

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

FILED IN THE DISTRICT COURT
MAYES CO. OKLAHOMA

SEP 30 2005

LORI PARSONS, COURT CLERK
BY _____ DEPUTY

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**

**EXPEDITED TREATMENT
REQUESTED**

**PLAINTIFF'S APPLICATION FOR HEARING ON
PRELIMINARY INJUNCTION
AND BRIEF IN SUPPORT THEREOF**

COMES NOW the Plaintiff, Spring Creek Conservation Coalition ("Plaintiff" or "SCC Coaliton"), and, pursuant to 12 O.S. § 1384.1, respectfully requests that upon notice and hearing, this Court enter a preliminary injunction enjoining and restraining the Defendants, Oklahoma Department of Wildlife Conservation (the "Department") and Oklahoma Wildlife Conservation Commission (the "Commission"), and their agents, hereinafter referred to collectively as the "Defendants," from taking further action under OAC § 800:20-2-2 (the "Rule on Procedures and Guidelines on Fish Introductions in Waters of the State" or "Fish Introductions Rule" or "Rule") with regard to the introduction of non-native fish species into Spring Creek. For its Brief in Support of this Motion, the Plaintiff states as follows:

1. The allegations set forth in Plaintiff's Verified Petition, the matters set forth in the Plaintiff's Motion for Summary Judgment, including the Exhibits filed in

Support of the Verified Petition, all filed contemporaneously herewith, are incorporated by reference as though fully set forth herein.

2. The facts supporting this Motion are set forth in the Verification of Jennifer Owen and Affidavit of Robert D. Kellogg, attached hereto as Exhibits "A" and "B," respectively. The following is a summary of the facts:

A. The Department issued a permit on November 17, 2004 to Jerry Parkhurst of the Spring Creek Angling Club to allow the stocking of non-native fish (rainbow trout) into Spring Creek. That permit expired on June 30, 2005. On information and belief, the Department has received a request to renew that permit and currently has the request under consideration. Issuance of a renewed permit is imminent.

B. The Rule as promulgated will not protect Spring Creek and its native wildlife from potential adverse affects caused by the stocking of non-native, predatory fish (rainbow trout).

C. The Department's rulemaking records reflect that it held several rulemaking hearings at which it received many comments in opposition to the proposed Rule and suggestions to further strengthen the proposed Rule in order to protect native fish and stream ecology. The Department did not alter its proposed Rule to reflect those comments, nor did the Department offer any explanation for not doing so. The Department then advised the Commissioners who adopted the Rule that there were no adverse comments, and the Department failed to inform the Governor and the Legislature that there were adverse comments.

3. The Defendants' promulgation of the Rule was in violation of the Oklahoma Administrative Procedures Act, 75 O.S. Sections 303(A)(2) and 303.1(E)(8).

Title 75 O.S. § 303(A)(2) provides:

A. Prior to the adoption of any rule or amendment or revocation of a rule, the agency shall:

* * *

2. For at least thirty (30) days after publication of the notice of the intended rulemaking action, afford a comment period for all interested persons to submit data, views or arguments, orally or in writing. **The agency shall consider fully all written and oral submissions respecting the proposed rule;**

(Emphasis supplied.)

Title 75 O.S. § 303.1(E)(8) provides:

E. The report required by subsection A of this section shall include:

* * *

8. A summary of the comments and explanation of changes or lack of any change made in the adopted rules as a result of testimony received at all hearings or meetings held or sponsored by an agency for the purpose of providing the public an opportunity to comment on the rules or of any written comments received prior to the adoption of the rule. The summary shall include all comments received about the cost impact of the proposed rules;

4. The Defendants' promulgation and application of the Rule has and continues to result in damages to the Plaintiff, and the Plaintiff has suffered and will continue to suffer immediate, irreparable injury unless a Preliminary Injunction is issued by this Court preventing the issuance of the renewed trout stocking permit.

5. Plaintiff has sought a hearing on its request for preliminary injunction rather than a temporary restraining order in order to permit the full participation of the Defendant Department and Defendant Commission. Nevertheless, because an application

for a fish stocking permit is currently pending before those agencies, the Plaintiff requests that consideration of this Motion proceed on an *expedited* basis.

6. The Defendants herein will not be prejudiced if they are required to participate in expedited proceedings. The introduction of trout into Spring Creek, if permitted, can be performed in the latter months of 2005. The Defendants have been on notice of Plaintiff's concerns with the administrative procedure failings since mid-Summer, 2005. Furthermore, the Administrative Record filed contemporaneously with the Petition and this Motion provides a sufficient and uncontestable evidentiary basis upon which to consider and rule upon Plaintiff's Motion. The materials contained in that Record are and have been readily available to the Defendants.

6. This requested preliminary injunction is necessary to preserve the status quo and to prevent any further damages to the Plaintiff and Spring Creek.

WHEREFORE, pursuant to 12 O.S. §1381 *et seq.*, the Plaintiff requests (1) that the Court set Plaintiff's Application for a Preliminary Injunction for hearing on an expedited basis; and (2) that the Court enter a Preliminary Injunction prohibiting the Defendants from taking further action under OAC § 800:20-2-2 with regard to the introduction of non-native species into Spring Creek; and that the Court set this matter for a full hearing on Plaintiff's Motion for Declaratory Judgment as soon as possible or contemporaneously with the instant motion.

BRIEF IN SUPPORT OF MOTION

Temporary Injunctive Relief Factors

A temporary injunction should be granted in the Court's sound discretion based upon the following four factors:

1. Plaintiff is Likely To Prevail Upon The Merits. The applicant has the burden of making a "prima facie case showing of reasonable probability of prevailing on the merits," not the burden to show its right to "final decision [to] be without doubt." Roye Realty & Developing, Inc. v. Watson, 1990 OK CIV APP 21,791 P.2d 821, 821 (Okla. Ct. App. 1990), citing with approval, Williams Expl. Co. v. U.S. Dept. of Energy, 561 F. Supp. 465 (N.D.Okla. 1980). The evidence is overwhelming that Defendant's failed to follow the procedural rules of the Administrative Procedures Act and the Rule on Procedures and Guidelines on Fish Introductions in Waters of the State is invalid. (See Motion for Summary Judgment and Brief in Support Therof, incorporated by reference.) Thus, Plaintiff has made the requisite *prima facie* showing on the first factor.

2. Plaintiff will Suffer Irreparable Harm In The Absence Of Injunctive Relief. The applicant must also show that irreparable harm will result from denial of a temporary injunction. House of Sight & Sound, Inc. v. Faulkner, **1995 OK CIV APP 112**, 912 P.2d 357, 360 (Okla. Ct. App. 1995). The introduction of non-native, predatory fish species, such as rainbow trout, have the potential to affect the biointegrity of Spring Creek. Competition between trout and native smallmouth bass and sunfish for space and food can upset the natural ecological balance of the stream, adversely affecting native species. The protections requested by commenters at public hearings, were completely ignored by Defendants in the promulgation of the rule.

3. The Relative Effect On Other Interested Parties Weighs In Favor Of Injunctive Relief. The Court must consider whether the irreparable harm which would be suffered by Plaintiff outweighs any irreparable harm that would be suffered by Defendant if injunctive relief is granted. See House of Sight & Sound, Inc., 912 P.2d at 360. Plaintiffs merely seek an injunction stopping Defendants from introducing non-native, predator species of fish into Spring Creek until this matter can be resolved. A decision on a pending permit can be delayed for a short time while this matter is resolved on summary judgment. Stocking can occur, if the Court finds it may occur, in the latter months of 2005 or early 2006. Therefore, Defendants will suffer no irreparable harm. On the other hand, Plaintiff will have to deal with the introduction of a potentially invasive non-native species that has already shown an ability to survive over summer and dine on the same foodstock as smallmouth bass.

4. The public policy supports issuance of injunctive relief. The final factor the courts consider in deciding whether to grant injunctive relief is the public policy. Id. The public interest is obviously served by requiring that the public health, safety, welfare, and environment be protected from conduct resulting in noncompliance with state statutes.

Bond

The amount of an injunction bond rests within the Court's discretion. Productos Carnic, S.A. v. Central American Beef and Seafood Trading Co., 621 F.2d 683 (5th Cir. 1980). The circumstances should be examined in determining whether a nominal bond may suffice. Hoeschst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411 (4th Cir. 1999). The court should require a bond that will cover only damages that are reasonably

foreseeable, not all possible damages. Greene County Citizens United by Cumpston v. Greene County Solid Waste Authority, 636 A.2d 1278 (Pa. 1994). In addition, the court should balance the equities involved. Id.

Here, the facts justify a nominal bond or no bond in the public interest. The injunction will do the enjoined party no material damage, and in fact, no damage at all. Plaintiff simply seeks that Defendant s not be allowed to do what it may not legitimately do.

While no Oklahoma cases have been found on this issue, in cases involving an injunction sought to protect the *environment*, the federal courts have consistently held that a *nominal* injunction bond may be imposed. *People ex rel. Van De Kamp v. Tahoe Regional Plan*, 766 F.2d 1319 (9th Cir. 1985); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322 (9th Cir. 1975); *Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp. 167 (D.D.C. 1971), *affd.* on other grounds 458 F.2d 827 (D.C. Cir. 1972); *Sierra Club v. Froehlke*, 359 F. Supp. 1289 (S.D.Tex. 1973), *rev'd.* on other grounds *sub nom. Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974); *State of Ala. ex rel. Baxley v. Corps of Engineers*, 411 F. Supp. 1261 (N.D.Ala. 1976); *Save the Prairie Society v. Greene Development*, 789 N.E.2d 389 (Ill.App. 2003); *National Wildlife Federation v. National Marine Fisheries Serv.*, CV 01-640-RE and CV 05-23-RE, United States District Court, (D. Oregon, June 17, 2005) (finding no bond amount required in face of request for \$50 million bond); *Save Our Sonoran v. Flowers*, 381 F.3d 905, 915-16 (9th Cir. 2004), amended and superceded, 2005 WL 1229750 *11 (9th Cir. May 25, 2005) (It is long standing precedent that requiring nominal bonds is perfectly proper in public interest litigation).

“Where the public interest is involved, the court has greater power to fashion equitable relief in defense of the public interest than it has when only private interests are involved.” *California ex rel Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985). Accordingly, “[t]he court has discretion to dispense with [a] security requirement [as a condition to ordering injunctive relief] or to request mere nominal security, where requiring security would effectively deny access to judicial review.” *Id.*

This federal policy is based on the perception that the public interest in preserving the environment pending a hearing on the merits is more significant than the defendant's economic interest. *Tahoe Regional Plan, supra*, 766 F.2d at pp. 1325-1326; *Morton, supra*, 337 F. Supp. at p. 169. Where the plaintiff has established a probability of success on the merits and has persuaded a trial court to grant injunctive relief, the federal courts conclude that to require a plaintiff to post a substantial bond could severely impair legitimate environmental challenges, particularly from relatively impecunious plaintiffs. Any bond other than a nominal one could “effectively deny access to judicial review” or “close the courthouse door in public interest litigation by imposing a burdensome security requirement on plaintiffs who otherwise have standing” to raise an environmental challenge. *Tahoe Regional Plan, supra*, 766 F.2d at p. 1325; *Corps of Engineers, supra*, 411 F. Supp. at p. 1276; *Barahona-Gomez*, 167 F.3d at 1237 (determining \$1,000 bond in class action not to be an abuse of discretion in light of the showing that “the vast majority of aliens [affected by class action] were very poor”); *Walker v. Pierce*, 665 F. Supp. 831 (N.D.Cal. 1987); *Utahns for Better Transp. v. United States Dept. of Transp.*, 2001 WL

1739458 at *5 (10th Cir. 2001) (bond must not be set so high as to deny moving party its right to judicial review of its claims).

Defendant may not disregard the legitimate right of Plaintiff to compliance with provisions of administrative law aimed at protecting the voices of public interests critical of agency action. Defendant should not be allowed to continue to thumb its nose at the public interest in environmental integrity, which deserves protection.

CONCLUSION

The Department staff that prepared the Memorandum explaining the “Purpose/Justification/Explanation” were exactly right: Because Oklahoma streams are “delicate and susceptible to damage by unregulated fish stockings,” we should not risk compromising our native biotic communities “unless we are confident the potential for negative impact is minimal.” (Exhibit A, SCCC #00076) It is clear from the communication surrounding the trout stocking issue, (Exhibit C in the Appendix of Exhibits), that there is no confidence that there will be minimum impacts. The driving force behind accepting the Brush Creek Report, with its limitations, was the fact that the anglers desiring to fish for trout were forcing the issue with the Commission through a letter writing campaign.

Protecting the environment is important business. Short term studies cannot predict long term consequences. “The loss of genetic information or decline of native fish densities or condition [as a result of non-native fish introductions] could be devastating to our natural stream aquatic resources.” (Exhibit A, SCCC #00076)

The Department failed to follow the Administrative Procedures Act and the Rule

should be invalidated. (See Plaintiff's Motion for Summary Judgment) Trout stocking permits should not be issued pending the promulgation of a new Rule. The Department, the Commission, and their agents should be enjoined from issuing any trout stocking permits in Spring Creek until the Rule is re-noticed and appropriately promulgated.


Dated this 30 day of September, 2005.

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