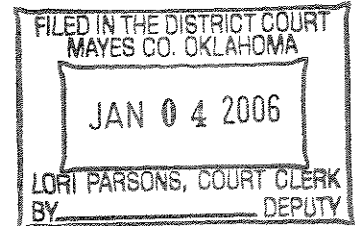


**IN THE DISTRICT COURT IN AND FOR MAYES COUNTY
STATE OF OKLAHOMA**

SPRING CREEK CONSERVATION)
COALITION, an association of individuals,)
)
Plaintiff,)
v.)
)
OKLAHOMA DEPARTMENT OF)
WILDLIFE CONSERVATION, and the)
OKLAHOMA WILDLIFE CONSERVATION)
COMMISSION,)
)
Defendants.)

Case No. CNM 05-73
Judge James D. Goodpaster



**PLAINTIFF’S REPLY IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT**

The Plaintiff respectfully submits this short reply to the *Response* filed by Defendants on December 21, 2005.

I.

**THE DEFENDANTS FAILED TO COMPLY WITH THE APA
AND THE RULE IS THUS INVALID**

The Oklahoma Department of Wildlife Conservation (the “*Department*”) is empowered by law to administer wildlife laws, rules and policies. The Oklahoma Wildlife Conservation Commission (the “*Commission*”) is empowered by law to, *inter alia*, adopt rules. See, Article 26, § 1 of the Oklahoma Constitution and 29 O.S. § 3-101(A). Thus, while the *Department* can propose rules, it cannot adopt rules – the authority to adopt rules lies solely with the *Commission*.

The Oklahoma Administrative Procedures Act (“the *APA*”) sets the procedures for adopting rules. Among those procedures is the requirement that

before an agency may adopt a rule it must “consider fully all written and oral submissions respecting the proposed rule.” 75 O.S. § 303(A)(2). It is undisputed that the *Department* proposed the fish-stocking rule and sent it out for public comment and discussion. Further, it is undisputed that the *Department* received multiple comments and discussion about its proposed fish stocking rule. The *Department* nevertheless presented its proposed rule to the *Commission* for adoption without making any changes as a result of those comments, without notifying the *Commission* of the existence or character of such comments, and without offering the *Commission* its response to those comments.

Instead, the *Commission* received only a memo from the *Department*, dated January 26, 2004, which stated that: “The consensus from those attending was in favor of all recommendations, except for the proposal to make it illegal to fillet fish on the water.” Thus, the *Commission*, the agency charged with adoption of rules, failed to consider fully all written and oral submissions respecting the proposed rule, as required by 75 O.S. 303(A)(2), and, thus, the Rule is invalid.

Moreover, neither the *Department* nor the *Commission* attempted to explain the changes or lack of changes made to the adopted Rule as a result of comments received from the public, as required by 75 O.S. 303.1(E)(8), and, thus, the Rule is invalid. The *Commission* was thus deprived of the public’s evaluation of the proposed rule. The Defendants’ contention that “*many of the comments received can and will be incorporated into the permitting process at any time, if determined to be necessary by ODWC reviewers,*” (Response Brief at p. 14), simply does not

meet the statutory requirements of the APA. Plaintiffs are not contending, as suggested by Defendants at p. 15 of their Brief, that the “*OWCC’s decisions on rulemaking and rule proposals should mirror the sentiments of the number of comments received at hearings and from correspondence, i.e., whomever has the most comments or most people expressing an opinion on an issue – wins.*” What Plaintiffs are contending is that there is a statutory duty for a rule-making agency to explain the reasons why comments should not cause a revision of the proposed Rule or how the Rule has been changed to accommodate those comments. As was stated in Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 35 (D.C. Cir. 1977):

Ensuring fair treatment for persons affected by the rule “requires an exchange of views, information, and criticism between interested persons and the agency,” and “[t]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.

Home Box Office, 567 F.2d at 35, citing Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375,393-94 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974). Defendant has failed to cite any authority in rebuttal to Plaintiff’s cases on the subject.

Two themes in defense of the validity of the Rule are developed by the Defendants in their joint Response. First, the Court is told that it is difficult to know whether a commenter is supportive of or opposed to a proposed Rule, and, therefore, the agency does not need to deal with “ambiguous” comments received from the public. See Response Brief at p. 7. (“Comments received at public

hearings do not clearly or explicitly state whether the person making the comment is “for” or “against” the proposed rule. To that end, it is mostly a subjective decision by the reviewer as to whether the commentator is stating their opposition or support for the rule as written or whether he/she is just providing a general suggestion about how they feel the rule could be improved.”) Frankly, Plaintiffs believe this argument is nothing more than bureaucratic double-speak.

Take for example the comment on the Rule that “There should be a process for opposition.” That, and requests that notice be provided to affected landowners, cannot be understood as anything but a negative comment toward the Rule *as proposed*. The response by Defendants in their brief is that the Commission has always provided ample opportunities for public input into the agency’s decision making process. See Response at p.13. The Rule itself, while suggesting the importance of public comment, does not in fact provide for a structure or process to ensure public comment. The public must not be left to content itself with *post hoc* assurances that the Defendants will do the right thing. Rather, these assurances must be secured in writing within the text of the Rule that governs this exercise of discretion. Regardless, having actually received the comments concerning public input and notice to landowners, it was incumbent on Defendants to respond to these important public concerns.

Second, the Defendants state in their Brief that the Rule was to be “a guideline with some explicit protocols, but also to have built-in flexibility for administering resource protection decisions regarding fish introductions by private

individuals when reviewed on a case-by-case basis.” See Response Brief at p. 9. The public has a right to suggest limits to the discretion or “flexibility” to be exercised by the Defendants. The *Commission*, in its promulgation and adoption of the Rule, has the duty to discuss and explain the comments and their applicability or inapplicability to the Rule. The *Commission*, never having seen the comments, was rendered unable to fulfill this duty. Allowing the Department to interpret or expand the Rule usurps the role of the Commission and runs the great risk of permitting an invalid exercise of authority.¹

The *Commission* adopted the proposed fish stocking rule without (i) considering fully all written and oral submissions on the proposed rule, contrary to 75 O.S. § 303(A)(2), and (ii) explaining the changes or lack of changes to the Rule as a result of the comments received, contrary to 75 O.S. 303.1(E)(8). This was a violation of statute. Plaintiff is entitled to Summary Judgment as a matter of law.

II.

PERMITTING THE INTRODUCTION OF TROUT IN SPRING CREEK IS AN ARBITRARY AND CAPRICIOUS ACT AND DOES NOT PROTECT OKLAHOMA WILDLIFE

¹ 75 O.S. § 302: * * *

D. An agency shall not by internal policy, memorandum, or other form of action not otherwise authorized by the Administrative Procedures Act:

(1) Amend, interpret, implement, or repeal a statute or a rule;

(2) Expand upon or limit a statute or a rule; and

(3) Except as authorized by the Constitution of the United States, the Oklahoma Constitution or a statute, expand or limit a right guaranteed by the Constitution of the United States, the Oklahoma Constitution, a statute, or a rule.

E. Any agency memorandum, internal policy, or other form of action violative of this section or the spirit thereof is null, void, and unenforceable.

Defendants assure the Court that: “[t]rout are not considered ‘undesirable species’ within the context of the Rule.” See Response Brief at p. 20. Plaintiff submits that “desirability” depends on your point of view. From the point of view of those concerned with the viability of the genetically distinct smallmouth bass that populate Spring Creek and the long-term impacts on native fishes from competition for food resources with young-of-year smallmouth bass, as discussed in the Brush Creek Report, trout is an undesirable species. As the Defendants admit in their Brief, “[i]f the [Brush Creek] study indicates anything, it is that more study is necessary before any definitive conclusions can be drawn.” See Response Brief at p. 21. As the state agency responsible for protecting the State’s natural resources, protection of native species should be most important. (This was another of those pesky comments from the public that the Commission failed to acknowledge or explain when it adopted the Rule.)

CONCLUSION

It is commendable that the *Department* sought the adoption of a rule to govern the stocking of fish. It is not commendable that the *Department* hid public comments and hid other criteria from the *Commission*, the Governor and the Legislature. The *Department* does not possess all three unseparated governmental powers (to adopt, administer and enforce rules that have the force and effect of law), as the power to adopt rules has been given separately to the *Commission*. Absent knowledgeable oversight by the *Commission*, the fallibility of the

Department cannot be tested. And it is a sign of arrogance for government employees to ignore the laws to which they are supposed to adhere and the citizens they are supposed to represent. This Court should void the fish stocking rule and retain jurisdiction of the matter until it is completely reconsidered and then adopted in full compliance with the *APA* and the approval of this Court.

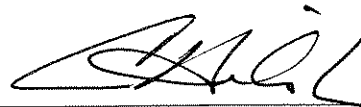
Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was furnished via regular U.S.

mail this 4th day of January, 2006, postage prepaid, to:

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