

IN THE DISTRICT COURT IN AND FOR DELAWARE COUNTY,  
STATE OF OKLAHOMA

FILED

APR 12 2023

CAROLINE M. WEAVER  
DELAWARE CO. COURT CLERK

SPRING CREEK COALITION,

Petitioner,

Vs.

Case No. CJ-21-33

STATE OF OKLAHOMA, ex re.,  
THE OKLAHOMA DEPARTMENT OF  
AGRICULTURE, FOOD AND FORESTRY,

Respondent,

And

MICHAEL PHAN,

CHAU TRAN & DONNA NGUYEN,

TONG NGUYEN,

MINH NGO,

LOAN KIM VO,

And

TRAN & TRAN LLC,

Interested Parties.

ORDER

Now on this 12 day of April, 2023, there came on for ruling on the  
*MOTION TO DISMISS*, filed by the Respondent, State of Oklahoma, ex rel. Oklahoma  
Department of Agriculture, Food, and Forestry, hereinafter ODAFF, and Michael Phan, Chau

Tran & Donna Nguyen, Tong Nguyen, Minh Ngo, Loan Kim Vo, and Tran & Tran LLC, collectively referred to here in as the “Interested Parties”.

ODAFF and the Interested Parties filed separate *Motions to Dismiss*, to which the Petitioner responded. Following a hearing on February 2, 2023, the parties each submitted *Supplemental Briefs*. Having heard arguments of counsel, and reviewing the filings, the court finds as follows:

The Petitioner, Spring Creek Coalition (hereinafter “Spring Creek”) filed its *Petition* on March 3, 2021. Said *Petition* states that Spring Creek is a “grass-roots citizen group” (Oklahoma Charitable Organization) whose “purpose is to protect the water and environment within the Spring Creek watershed.” The *Petition* further states that many of its members “live, reside, own property, recreate, work or attend school or religious services in the Spring Creek watershed in Delaware County,” Oklahoma.

In addition, the *Petition* states that ODAFF is the state agency authorized to issue permits to operate poultry farms in Oklahoma and that the Interested Parties have received such permits for the purpose of operating poultry farms in the Spring Creek watershed area of Delaware County.

The essence of Spring Creek’s complaint is that by issuing operating permits to the Interested Parties, ODAFF violated the Petitioner’s substantive and procedural rights of due process, first by failing to give its members reasonable notice and opportunity to comment on the Interested Parties’ applications for operating permits, and, secondly, ODAFF’s deliberative process and application of the law when it issued such permits is a denial of substantive due process because it fails to protect plaintiffs’ interests in the air and water quality of the Spring Creek watershed.



The Interested Parties filed their *Motion to Dismiss*, on September 30, 2022 and therein alleged that Spring Creek lacks standing to invoke this court's jurisdiction over its claims against ODAFF and the Interested Parties. Specifically, this *Motion* argues that the *Petition* only alleges the possibility of injuries arising from the chicken farming operations and does not allege specific damages suffered by Spring Creek or its members.

The Oklahoma Supreme Court in *Oklahoma Public Employees Association v. Ok Department of Central Services*, 2002 OK 71; 55 P3d 1072, stated "We have said that an association possesses standing to seek relief on behalf of its members." Then, refers to its findings in *Private Truck Council of America, Inc., v. Oklahoma Tax Commission*, 1990 OK 54; 806 P2d 598, 607, to-wit:

"The Supreme Court of the United States "has recognized that an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity." In determining whether an association has standing, the United States Supreme Court has recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

It appears to this court that Spring Creek meets all three of these requirements. First, It alleges that many of its members "live, reside, own property, recreate, work or attend school or religious services in the Spring Creek watershed in Delaware County." These activities are each afforded some level of protected interest with regard to water and air quality. The Oklahoma Environmental Quality Act, Title 27A O.S. §1-1-201(10) (16) provide as follows:

10 "Pollution" means the presence in the environment of any substance, contaminant or pollutant, or any other alteration of the physical, chemical or biological properties of the environment or the release of any liquid, gaseous or solid substance into the environment in quantities which are or will likely create a nuisance or which render or will likely render the environment harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, or to property?  
(Emphasis added)

16 "Waste" means any liquid, gaseous or solid or semi-solid substance, or thermal component, whether domestic, municipal, commercial, agricultural or industrial in origin, which may pollute or contaminate or tend to pollute or contaminate, any air, land or waters of the state;"

**Second**, Spring Creek alleges that its purpose "is to protect the water and environment within the Spring Creek watershed." Since it seeks to enjoin ODAFF from issuing operating permits in the Spring Creek watershed, the interests it seeks to protect are germane to the stated purposes of the organization.

**Third**, Spring Creek is seeking injunctive and declaratory relief, neither of which require the individual participation of its members but if granted, would protect the rights of its individual members as well as the public interests described in 27A O.S. §1-1-201(10) (16).

The Interested Parties insist that Spring Creek has not alleged a specific harm or damage which would be necessary to support a right of standing. They say all of Spring Creek's claims are speculative or only may occur in the future, if at all. This court disagrees.

It should be intuitively obvious that raising hundreds of thousands of chickens in a confined space creates a high "possibility" of polluting the air and water of the areas around such operations. This is why the state legislature has created strict rules regulating the activity, even to the point of requiring the application for a permit to operate these farms to be renewed each year.

Our Supreme Court in *Oklahoma Education Association v. State ex rel Oklahoma Legislature*, 2007 OK 30; 158 P.3d 1058 stated that:

"When ruling on a pretrial motion to dismiss for lack of standing, the trial court, and subsequently the reviewing court, "must construe the petition in favor of the complaining party."<sup>14</sup> If the plaintiff alleges facts which are sufficient to establish standing, then the case proceeds to the next stage. . ."

Spring Creek alleges that it is entitled to notice and opportunity to be heard on any new application or annual renewal of ODAFF operating permits in the Spring Creek watershed.



ODAFF unequivocally denies that neither its administrative rules or Oklahoma Statutes require such notice.

In *PURCELL V. PARKER*, 2020 OK 83 ¶¶18-19; 475 P3d 834 the Oklahoma Supreme Court addressed the overarching importance of ground water and due process notice of activities which could cause pollution of the waters in our states, to-wit:

¶18 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. *Dulaney* involved an applicant for a landfill permit from the Oklahoma State Department of Health. Landowners who owned real property and mineral interests adjacent to the application site, requested an evidentiary hearing which the Health Department denied before issuing the permit. The Landowners filed a lawsuit challenging the applicable administrative rules and statutes.

¶19 The permit applicant and Health Department argued that the Landowners had no statutory or constitutional right to notice or an opportunity to be heard. We held that minimum standards of due process require that administrative proceedings, which may directly and adversely affect legally protected interests, be preceded by notice calculated to provide knowledge of the exercise of adjudicative power and an opportunity to be heard. We also stated that:

¶18 Even if we were not convinced that adjacent landowners had constitutional rights sufficient to require the application of due process, we would be constrained to hold that, under the facts presented, these landowners are entitled to notice and an opportunity to be heard. Water rights are property which are an important part of the landowners' "bundle of sticks." 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. Here, evidence was presented that drilling operations, which the mineral interest owners are entitled to engage in on the landfill site, 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. It would be incongruous to protect oil and gas interests and to ignore the protection of fresh water. If we continue to do so, the price of a barrel of water will exceed the price of a barrel of oil. [This has happened before. See R. Kerr, *Land, Wood & Water*, Ch. 3, p. 44 (Fleet Publishing Co. 1960).]

While the appropriation and use of water in this cause may or may not involve potentially contaminating the ground water supply, the same principles still apply and the same "bundle of sticks" exist as to the petitioners in this cause. Accordingly, notice must be reasonably calculated to provide knowledge of the existence of an adjudicative power and an opportunity to be heard.



When construing Spring Creek's *Petition* in its most favorable light, the court finds that the Petitioner alleges that its members have protected rights and interests in the environmental quality of the Spring Creek watershed and are entitled to notice and should be afforded an opportunity to be heard when ODAFF considers applications for chicken farm operating permits in this area. This allegation is sufficient to allow Spring Creek to proceed to the next level in litigation. It's entirely possible that after this issue is fully developed and properly presented, this court may find that Spring Creeks' due process rights are otherwise protected and rule against it's claims. But for the present time, they may proceed with this case.

In its *Motion to Dismiss*, ODAFF adopted the forgoing argument propounded by the Interested Parties and in addition, allege that Spring Creek lacks standing because it has not availed itself of other opportunities under the Department's administrative code. The Oklahoma Administrative Code §35:1-5-1 provides that:

Any person who alleges that any rule or order of the State Board of Agriculture interferes or impairs, or threatens to interfere with or impair a legal right of that person may petition the Board and request a declaratory ruling on the applicability of the rule or order. (Emphasis added)

It should be noted that §35:1-5-1 uses the permissive "may" instead of the restrictive "shall", when describing the Declaratory Action option. Spring Creek didn't "request a declaratory ruling" but instead sent nine letters of protest, which made their way to Teena Gunter, General Counsel Director, Agricultural Environmental Management Services, Oklahoma Department of Agriculture, Food and Forestry. Ms. Gunter in an email dated December 30, 2020 told Spring Creek's attorney, Matthew Allison: *"The letter of protest can be addressed to me. You can use email or hard copy. Our street and mailing address are the same and they are in my signature."* In a separate email to Mr. Allison on the same date, Ms. Gunter

says: “Generally speaking, there is no formal method for protesting a poultry facility. However, you can send a letter of protest to me. Another method would be to use the Declaratory Action procedures found at PAC 35;1-5-1 et seq. If you choose the dec action, any filing would go to the Executive Secretary of the Board, Kandi Batts, at the same address.” (See *RESPONDENT THE OKLAHOMA DEPARTMENT OF AGRICULTURE, FOOD AND FORESTRY MOTION TO DISMISS* Exhibit “A”)

During the hearing of this matter, counsel for ODAFF stated that even if Spring Creek had elected to request a Declaratory Action under the administrative code, it would have been denied because ODAFF followed the law when it issued the operating permits in question. Specifically, counsel stated that so long as the applicant meets all of the regulatory requirements (checks all the boxes), the permit will be issued regardless of “protests” by adjacent landowners or others with protected interest within the Spring Creek watershed. Further, counsel stated that the permits issued to the Interested Parties met all of the regulatory requirements.

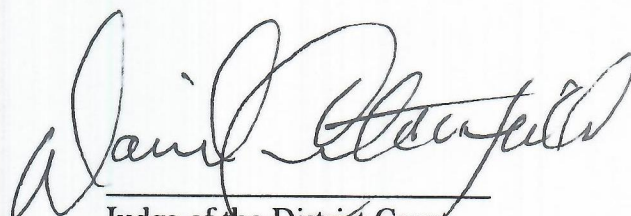
In *Lone Star Helicopters, Inc. v. State*, 1990 OK 111, ¶6, 800 P2d 235, 237, the Oklahoma Supreme Court held that: “Exhaustion of an administrative remedy is generally a prerequisite for resort to the courts,<sup>11</sup> but the doctrine will not bar a district court action that bypasses the agency's own rule-prescribed mode for processing a complaint *if the administrative remedy is unavailable, ineffective or would be futile to pursue.*<sup>12</sup>


General Counsel Gunter’s email to Matthew Allison on December 30, 2020, was deceptive. She may not have intended to deceive but her email presents Spring Creek with false alternatives—you can either send your letter of protest to me or use the Declaratory Action under OAC 35:1-5-1. She didn’t tell Allison that if you choose to send me your letter of protest, I’ll throw it in the trash and forget the whole thing. The email suggests that the protest letter would



get the same attention as a petition for Declaratory Action. When this fact is coupled with trial counsel's statement that all the boxes were checked and therefore the result would have been the same in a Declaratory Action, it leads the court to believe that the administrative process is not being used to provide a forum to chicken farm constituents to protect their interests. To now dismiss this action and require Spring Creek to back-track through the administrative process only to arrive at the same conclusion, would be a futile effort and the results would be ineffective. For this reason and those previously enumerated, the *Motion's to Dismiss* filed by ODAFF and the Interested Parties are each denied.

Done this 11 day of April, 2023

  
Judge of the District Court

CLERK  
Caroline M. Weaver, Court Clerk of Delaware County  
Oklahoma, hereby certify that the foregoing is a true,  
correct and full copy of the instrument herewith set  
out as books of record in the Court Clerk's office of  
Delaware County Oklahoma. This 11 day of  
April, 2023 By  
  
Deputy Court Clerk



CERTIFICATE OF E-MAILING

Now on this 13th day of April, 2023, I certify that a true and correct copy of the foregoing was e-mailed to all counsel in this case:

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A handwritten signature in blue ink, appearing to read 'Melissa Carpenter', is written over a horizontal dashed line.

Melissa Carpenter  
Secretary/Bailiff for  
Associate District Judge  
Dave Crutchfield