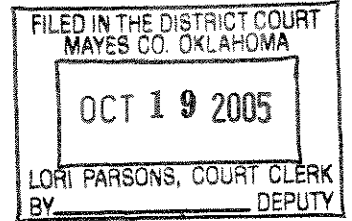


IN THE DISTRICT COURT IN AND FOR MAYES COUNTY
STATE OF OKLAHOMA



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

Case No. CNM-05-73
Judge Goodpaster

SUPPLEMENT TO MOTION FOR SUMMARY JUDGMENT

The Plaintiffs' Motion for Summary Judgment refers to the Brush Creek Study. What was actually included as the Brush Creek Study in the Appendix of Exhibits is just a portion of the Brush Creek Study. Included as a Supplemental Exhibit in support of the Motion for Summary Judgment is the complete Final Report of the Brush Creek Study.

The Final Report makes all the more clear that the use of this study to predict the long term impacts of the introduction of trout to Spring Creek is fallacious. The Brush Creek Study is limited by its own terms and cannot serve as an able and efficient predictor of future consequences, as shown more fully below. The one sentence that arguably supports the decision to stock trout in Spring Creek is immediately juxtaposed with a caution about the limits of the study:

Limited short-term stocking,¹ such as that evaluated by this study, would be unlikely to have any long-term impacts on Ozark stream ecosystems. *However, our study was relatively short-term and may have missed important effects of trout because of the inherent natural variability in these ecosystems, particularly variability in*

¹ Trout stocking in Spring Creek is now in its third consecutive year as a permit was issued on September 27, 2005, just a few days before the filing of the instant lawsuit. Three straight years can hardly be considered "limited, short-term stocking."

abiotics factors such as flow, that may have masked effects of stocking trout. Additionally, there may be long-term cumulative effects of trout stocking that may not be seen in only two years.

(Final Report, p. 5.)(Emphasis supplied.)

The Wildlife Department and Wildlife Commission's reliance on the Brush Creek Report with its uncertainties, its inconclusive results, and its flawed comparisons to Spring Creek renders the decision to stock trout in Spring Creek an arbitrary and capricious decision. "A regulation cannot stand if it is based on a flawed, inaccurate, or misapplied study. Texas Oil & Gas Ass'n v. U.S. EPA, 161 F.3d 923, 935 (5th Cir. 1998). When an agency adopts a regulation based on a study [that is] not designed for the purpose and is limited or criticized by its authors on points essential to its use sought to be made of it the administrative action is arbitrary and capricious and a clear error in judgment." Humana of Aurora, Inc. v. Heckler, 753 F.2d 1579, 1583 (10th Cir.), cert. denied, 474 U.S. 863 (1985).

A review of the complete Final Report reveals the limitations of the Study. First, Brush Creek is much smaller than Spring Creek. In fact, it is one-sixth the size of Spring Creek. (Final Report, p.3.) Although the Brush Creek Study concludes that "there is little chance that rainbow trout would establish a naturalized population in Brush Creek," it goes on to state, "However, larger streams or streams with more spring input may allow rainbow trout to survive summer conditions." (Final Report, p. 1) The researchers did not monitor temperatures downstream in Spring Creek and did not identify natural spring inputs. As a result, they concluded, "Since Spring Creek is larger and may have more cold water sources, it may be possible that rainbow trout could find areas to over-summer that weren't available in Brush Creek." (Final Report, p. 2.) Although most trout remained at the stocking site in Brush Creek, the Final Report concluded, "Movement of stocked trout, particularly in larger streams, seems likely." (Final Report, p. 2.) The Final

Report also stated that, "If rainbow trout could avoid lethal summer water temperatures by using springs as thermal refuge, they could potentially survive over-summer and have long-term impacts on native fishes," (Final Report, p. 42.) Part of the concern expressed for long-term impacts on native fishes was competition for food resources with young-of-year smallmouth bass. (Final Report, p.77-78.)

The Final Report noted that stocking rainbow trout may cause "local disruption in assemblage structures in pool habitats." (Final Report, p. 2.) The researchers found "declines in seven species, including smallmouth bass." These changes were referred to in the Final Report as a "cause for concern." (Final Report, p. 2.) The Final Report also noted, as "an additional conservation concern," that "smallmouth bass in the southwestern Ozarks, including streams in the Illinois River drainage, have been documented as genetically distinct from other interior U.S. populations (Neosho smallmouth, Stark and Echelle 1998)." (Final Report, p. 77.)

Although the Final Report observed that "overall, rainbow trout did not appear to have negative effects on the condition or reproduction of sportfish in the stream," the caveat followed closely: "However, smallmouth bass recruitment appears to be highly variable and detecting effects of rainbow trout may be difficult at the whole stream scale." (Final Report, p.2.)

Concerns for diet overlap between stocked trout and native fishes remained following the Brush Creek Study. For instance, the study was limited by the fact that it "examined diets of only a few of the native species present." (Final Report, p. 91.)

[W]e examined only 3 of at least 25 native species and rainbow trout diets may overlap with other fishes in the system. Dietary overlap with other native fishes could have a direct effect on those native fishes and could have unforeseen indirect effects on other fishes. Additionally, potential diet overlap with juvenile smallmouth bass needs to be addressed. *We feel that further research is warranted before stocking rainbow trout in northeastern Oklahoma Ozark streams.*

(Final Report, p. 92.)

CONCLUSION

The Brush Creek Study has limited application as a predictor of future consequences of trout stocking on Spring Creek. The limits of its usefulness are explored throughout the complete Final Report. If the Wildlife Department and its Director are to err on the side of caution, as Plaintiffs believe is called for as part of its conservation mission, then the Brush Creek Study makes clear that "further research is warranted before stocking trout in northeastern Oklahoma Ozark streams."

The use of the Brush Creek Study as the excuse to allow trout stocking in Spring Creek is arbitrary and capricious and should be overturned.

Respectfully submitted,

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*ATTORNEYS FOR THE PLAINTIFF
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CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on the 18th day of October, 2005, a true and correct copy of this Plaintiffs' Supplement to Motion for Summary Judgment was served, via U.S. Mail, postage prepaid, to the following:

James V. Barwick, Esq.
Office of the Attorney General
112 State Capitol
2300 North Lincoln Blvd
Oklahoma City, OK 73105-4894

In addition, this Plaintiffs' Supplement to Motion for Summary Judgment was served, via U.S. Mail, postage prepaid, on Defendants herein.



Gerald L. Hilsher