. 2017-583.

26. The OWRB issued Tran & Nguyen their requested PTP which allowed the withdrawal and use of 10 acre-feet of water, from August 28, 2018 through November 26, 2018 for utilization within Tran & Nguyen's CAFO. OWRB Ex. No. 14. The PTP explicitly states that it "accompany[ies]," "correspond[s]" with, and is "associated" with long-term permit 2017-583. The PTP further states that Tran & Nguyen – as the permit applicants – accept all risks, liabilities, and costs associated with the use of water under the permit.

27. Tran & Nguyen reported to the OWRB that they withdrew and used water under PTP-G0305, which was issued for the express, non-domestic purpose of raising poultry in the S ½, N ½, of Section 18.

28. Accordingly, the Court finds that Tran & Nguyen began operating their poultry CAFO – in S ½, N ½, of Section 18 – sometime between August 28, 2018 and November 26, 2018 and did so because the OWRB issued PTP 2018-G0305.

29. Because Tran & Nguyen represented they had no water source for their CAFO other than groundwater, and because Tran & Nguyen had no legal authority to withdraw groundwater for their CAFO between August 28, 2018 and November 26, 2018 apart from that granted by PTP 2018-G0305, the Court finds that Tran & Nguyen would not have, and could not have, legally operated their CAFO during this time period except for the OWRB granting PTP 2018-G0305.

30. Subsequent to PTP 2018-G0305, the OWRB issued PTP 2018-G0402 to Tran & Nguyen, effective from November 27, 2018 through February 25, 2019, which allowed Applicants to continue withdrawing water for use within their CAFO after the first PTP expired. Tran & Nguyen reported withdrawing and using water under this PTP, which was issued for the express, non-domestic purpose of raising poultry in the S ½, N ½, of Section 18.

31. Just as with PTP 2018-G0305, the Court finds that Tran & Nguyen operated their CAFO by utilizing PTP 2018-G0402 and that the CAFO could not have operated but for this permit from the OWRB.

32. Subsequent to PTP 2018 G0402, the OWRB issued PTP 2019-G0037 to Tran & Nguyen, effective from February 26, 2019 through May 27, 2019, which allowed Applicants to continue withdrawing water for use within their CAFO after the second PTP expired. Tran & Nguyen reported withdrawing and using water under this PTP, which was issued for the express, non-domestic purpose of raising poultry in the S ½, N ½, of Section 18, OWRB Ex. No. 20.

33. Just as with PTP 2018-G0305 and PTP 2018-G0402, the Court finds that Tran & Nguyen operated their CAFO by utilizing PTP 2019-G0037 and that the CAFO could not have operated but for this permit from the OWRB.

34. Subsequent to PTP 2019-G0037, the OWRB issued PTP 2019-G0108 to Tran & Nguyen, effective from May 28, 2019 through August 26, 2019, which allowed Applicants to continue withdrawing water for use within their CAFO after the third PTP expired

35. Just as with PTP 2018-G0305; PTP 2018-G0402; and PTP 2019-G0037, the Court finds that Tran & Nguyen operated their CAFO by utilizing PTP 2019-G0108 and that the CAFO could not have operated but for this permit from the OWRB.

36. Subsequent to PTP 2019-G0108, the OWRB issued PTP 2019-G0164 to Tran & Nguyen, effective from August 27, 2019 through November 25, 2019, which allowed Applicants to continue withdrawing water for use within their CAFO after the fourth PTP expired.

37. The Court finds that the OWRB serially-issued five (5) PTPs to Tran & Nguyen, from August of 2018 through the date of this hearing, which enabled and currently

enable Tran & Nguyen to operate their poultry CAFO. The Court finds that each of the five (5) PTPs was issued to the same individuals (Chau Tran & Donna Nguyen), that the groundwater was to be withdrawn from the same area (S ½, N ½, of Section 18), that the water was to be used in the same area (S ½, N ½, of Section 18), for the same purpose growing chickens. Strung together, these five (5) PTPs “permitted” the withdrawal and use of groundwater for a period exceeding one calendar year.

38. Although Plaintiff’s protest to the temporary permit was filed before any of the 5 PTPs were requested, Plaintiffs were not given notice of these requests or provided a hearing before any of the PTPs were granted.

39. Currently, PTPs are issued at the discretion of the OWRB’s Executive Director.

40. Currently, OWRB, through its staff, processes PTP applications by reviewing the application’s compliance with four separate provisions which the OWRB refers to as ‘the four points of groundwater law’. These four provisions are found in 82 O.S. § 1020.9, subpart A. The four provisions are: 1) are the lands owned or leased by applicant; 2) does the applicant’s proposed use of groundwater constitute a beneficial use; 3) will waste result from applicant’s proposed use of water; and 4) will the proposed use of water degrade or interfere with springs or streams emanating from a sensitive sole source aquifer.

41. If, in the OWRB staff’s opinion, an applicant for a PTP is meeting ‘the four points of law,’ the OWRB Executive Director issues the PTP whether a protest has been filed or not. Apart from the referenced ‘four points of law,’ the OWRB does not consider

other factors in evaluating PTP applications. The OWRB considers the same 'four points of law' in evaluating long-term permits or PTPs.

42. During the years Ms. Julie Cunningham has been OWRB's Executive Director, the OWRB has never denied a PTP application

43. PTPs are the only type of permits issued by the OWRB which do not require notice. Otherwise, notice is provided to all adjacent property owners within ¼ mile of the permit site.

44. The Court finds that the OWRB has no policies regarding the consideration and issuance of PTPs. The Court further finds that the OWRB does not provide notice of PTP applications or of the permits themselves. Further, the Court finds that the OWRB has no process or mechanism to respond to protest of PTPs. Additionally, the Court finds that the OWRB does not conduct any hearings regarding PTPs. The Court finds that the OWRB evaluates PTP applications only upon what the OWRB labels as the 'four points of groundwater law.'

45. OWRB received a protest from Plaintiffs relating to the PTPs Tran and Nguyen requested before the OWRB issued any of the PTPs. Though the OWRB reviewed Plaintiffs' protest, comment, and objection to long-term permit 2017-583, OWRB did nothing to take into account Plaintiffs' property rights in issuing Tran & Nguyen multiple PTPs.

46. Plaintiffs were not informed that the OWRB was considering issuing PTPs for use in Tran & Nguyen's poultry CAFO even though the water would be utilized 300' from Ms. Cochran's home.

47. Plaintiffs were not given notice of the PTPs, nor were Plaintiffs provided an opportunity to participate in any discussions with the OWRB regarding whether to issue the PTPs.

48. The Court finds that Plaintiffs submitted a protest against the issuance of a water permit to Tran & Nguyen for use within their CAFO before the OWRB issued any permit. The Court further finds that the OWRB did not provide Plaintiffs notice of the PTP applications or the permits itself, and that the OWRB did not provide Plaintiffs an opportunity to protest the PTPs, even though Plaintiffs had submitted a protest pertaining to Tran & Nguyen's withdrawal and use of groundwater within Section 18 for utilization within the poultry industry.

49. Despite the prohibition of renewing PTPs set out in its agency rules, OWRB issued five PTPs in a row, one right after another, without any substantive differences between the permits and which were issued for the same water, for the same purposes, out of the same well, by the same people. The only effective difference between the various PTPs is their effective date.

50. OWRB admits that Plaintiffs, in their original Protest, told the OWRB that they believe Tran & Nguyen were polluting Plaintiffs' homes or will pollute Plaintiffs' homes. However, OWRB contends that Plaintiffs provided no specific information that waste or pollution is occurring as a result from Tran & Nguyen's CAFO and represents there was no indication of anything that the OWRB could consider.

51. OWRB did not set a hearing regarding plaintiffs' complaints, did not investigate the complaints and did not forward Plaintiff's complaints to any other agency.

52. OWRB contends Plaintiffs' protest was invalid because it did not provide specific enough information to demonstrate how their legally protected interests would be adversely impacted.

53. OWRB staff made a determination regarding the adequacy of Plaintiffs' protest without notifying Plaintiffs the OWRB was making such a determination,

54. The Court finds that Plaintiffs submitted a valid protest that should have been set for a hearing before any PTP's were issued.

55. The Court further finds that OWRB staff improperly: failed to consider Plaintiffs' protest; failed to adequately investigate Plaintiff's protest; rejected Plaintiffs' protest; and deemed Plaintiffs' protest invalid.

56. OWRB also admits it did not forward the Plaintiff's complaints to any other agency the OWRB contends has jurisdiction over those matters which the OWRB alleges it does when it receives such complaints.

57. OWRB has a responsibility to implement the no degradation policy of the Clean Water Act. Oklahoma has also adopted a no degradation policy at the state level for which the OWRB is responsible as well. OWRB is responsible for the state's anti-degradation policy and implementation.

58. Polluting someone else's water is illegal, and the OWRB cannot permit someone to do an illegal act. OWRB acknowledged that polluting waters of the state is a public nuisance and in violation of the state's environmental code and that the OWRB cannot permit such pollution in matters under its jurisdiction.

59. OWRB's Water Quality Standards Implementation Plan indicates that the OWRB's groundwater quantity program is one of the OWRB's programs impacting surface water quality, but the Water Quality Standards Implementation Plan is not considered by OWRB while evaluating water use permit application.

60. OWRB does not consider anything related to water quality when considering whether to issue a surface or ground water quantity use permit.

61. Oklahoma has a policy to not pollute the surface waters or groundwaters of the state, and OWRB has a duty to implement that policy.

62. The Court finds, that the OWRB does not sufficiently consider water quality or waste by pollution of surface water when evaluating groundwater permit applications.

63. The Court further finds that the OWRB does not reference or implement its Water Quality Standard Implementation Plan in groundwater permit consideration or issuance.

64. Plaintiffs contend that, since the OWRB issued Tran & Nguyen PTPs to withdraw and use water within their CAFO, pollution runoff from the chicken houses crosses onto Plaintiffs' lands.

65. Plaintiffs contend that, since the OWRB issued Tran & Nguyen PTPs to withdraw and use water within their CAFO, Plaintiffs have been negatively impacted by pollution that entered Plaintiffs' property from Tran & Nguyen's CAFO. Plaintiffs contend they do not let their kids play outside like they used to play, and that Plaintiffs are unable to have gatherings and celebrations like they used to. Plaintiffs contend that CAFO wastes and pollution are crossing onto their properties from Tran & Nguyen's CAFO,

nutrients from the manure are “fertilizing” the lawn, that the liquid waste flowing onto Plaintiffs’ property stinks of a gassy, rotten smell, and that the stinky liquid pollution is in Plaintiffs’ lawns, right next to their homes, and it remains there. In Ms. Cochran’s opinion, Tran & Nguyen’s poultry CAFO is the cause of the liquid pollution that enters Ms. Cochran’s yard, some of which remains standing on her yard, and some of which passes to Saline Creek.

66. Further, since the OWRB’s issuance of PTPs to Tran & Nguyen, Ms. Cochran contends that she lacks adequate water from her groundwater well to accomplish multiple ordinary domestic tasks at the same time, for instance she cannot wash dishes at the same time someone is using the shower, or cannot use the sink during those same activities. Ms. Cochran contends that, within the prior month, she replaced her well pump but those problems persist, and that the pump that was replaced was still good.

67. The OWRB contends that the issue of pollution emanating from Tran & Nguyen’s CAFO is outside the jurisdiction of the OWRB and, in fact, that the OWRB is precluded from investigating the matter. OWRB contends that the OWRB is precluded from evaluating whether pollution is occurring at Tran & Nguyen’s CAFO unless and until the Department of Agriculture notifies the OWRB that waste by pollution is occurring. However, OWRB has not forwarded Plaintiffs’ complaints to the Department of Agriculture, Transcript despite asserting that if the OWRB received complaints from Plaintiffs which were under the Department of Agriculture’s jurisdiction that OWRB would forward such complaints to the Department.

68. The OWRB contends that Tran & Nguyen essentially promised to not commit waste as a condition of their PTPs and this, according to the OWRB's representations, satisfies the OWRB's inquiry into the matter.

69. The Court further finds that the OWRB has been apprised of Plaintiffs' concerns regarding pollution emanating from Tran & Nguyen's CAFO site entering on Plaintiffs' property but the OWRB has neither conducted its own inquiry into the matter, has not corresponded with Plaintiffs regarding the matter, nor has the OWRB forwarded the matter on to any other agency including, notably, not to the Department of Agriculture.

CONCLUSIONS OF LAW³

³ Any finding of fact more appropriately characterized as a conclusion of law shall be incorporated herein.

1. Relevant Oklahoma Statutes do not require that the OWRB provide notice of PTPs or applications for the same. *See* 82 O.S. § 1020.10; Plaintiffs' Ex. No. 1.
2. Similarly, relevant rules of the OWRB do not require that the OWRB provide notice of PTPs or applications for the same. *See* 785 OAC 30-5-4; Plaintiffs' Ex. No. 2.
3. Agency rule and state statute provide that PTPs may be issued immediately upon the OWRB's administrative approval and at the discretion of the OWRB's Executive Director. 82 O.S. § 1020.10(A); 785 OAC 30-5-4.
4. The OWRB purports to have no policies or procedures regarding consideration and issuance of PTPs apart from internal agency evaluation of the self-labeled 'four points of groundwater law' and that such permits are issued at the sole discretion of the agency's Executive Director. While the agency is, undoubtedly, afforded

discretion in issuing such permits, the Court concludes that “discretionary power should be properly confined, structured, and checked. It may be confined by the adoption of rules or statutes. It may be structured by stating findings and reasons, and following precedent, all of which are open to the public. It may be checked by administrative review or submission to the courts. Discretion which is unfettered, i.e. exercised without guiding rules in an ad hoc manner, will be stricken down.” *Citicorp Sav. & Tr. Co. v. Banking Bd of State of Okla.*, 704 P.2d 490, 494, 1985 OK 6.

5. OWRB discretion, or even statutory direction, may lead the OWRB to consider the ‘four points of groundwater law’ when evaluating PTP applications. The Court does not conclude the OWRB abused its discretion by basing its PTP application review process upon these four provisions. However, as discussed *infra* Section VIII and as addressed further below, the Court concludes the OWRB abused its discretion in evaluating Tran & Nguyen’s PTP applications without considering how the use of the applied-for water might adversely impact waters of the state or degrade surface water quality. Phrased differently, the OWRB abuses its discretion by evaluating PTP applications solely upon ‘the four points of groundwater law and any assurances by the applicant that they will not pollute water.

I. Due Process Violations

6. Though neither agency rule nor state statute expressly require a hearing regarding PTP issuance “due process considerations necessitate that a hearing be afforded” if

a protest against a PTP is lodged. *Ricks Exploration Co. v. Oklahoma Water Resources Bd.*, 695 P.2d 498, 1984 OK 73.

7. The Court concludes, as did OWRB back in 1982, that because PTPs do not entail notice or a hearing, “where the [OWRB] timely receives a protest or objection to the application by an interested party and where the protest raises issues relevant to the [OWRB’s] authority to issue permits,” PTPs may not be summarily issued. Plaintiffs’ Ex. No. 3.
8. Though OWRB staff represented to the Court that they considered Plaintiffs’ protest to be invalid, the issued PTPs state – on their face – that they are “associated” with Permit App. 2017-583. Plaintiffs’ protest satisfies the OWRB’s standards for protests as outlined within 785 OAC 4-5-4(b). 785 OAC 4-5-4(b)(3) requires that, to be considered by the OWRB, a protest must contain “specific 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.” The Court concludes, as has the Hearing Examiner, that Plaintiffs’ protest (OWRB Ex. No. 12) satisfies this standard and the OWRB staff erred by rejecting this protest and, in doing so, violated (and continues to violate) Plaintiffs’ due process rights.
9. In Oklahoma, groundwater and the water flowing on the surface but not in a definite course is private property. *See* 60 O.S. § 60; *DuLaney v. Okla. State Dep’t of Health*, 1993 OK 113, ¶ 18, 868 P.2d 676 (“Water rights are property which are an important part of the landowners’ ‘bundle of sticks’. . . No commodity affects and concerns the citizens of Oklahoma more than fresh groundwater.”). A landowner’s “water-

related property interest alone requires that [he or she] be given notice and an opportunity to participate in a hearing whose outcome could affect their constitutionally protected rights.” *DuLaney*, 1993 OK 113, ¶ 18.

10. When a protest has been lodged, due process requires “that notice and an opportunity for a hearing must be afforded to citizenry whose health, property use, and drinking water **may be affected** by the location of [the application] site.” *See Dulaney*, 1993 OK 113, ¶16. When an application “could potentially contaminate the ground water supply—the same supply underlying the adjacent landowners’ property and which they use for drinking purposes, it is a problem which must be explained. 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.” *See id.* ¶18.
11. The Court concludes, again as did the OWRB back in 1982, that due process requires a protestant be afforded a hearing regarding the issues raised within his/her protest. *See* Plaintiffs’ Ex. No. 3. “Simply stated, provisional temporary permit applications are only approved in instances where the application is not contested and there are no protests filed.” *Id.*
12. Further, PTPs can only be approved for one 90 day period pursuant to current law & agency regulations, the Court concludes that Plaintiffs have a protectable interest in their real property being free from contamination or pollution and that they are entitled to some level of process before the OWRB authorizes actions which might adversely, directly, and foreseeably impact Plaintiffs’ property. As Plaintiffs are

adjacent to Tran & Nguyen's application site, the Court concludes that due process required the OWRB to not issue Tran & Nguyen a permit(s), temporary or PTP, once Plaintiffs had lodged a protest regarding the same, until the protest has been investigated by OWRB and a hearing is provided by OWRB.

II. OWRB's Obligations Regarding Water Quality

13. The Court concludes that the OWRB is bound by the state's published public policy which: designates pollution of waters of the state to be a public nuisance; conserves water resources; prevents pollution; and protects, maintains, and improves waters of the state. 82 O.S. § 1084.1. To carry out the above policy objectives, the state has expressly directed OWRB "to cooperate with other agencies of this state, agencies of other states and the federal government. . . ." 82 O.S. § 1084.1.
14. The Court concludes that in undertaking water permitting decisions without investigating Plaintiffs' concerns regarding pollution and water quality degradation or without forwarding those concerns on to a more appropriate agency (as Mr. Wilkins testified the OWRB would do), the OWRB violated its obligations to cooperate with the other agencies of the state in carrying out the state's policies regarding pollution of waters of the state.
15. The Court concludes that the OWRB is responsible for the state's "anti-degradation" policy and implementation, and policies generally affecting Oklahoma Water Quality Standards application and implementation" as well as "[g]roundwater protection for activities subject to [its] jurisdictional areas of environmental responsibility." 27A O.S. § 1-3-101(C)(9) & (10); *see also* 82 O.S. § 1085.30(C)(1)

(“Oklahoma Water Quality Standards, their accompanying use support assessment protocols, anti-degradation policy and implementation, and policies generally affecting Oklahoma Water Quality Standards application and implementation . . . shall be enforced by all state agencies within the scope of their jurisdiction.”). The OWRB is responsible for establishing state-wide Water Quality Standards and is also tasked with assisting state environmental agencies in formulating a plan to implement such standards over their respective environmental jurisdictions. 27A O.S. §§ 1-1-202(A)(2) & (B)(2). While the testimony and evidence presented to the Court does articulate the full scope of the OWRB’s responsibilities in these regards, the Court concludes the OWRB failed to satisfy these responsibilities (whatever that might entail) because, as the OWRB candidly admits, the OWRB undertook no actions to fulfill these obligations apart from evaluating the integrity of Tran & Nguyen’s wells. Said wells are the mechanism for Tran & Nguyen to “withdraw” water and, conceivably, the OWRB’s actions to ensure that Tran & Nguyen’s “withdrawal” of groundwater would not impair the waters of the state are sufficient to satisfy the OWRB’s obligations relating to withdrawal. However, in addition to permitting Tran & Nguyen to “withdraw” water, the OWRB also permitted Tran & Nguyen to “use” water. The OWRB purports to have undertaken no consideration regarding how Tran & Nguyen’s “use” of water might impact the waters of the state. The OWRB erred in failing to do so. Whatever the OWRB’s obligations are in this regard, the Court concludes that the OWRB failed to meet these obligations by doing nothing.

16. The Court finds and concludes that the OWRB has, by rule, indicated its groundwater quantity program (at issue in this proceeding) impacts water quantity of the state but, again, the OWRB has wholly failed to operate its groundwater quantity program in conformance with the OWRB's Water Quality Standards Implementation Plan. *See* 785 OAC 46-17-5.

17. The Court concludes that the OWRB must consider potential water quality issues – both surface water and groundwater, unless otherwise expressly precluded – in the OWRB's withdrawal and use permitting decisions. The OWRB erred in failing to do so in evaluating Tran & Nguyen's PTP permit application(s).

III. OWRB's Serial Issuance of Provisional Temporary Permits

18. State statute and agency rule provide a PTP may not be effective for more than ninety (90) days. 82 O.S. § 1020.10; 785 OAC 30-5-4.

19. Agency rule provides that a PTP cannot be renewed. 785 OAC 30-5-4(a)

20. Though the OWRB contends it is the agency's practice to issue multiple back-to-back PTPs to a particular applicant, the Court concludes that such serial permits circumvent any meaningful effect of statute and agency rule that a PTP may neither be renewed nor be effective for a period longer than 90 days.

21. OWRB advances the argument, without frankly admitting as much, that PTP issuance is within the OWRB Executive Director's discretion and entirely unreviewable. This Court refuses to adopt such a proposition.

22. The OWRB presented argument that the agency should be allowed to permit both short-term uses as well as long-term uses through issuances of PTPs, contending

this is the current practice of the OWRB. This Court is concerned with such a proposition as PTPs may be strung together for a year or more – as is the case in this instant proceeding – without any review outside of whatever internal agency conclusions may have been had. Such a proposition is an open invitation to abuse and will not be lent any credence by this Court. The OWRB suggests, if not contends outright, that if long-term permit App. No. 2017-583 were ultimately denied – either by the agency itself or on APA appeal – that the Executive Director would not be precluded from then issuing PTPs to Tran & Nguyen for the same use of water, from the same wells, to be used in the same place. *See* Transcript 174:16 – 177:18; 200:4 – 201:1. This Court refuses to lend countenance to such proposition.

23. This Court finds that the OWRB may not serially-issue PTPs but, rather, PTPs may not extend more than ninety (90) days and are nonrenewable.

IV. Plaintiffs' Likelihood of Success on the Merits

24. State law and agency regulations “may not curtail rights guaranteed by federal law or the United States Constitution.” *Daffin v. State ex rel. Okla. Dep’t of Mines*, 251 P.3d 741, 2011 OK 22, ¶16. Satisfaction of state statute or agency rule does not necessarily meet minimum due process requirements. *See id.*
25. The Court concludes that Plaintiffs’ Due Process rights will be violated if the OWRB issues further PTPs to Tran & Nguyen without affording Plaintiffs the opportunity for a hearing, even though neither statute nor rule require such a hearing. Due process requires “a meaningful opportunity to appear and be heard,”

Daffin, 2011 OK 22, ¶16, and the OWRB is not prepared to offer Plaintiffs such opportunity.

26. The Court concludes that Plaintiffs have demonstrated a particular interest in seeing their real property free of pollution and that the OWRB has not conducted, is not conducting, and will not conduct the necessary review to ensure that the OWRB's PTP permitting decisions do not lead to direct and foreseeable pollution upon or within Plaintiffs' property.

27. The Court concludes that the OWRB has provided, and without an injunction, will provide no due process to Plaintiffs regarding PTP issuance to Tran & Nguyen. The parties do not dispute the extent of process due to Plaintiffs but, more basically, whether Plaintiffs are entitled due process. This Court agrees with Plaintiffs that they are entitled to some level of due process – such process can likely be met through a hearing – and that the OWRB is not prepared to provide Plaintiffs any level of process.

28. The Court finds Plaintiffs will likely, succeed on the merits of their current action.

V. Plaintiffs Stand to Suffer Irreparable Harm if Their Requested Injunction is not Issued

29. "Oklahoma law provides that injury is irreparable when it is incapable of being fully compensated by money damages, or where the measure of damages is so speculative that arriving at an amount of damages would be difficult or impossible."

Tulsa Order of Police Lodge No. 93 ex rel. Tedrick v. City of Tulsa, 2001 OK Civ

App 153, ¶28 39 P.3d 152 (quoting *House of Sight & Sound, Inc. v. Faulkner*, 1995 OK CIV APP 112, ¶10, 912 P.2d 357) (quotations omitted).

30. The Court concludes that Plaintiffs' denial of due process – denial to date and denial likely to continue without an injunction – constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (deprivation of constitutional rights “for even minimal periods of time, unquestionably constitutes irreparable harm”).
31. Further, the Court concludes that Plaintiffs' fears regarding pollution on their properties is currently impairing Plaintiffs' enjoyment of their homes and that it is limiting Plaintiffs' ability to gather as they have for generations. The Court concludes that such fears – reasonable as they are – if correct, would likely lead to material damage to Plaintiffs' property that cannot be undone. Environmental contamination is a pervasive problem and, specific to Plaintiffs' concerns, “The difficulty, complexity and costliness of remedying groundwater contamination is well documented [and] once seriously contaminated groundwater is often rendered unusable and cleaning it up is often unsuccessful.” *Sharp v. 251st St. Landfill, Inc.*, 1991 OK 41, ¶30, 810 P.2d 1270. The Court concludes that irreparable environmental harm is likely to result through the OWRB permitting the use of water without the agency undertaking any review of the potential adverse consequences of such use.
32. Accordingly, an injunction should issue until the OWRB can ensure that necessary pollution and depletion consideration will be undertaken and hearings will be held.

VI. Public Policy Militates Towards Granting Plaintiffs' Their Requested Injunction

33. The OWRB contends that it is the state's policy to put groundwater to expeditious use. However, OWRB contends that the administrative backlog prevents the OWRB from completing the long-term permit proceeding for 2017-583 in an expeditious fashion. Therefore, it is OWRB's contention that public policy favors granting PTPs during the protested permit proceeding. Though the Court recognizes that the OWRB and permit applicants (as well as permit protestants) may desire to have expedient resolution to contested permit proceedings, whatever the OWRB's motivation, "[t]he state's interest [in reducing administrative burdens] must be balanced against the risk of unconstitutionally depriving a property owner of an opportunity to protect his interest." *Daffin*, 2011 OK 22, ¶22. The Court does not agree that public policy favors negating Plaintiffs' due process consideration.
34. Rather, the Court concludes that Oklahoma has adopted an explicit public policy which aims to prevent pollution, to conserve water resources, and to prevent the degradation of water quality.
35. Accordingly, this Court concludes that public policy favors issuing the requested injunction.

VII. Balancing of the Equities Regarding OWRB's Serial Issuance of Provisional Temporary Permits

36. The Court concludes that Tran & Nguyen have no long-term right to a PTP and that Tran & Nguyen's PTP can be cancelled at any time. Any hardship that may befall Tran & Nguyen if they are unable to access additional groundwater through

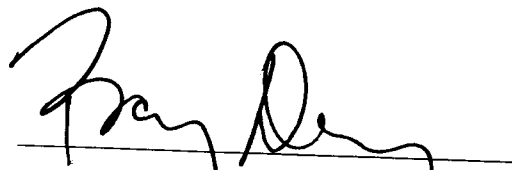
PTPs is a hardship of their own making. Tran & Nguyen had, and have, no right to the use of groundwater for non-domestic purposes outside of applicable permit proceedings. Additionally, Tran & Nguyen commenced their CAFO enterprises with this stark reality. Whatever expectations Tran & Nguyen may have had regarding their ongoing ability to obtain additional PTPs, (irrespective of whether such expectations were reasonable) those are negated by Tran & Nguyen's acceptance of the OWRB's conditions letters which state that Tran & Nguyen alone accept all risk and costs associated with their CAFO not being able to access groundwater.

37. Conversely, the Court is convinced that Plaintiffs have earnestly undertaken what they knew and understood to do in order to protect their access to modest amounts of potable groundwater for domestic needs and, relatedly, a desire to keep their ancestral lands free from pollution and in a habitable state.
38. Accordingly, the Court finds that a balancing of the equities mandates an injunction issue to prevent issuance of any additional PTP permits until Plaintiffs are provided an opportunity for hearing after OWRB has adequately investigated Plaintiff's complaints.

CONCLUSION

For the reasons stated above and herein, the Court finds that Petitioners' request for a preliminary injunction should be, and is hereby, GRANTED.

Dated this 19 day of February, 2020,


Judge of the District Court

BVD/js

CERTIFICATE OF MAILING


I hereby certify that on this 19th day of February, 2020 a true and correct copy of the foregoing instrument along with all attachments thereto was deposited in the United States mail, or sent electronically, to the following:

Indian and Environment Law Group, PLLC / Jason Aamodt
Nine E.4th St.
204 Reunion Center
Tulsa, OK 74103

Oklahoma Water Resources Board
3800 N. Classen Blvd
Oklahoma City, OK 73118

Chau Tran & Donna Nguyen
7364 U.S. Hwy 412 Alt
Kansas, OK 74347
Interested Parties

Fellers Snider Blankenship
Bailey & Tippens, P.C. / Blaine Nice
100 N. Broadway, Suite 1700
Oklahoma City, OK 73102
Attorney for Chau Tran & Donna Nguyen


Julie Stonecipher