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## Notice to Fresh Water Rights Owners of OCC Hearings: Oklahoma Ex Rel. Corporation Commission v. Texas County Irrigation & Water Resources Association

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# NOTES AND COMMENTS

## NOTICE TO FRESH WATER RIGHTS OWNERS OF OCC HEARINGS: *OKLAHOMA EX REL. CORPORATION COMMISSION v. TEXAS COUNTY IRRIGATION & WATER RESOURCES ASSOCIATION*

“Water is the principal, or the element, of things.”<sup>1</sup>

### I. INTRODUCTION

No living thing can exist without water.<sup>2</sup> Water is also useful in engineering, specifically in enhanced recovery projects for increasing oil production.<sup>3</sup> In *Oklahoma ex rel. Corporation Commission v. Texas County Irrigation & Water Resources Ass'n*,<sup>4</sup> these interests clashed. The Oklahoma Supreme Court ruled that owners of fresh water rights were not entitled to notice of Oklahoma Corporation Commission (OCC) hearings on applications to conduct enhanced recovery operations, even though fresh water may be used as a component of the injection fluid.<sup>5</sup> The court based its ruling on a determination that the interests of fresh water rights owners were not at stake in the OCC hearings.<sup>6</sup> However, this determination is erroneous because enhanced recovery operations, when they use fresh water, potentially cause pollution and depletion of nearby fresh groundwater.<sup>7</sup> In effect, owners of nearby groundwater

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1. THE GREAT THOUGHTS 412 (George Seldes, ed. 1985) (attributed by Aristotle to Thales of Miletus, Semitic founder of Greek sciences and philosophy).

2. WILLIAM K. PURVES & GORDON H. ORIANS, LIFE: THE SCIENCE OF BIOLOGY 35 (1983).

3. Interview with Ekrem Kasap, PhD., Assistant Professor of Petroleum Engineering at the University of Tulsa, in Tulsa, Okla. (Sept. 17, 1992).

4. 818 P.2d 449 (Okla. 1991).

5. *Id.* at 454-55.

6. *Id.* at 452.

7. *See generally* Texas County Irrigation & Water Resources Ass'n v. Oklahoma Water Resources Bd., 803 P.2d 1119 (Okla. 1990) (challenging OWRB's determination of the maximum annual yield of groundwater over the Ogallala Groundwater Basin); Oklahoma Water Resources Bd. v. Texas County Irrigation & Water Resources Ass'n, 711 P.2d 38 (Okla. 1984) (challenging OWRB's authorization of withdrawal of fresh groundwater from the Ogallala aquifer by Mobil Corporation

rights face potential deprivation of their property interests. Therefore, because the Due Process Clause of the Fourteenth Amendment requires a state to provide notice and a hearing before depriving persons of their property, when the OCC conducts hearings on applications to conduct enhanced recovery operations, owners of property rights to fresh groundwater underlying the area around the well site are entitled to notice and an opportunity to be heard.

## II. THE LAW OF DUE PROCESS

The Fourteenth Amendment provides that no "[s]tate [shall] deprive any person of life, liberty, or property, without due process of law."<sup>8</sup> The law of due process is generally concerned with determining who is protected,<sup>9</sup> what rights are protected,<sup>10</sup> what constitutes a deprivation by a state,<sup>11</sup> and what process is due before a state may deprive a person of life, liberty, and property.<sup>12</sup> Procedural due process "delineates the constitutional limits on judicial, executive, and administrative enforcement" of the law.<sup>13</sup> It is a fundamental precept under the law of procedural due process that, in adjudicatory proceedings, a person is entitled to notice and an opportunity to be heard before he can be deprived of life, liberty, or property.<sup>14</sup> Important to the analysis of the requirements of due process as they apply to the giving of notice is consideration of the method, timing, and content of notice.

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for secondary and tertiary waterflood operations); *Texas County Irrigation & Water Resources Ass'n v. Cities Serv. Oil Co.*, 570 P.2d 49 (Okla. 1977) (challenging OWRB's authorization of withdrawal of fresh groundwater from the Ogallala aquifer by Cities Service for secondary oil recovery); *Southern Union Gas Co. v. Texas County Irrigation & Water Resources Ass'n*, 564 P.2d 1004 (Okla. 1977) (challenging the OCC's authorization of a rate increase for irrigation gas sold); *Texas County Irrigation & Water Resources Ass'n v. Dunnett*, 527 P.2d 578 (Okla. 1974) (challenging the OCC's authorization for Texaco to inject salt water into the Glorieta Sand Formation, part of the Ogallala aquifer).

8. U.S. CONST. amend. XIV. Due process is a "living principle" that changes to embrace new concepts of reasonable treatment. *Frank v. Maryland*, 359 U.S. 360, 371 (1959).

9. See generally *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (holding that "person" under the Fourteenth Amendment includes lawfully admitted resident aliens as well as United States citizens); *In re Gault*, 387 U.S. 1, 13 (1967) (holding that the Fourteenth Amendment applies to children).

10. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 10-8 to 10-11, at 678-706 (2d ed. 1988). "The actual elaboration by the Supreme Court of protected interests . . . has long been an evolving process punctuated by vague generalizations and declarations of broad, overarching principles." *Id.* § 10-8, at 678.

11. See generally *Virginia v. Rives*, 100 U.S. 313, 318 (1879) (noting that the Fourteenth Amendment applies to "[s]tate action exclusively, and not to any action of private individuals"); TRIBE, *supra* note 10, §§ 18-1 to 18-7.

12. See generally TRIBE, *supra* note 10, §§ 10-12 to 10-15 (discussing the source, nature, and timing of protection).

13. *Id.* § 10-7, at 664.

14. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (involving notice

### A. *Method of Notice*

The method of notice must be reasonably calculated to apprise interested parties of the state proceeding and provide them with an opportunity to be heard.<sup>15</sup> Because of the occasional difficulties of giving proper notice and because of the state's interest in conducting certain types of proceedings without undue delay, attempts to give notice need not always succeed.<sup>16</sup> However, when a person is an interested party and therefore entitled to notice, due process requires more than a mere gesture of notice.<sup>17</sup> The method of notice, to be constitutional, at least cannot be substantially less likely to inform interested parties than another available method.<sup>18</sup> Various methods of notice include personal service; certified, registered, or ordinary mail; and publication.

The most accurate method of service is personal service of written notice of a proceeding upon the interested party.<sup>19</sup> The Supreme Court held that personal service is always constitutionally sufficient.<sup>20</sup> Personal service is not always required because of the impracticability of identifying and locating all interested parties in some situations.<sup>21</sup>

Service of notice by registered or certified mail is another accurate method of providing notice because, in part, a return receipt is provided.<sup>22</sup> However, an actual return of the receipt is not required.<sup>23</sup> Notice by mail is constitutionally adequate when the identity and location of interested parties is known or can be reasonably determined and when the costs of personal service would be prohibitively high.<sup>24</sup> Sometimes, service by ordinary mail is sufficient to satisfy due process

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given in a New York state proceeding held to settle accounts of participants in a common trust fund); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1074, at 456 (2d ed. 1987).

15. *Mullane*, 339 U.S. at 314.

16. *TRIBE*, *supra* note 10, § 10-15, at 732-33 ("The constitutionality of a particular notice mechanism is not to be judged by its actual success. . .").

17. *Mullane*, 339 U.S. at 315.

18. *Id.* The method of notice that is not substantially less likely to inform interested persons than other available methods is allowed only where "conditions do not reasonably permit" the giving of notice that is reasonably certain to inform interested parties. *Id.*

19. FED. R. CIV. P. 4(i)(1)(C) advisory committee's note.

20. *Mullane*, 339 U.S. at 313.

21. *Id.* at 314 ("Personal service has not in all circumstances been regarded as indispensable to [due process].").

22. *WRIGHT & MILLER*, *supra* note 14, § 1074, at 457-58.

23. *Nikwei v. Ross Sch. of Aviation, Inc.*, 822 F.2d 939, 945 (10th Cir. 1987); *Yox v. Durgan*, 302 F. Supp. 1262, 1263 (E.D. Tenn. 1969).

24. *Mullane*, 339 U.S. at 319; *Menonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983); *WRIGHT & MILLER*, *supra* note 14, § 1074, at 458 & n.6 (noting that service by registered or certified mail has been "of unquestioned validity" since 1912).

requirements.<sup>25</sup>

Notice by publication in a newspaper is one of the methods that is least likely to inform interested persons of pending proceedings.<sup>26</sup> Therefore, notice by publication is generally held insufficient when the identity and location of interested parties are known or can be reasonably determined.<sup>27</sup> Such people can be "notified by more effective means such as personal service or mailed notice."<sup>28</sup> Notice by publication in a newspaper, however, will be considered adequate where "it is not reasonably possible or practicable to give more adequate warning."<sup>29</sup> When, however, notice by publication is used, the notice will be held to a higher standard of accuracy,<sup>30</sup> although it need not be perfectly accurate.<sup>31</sup> Notice by publication may be sufficient for interested parties whose whereabouts cannot be determined with due diligence.<sup>32</sup> Although a final standard for due diligence has not been articulated,<sup>33</sup> courts will consider the nature of the proceeding and of the interests at stake in it.<sup>34</sup>

### B. *Timing of Notice*

The opportunity to be heard is of little or no value unless it is

25. FED. R. CIV. P. 4(c)(2)(C)(ii). Rule 4 authorizes service of notice by first class mail upon competent adults and certain types of organizations. *Id.*

26. *Mullane*, 339 U.S. at 315.

27. *Id.* at 315-16; *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962); WRIGHT & MILLER, *supra* note 14, § 1074, at 461-62. The Court also addressed notice by a combination of publication and posting in *Schroeder*. The City of New York planned to hold condemnation proceedings under the New York City Water Supply Act to divert water from a river that supplied the property of a state resident. Local law required the corporation to publish notice in several newspapers and to post handbills of the notice in "conspicuous" places around the area to be affected. Applying the standard set out in *Mullane*, the Court held that the notice by publication and posting was insufficient under the Due Process Clause of the Fourteenth Amendment. Indispensable to the decision was the Court's finding that the property owner's name and address were easily determinable from deed records and tax rolls and that neither the newspaper notices nor the posted handbills contained the name of the property owner. *Schroeder*, 371 U.S. at 210.

28. *Adams*, 462 U.S. at 791.

29. *Mullane*, 339 U.S. at 317.

30. *Grannis v. Ordean*, 234 U.S. 385, 395 (1914) (noting that the need for accuracy in the spelling of the interested party's name is more crucial when the exclusive method of notice is by publication).

31. *Id.* "[E]ven in names, 'due process of law' does not require ideal accuracy." *Id.* at 395-96 (recognizing generally accepted conventions of the spelling of names).

32. See *Mullane*, 339 U.S. at 317. The Court also noted that the interests of those parties who were absent from the proceedings would be represented by those who were present. *Id.* at 319 ("any objections [by parties present] sustained would inure to the benefit of all").

33. *Id.* ("Whatever searches might be required in another situation under ordinary standards of diligence. . .").

34. *Id.* The Court noted that the costs of periodic investigations into the locations of many of the interest holders would consume much of the benefit of the investment fund. *Id.* at 317-18.

“granted at a meaningful time and in a meaningful manner.”<sup>35</sup> In *Mullane v. Central Hanover Bank & Trust Co.*,<sup>36</sup> the Court recognized the inherent value<sup>37</sup> of the right to be heard. The right has “little reality or worth” unless the interested person is made aware of the matter so that he can decide whether to attend upcoming proceedings and contest the action or to default.<sup>38</sup> Hearings should be held before the proposed state action because, generally, post-deprivation hearings are constitutionally insufficient to cure a lack of notice.<sup>39</sup>

### C. Content of Notice

The requirement that notice be reasonably calculated to inform interested parties of an action speaks not only to the method and timing of the notice, but also to its content. From this requirement it follows that the content of the notice must give the interested party sufficient information to decide whether to appear at the hearing.<sup>40</sup> In *Schroeder v. City of New York*,<sup>41</sup> the Court noted that the insufficient notice provided by

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35. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

36. 339 U.S. 306 (1950).

37. *TRIBE*, *supra* note 10, § 10-7, at 666. One proposition is that the right to be heard has intrinsic value because it recognizes the “dignity as persons” of citizens by allowing them a voice in government action; it is the “antithesis of power wielded without accountability to those on whom it focuses.” *Id.*

38. *Mullane*, 339 U.S. at 314.

39. *TRIBE*, *supra* note 10, § 10-7, at 673 (“[O]ne should be able to continue living in quiet enjoyment of liberty or property unless and until there has been a fair determination that the state is entitled to intrude. . .”).

Against the general proposition that a hearing must precede a deprivation, the Supreme Court has found that a pre-deprivation hearing is unnecessary in extraordinary situations where the state can establish a valid interest in delaying the hearing until after the deprivation. *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (striking down a Connecticut statute requiring prepayment of costs for a divorce hearing as violative of indigents’ due process rights). For example, states are not required to provide pre-deprivation hearings if providing such would be impracticable. *Id.* at 379. A pre-deprivation hearing may not be required if a delay would result. *Barry v. Barchi*, 443 U.S. 55, 63-64 (1978) (upholding state’s temporary suspension of a jockey’s racing license on suspicion of racing a drugged horse, in part because the state suspended the license only after a preliminary determination by an expert that the horse was drugged). Post-deprivation hearings may be allowed when notice prior to the deprivation would allow a person to evade legitimate state action. *Mackey v. Montrym*, 443 U.S. 1, 15 (1978) (upholding a Massachusetts statute providing for immediate suspension of driver’s license for refusal to take breath-analysis test because, in part, deprivation would occur only after encounter with a trained police officer). These decisions denoting exceptions to the general proposition seem to be based on minimizing the risk of erroneous deprivations rather than on the inherent value of process in the relationship between a government and its people. *TRIBE*, *supra* note 10, § 10-7, at 666.

The discussion of circumstances under which a pre-deprivation hearing is constitutionally permissible is intentionally brief because it is not an issue in this case. The OCC rules provide for a public hearing on an application for permission to conduct enhanced recovery operations; therefore, Oklahoma has not attempted to establish a legitimate state interest in delaying hearings. *OKLA. ADMIN. CODE* 165:5-7-27(e) (1992).

40. *See Mullane*, 339 U.S. at 314.

41. 371 U.S. 208 (1962).

the city concerning condemnation proceedings did not discuss the action a property owner could take to receive compensation for resulting damages or the time limits for filing such a claim.<sup>42</sup> Notice of a proceeding should contain not only the time and place of the proceeding but also information concerning its nature and options available to the interested party.<sup>43</sup>

To summarize, the notice of a state proceeding affecting life, liberty, or property interests must be reasonably calculated to inform interested persons of the proceeding and provide them with an opportunity to be heard.<sup>44</sup> To comply with this requirement, the method of notice must be reasonably certain to actually inform the interested persons,<sup>45</sup> the timing of the notice must usually precede the deprivation,<sup>46</sup> and the content of the notice must be such that an interested party will be able to decide whether to contest the proposed deprivation.<sup>47</sup>

### III. DUE PROCESS AND ADMINISTRATIVE AGENCIES

The OCC is the administrative agency responsible for reviewing applications to conduct enhanced recovery operations,<sup>48</sup> and it must observe the requirements of due process in its actions. Administrative agencies conduct some proceedings which are characterized as legislative in nature — rulemaking — and some which are judicial in nature — adjudication of disputed facts.<sup>49</sup>

According to the Supreme Court, where an administrative action affects more than a few people who are equally situated, an agency is not required to provide those people with an opportunity to be heard.<sup>50</sup> In such instances, the agency action is properly characterized as rulemaking

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42. *Id.* at 210.

43. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264 (1987); *TRIBE*, *supra* note 10, § 10-15, at 732 n.6.

44. *Mullane*, 339 U.S. at 314.

45. *Id.* at 315. At the least, the notice must not be substantially less likely to actually inform interested persons than another available method. *Id.*

46. *TRIBE*, *supra* note 10, § 10-7, at 673.

47. *See Brock*, 481 U.S. at 253; *TRIBE*, *supra* note 10, § 10-15, at 732 n.6.

48. OKLA. ADMIN. CODE 165:10-15-14(b) (1992).

49. BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 5.6, at 232 (3d ed. 1991). The difference between the two functions are illustrated by two United States Supreme Court decisions, *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), and *Londoner v. Denver*, 210 U.S. 373 (1908). *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973) (naming *Bi-Metallic* and *Londoner* as the illustrative cases).

50. *Bi-Metallic*, 239 U.S. at 445-46. The Court held that property owners were not entitled, under the Due Process Clause of the Fourteenth Amendment, to a hearing concerning an order of the Colorado Tax Commission and the State Board of Equalization increasing by 40% the value of taxable property in Denver. *Id.* at 443; *see also* SCHWARTZ, *supra* note 49, § 5.6, at 224-25.

or legislative, and the political process protects the interests of affected persons.<sup>51</sup> On the other hand, where the administrative action affects only a few particularly situated people, an agency is required to provide those people with an opportunity to be heard.<sup>52</sup> In such instances, the agency action is similar to adjudication and, therefore, interested persons are entitled to notice.<sup>53</sup>

The Supreme Court of Oklahoma stated that the applicability of due process standards for notice of an OCC proceeding depends upon whether the Commission acts in its rulemaking or adjudicative capacity.<sup>54</sup> “Orders of an administrative body are *adjudicative* in character. They apply to named persons or specific situations and have immediate rather than future operation.”<sup>55</sup> Generally, when the agency is required to apply rules to facts in a specific situation, the agency is engaged in adjudication.<sup>56</sup>

In its adjudicatory proceedings, the OCC must give notice to interested parties that is reasonably calculated to inform them of the proceeding.<sup>57</sup> According to the Oklahoma Supreme Court, notice by publication of OCC drilling and spacing proceedings was insufficient where the names and addresses of producing<sup>58</sup> and non-producing mineral interest owners<sup>59</sup> were reasonably ascertainable. For such persons, notice by mail or other means equally certain to insure actual notice is “*a constitutional prerequisite in every proceeding which affects either a person’s liberty or property interests.*”<sup>60</sup>

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51. *Bi-Metallic*, 239 U.S. at 447.

52. *Londoner*, 210 U.S. at 385. The action of the Denver taxing authorities in *Londoner* illustrates adjudication by an administrative agency. The city council assessed a tax upon a particular group of landowners for the cost of paving a street adjacent to their lands. *Id.* at 374. The property owners were allowed to file complaints throughout the proceedings but were never given an opportunity to be heard. *Id.* at 385. The Court held that a taxpayer is entitled to notice of an opportunity to be heard at a fixed time and place before such a special tax becomes final. *Id.*

53. *Id.*; *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438, 441 (Okla. 1986); SCHWARTZ, *supra* note 49, § 5.6, at 232-33.

54. *Harry R. Carlile Trust*, 732 P.2d at 441.

55. *Id.* at 442 (emphasis in original). In contrast, the court noted that rulemaking involves promulgation of regulations that are general in application, legislative in nature, and operative in the future. *Id.* at 441.

56. *Id.* at 442.

57. *Id.* at 443.

58. *Cravens v. Corporation Comm’n*, 613 P.2d 442, 444 (Okla. 1980).

59. *Harry R. Carlile Trust*, 732 P.2d at 443-44.

60. *Id.* at 444 (emphasis in original).



IV. *OKLAHOMA EX REL. CORPORATION COMMISSION V. TEXAS COUNTY IRRIGATION & WATER RESOURCES ASSOCIATION*<sup>61</sup>

A. *The Facts*

In 1985, Mobil Oil Corporation and Anadarko Petroleum Corporation applied for OCC authorization to convert ten wells in the West Hough Morrow Unit in Texas County<sup>62</sup> of western Oklahoma to enhanced recovery injection wells.<sup>63</sup> In 1986, Mobil and Anadarko sought OCC permission to amend several of the orders to broaden the range of permissible injection fluids.<sup>64</sup> Mobil and Anadarko sought permission to conduct the injection operations in order to increase oil production from the wells.<sup>65</sup> The Texas County Irrigation and Water Resources Association (County Water), a non-profit corporation representing property owners and business people—owners of water rights—located in Texas County,<sup>66</sup> opposed the oil companies before the OCC.<sup>67</sup> County Water was concerned with the pollution and depletion of area fresh water.<sup>68</sup> The OCC granted the orders and the amendments.<sup>69</sup>

The Oklahoma Court of Appeals reversed the OCC's orders,<sup>70</sup> holding that the notice given, as required by the OCC rules, violated the due process rights of owners of property rights in the water surrounding the injection wells. According to the appellate court, OCC notice did not notify all interested parties and did not specify that fresh water would be used as an injection fluid.<sup>71</sup> Additionally, the court held that the OCC had erred in granting Anadarko's application because Anadarko did not have a permit to use fresh water from the Oklahoma Water Resources Board (OWRB).<sup>72</sup>

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61. 818 P.2d 449 (Okla. 1991).

62. Transcript of testimony at 15, lines 13-15, *In re* Mobil Oil Corp. (Okla. Corp. Comm'n Nos. 16480, 16481, 16832-16838, 16861) (Dec. 3, 1985) (application for enhanced recovery injection wells) [hereinafter Transcript I].

63. *Id.* at 11, lines 1-5.

64. Transcript of testimony at 96, *In re* Mobil Oil Corp. (Okla. Corp. Comm'n Nos. 017106-017109) (Feb. 5, 1986) (application for enhanced recovery injection wells) [hereinafter Transcript II].

65. *Oklahoma ex rel. Corporation Comm'n*, 818 P.2d at 450.

66. Transcript I, *supra* note 62, at 21, lines 2-13.

67. *Oklahoma ex rel. Corporation Comm'n*, 818 P.2d at 450.

68. Transcript I, *supra* note 62, at 47, lines 18-23.

69. *Oklahoma ex rel. Corporation Comm'n*, 818 P.2d at 450.

70. *Texas County Irrigation & Water Resources Ass'n v. Mobil Oil Corp.*, No. 66,698, Summary Opinion at 2 (Okla. Ct. App. Div. 4, Nov. 4, 1988) [hereinafter Summary Opinion].

71. *Id.* at 2-3.

72. *Id.* at 3.

## B. *The Decision*

The Oklahoma Supreme Court considered the three points of the court of appeals' decision: whether surrounding owners of water rights were entitled to notice, whether the notice was required to indicate that fresh water was a component of injection fluid, and whether the oil companies needed a permit from the OWRB before the OCC could grant an application to use enhanced recovery fluids.<sup>73</sup> This note considers the first two points of the court's decision.<sup>74</sup>

In addressing the question of whether nearby owners of fresh water rights were entitled to notice, the court noted that the OCC's orders do not authorize the appropriation of fresh water in the enhanced recovery operation.<sup>75</sup> Such an order would have to be issued by the OWRB.<sup>76</sup> The court held, therefore, that the water rights owners were not affected by the OCC's orders, and that all interested parties, namely the operators of producing leaseholds within one-half mile, were notified.<sup>77</sup> In response to County Water's pollution concerns, the court stated that the OCC is empowered to protect fresh water strata from pollution and that the OCC's exercise of police power in conducting the hearing and issuing the order was due process.<sup>78</sup>

The court also held that notice did not have to specify that fresh water was a component of injection fluid because fresh water rights owners did not have to be notified.<sup>79</sup> The court stated that if water rights owners were entitled to notice, the notice would then have to indicate that fresh water was a recovery fluid.<sup>80</sup>

## VI. ANALYSIS

### A. *Water Rights and the Oklahoma Water Resources Board*

In its decision, the Oklahoma Supreme Court stressed the division of authority between the OWRB and the OCC. This section will discuss water rights and the authority of the OWRB with respect to the use of

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73. *Oklahoma ex rel. Corporation Comm'n*, 818 P.2d at 451.

74. On the third point, the court, in holding that an applicant did not need a permit from the OWRB before obtaining an order from the OCC authorizing injection operations, emphasized that the OCC's order does not authorize the taking of fresh water, only its injection. *Id.* at 455. To appropriate fresh water, an applicant would need an order from the OWRB. *Id.* A discussion of the division of authority between the OCC and the OWRB is outside the scope of a due process analysis.

75. *Id.* at 452.

76. *Id.*

77. *Id.*

78. *Id.* at 453-54.

79. *Id.* at 454-55.

80. *Id.*

fresh water. Later, the role of the OCC will be examined in relation to its duties to regulate enhanced recovery operations and prevent water pollution.

At common law, an owner of land enjoyed the right of absolute ownership of the water beneath his land.<sup>81</sup> In America, this right of absolute ownership was limited by the doctrines of reasonable use<sup>82</sup> and correlative rights.<sup>83</sup> Oklahoma adopted the rule of reasonable use, which allowed a landowner to make use of the water underlying his land in reasonable relation to the "natural use of his land."<sup>84</sup> Additionally, the landowner could not extract the groundwater from beneath his land and sell it at a place away from the land in exhaustion of the supply.<sup>85</sup>

The OWRB was created<sup>86</sup> to develop plans "to assure the best and most effective use and control of water to meet both the current and long range needs of the people of Oklahoma."<sup>87</sup> Under the Oklahoma Groundwater Law of 1973,<sup>88</sup> the OWRB is empowered to regulate the use of groundwater<sup>89</sup> and modify the property rights of landowners in the groundwater beneath their land. The law declared that the use of the state's water would be guided by a beneficial use policy.<sup>90</sup> In contrast, the previous statutory policy was one of conservation.<sup>91</sup>

Under the 1973 Groundwater Law, a landowner does not need a permit to use water from beneath his land for domestic purposes.<sup>92</sup> The landowner is subject only to sanctions against waste when he uses the water for domestic purposes.<sup>93</sup> A person intending to use groundwater for other purposes is required to file an application with the OWRB before drilling a well or using groundwater from an existing well.<sup>94</sup> The

81. *Acton v. Blundell*, 12 M. & W. 324, 354; 152 Eng. Rep. 1223, 1235 (Exch. 1843).

82. *Patrick v. Smith*, 134 P. 1076 (Wash. 1913).

83. *Katz v. Walkinshaw*, 74 P. 766 (Okla. 1903).

84. *Canada v. City of Shawnee*, 64 P.2d 694 (Okla. 1937).

85. *Id.* at 695.

86. 1957 Okla. Sess. Laws tit. 74, ch. 23 § 1.

87. *Id.* § 2(d). This 1957 statutory provision is identical to the current one. OKLA. STAT. ANN. tit. 82, § 1085.2(4) (West 1990).

88. OKLA. STAT. ANN. tit. 82, §§ 1020.1-.22 (West 1990 & Supp. 1993). The law was adopted in 1972, became effective in 1973, and will be referred to as the 1973 Groundwater Law.

89. *Id.* § 1020.7 (West 1990).

90. *Id.* § 1020.2. "It is hereby declared to be the public policy of this state, in the interest of the agricultural stability, domestic, municipal, industrial and other beneficial uses, general economy, health and welfare of the state and its citizens, to utilize the groundwater resources of the state. . . ." *Id.*

91. OKLA. STAT. tit. 82, § 1003 (1971). "It is hereby declared to be the public policy of this State. . . to conserve and protect the ground water resources of the State. . . ." *Id.*

92. OKLA. STAT. ANN. tit. 82, § 1020.3 (West 1990).

93. *Id.*

94. *Id.* § 1020.7. The application must be filed on a form provided by the OWRB and according to its rules and regulations. *Id.*

OWRB will then hold a public hearing on the application<sup>95</sup> where it will determine whether the applicant owns or leases land overlying a fresh groundwater basin, whether the applicant intends to put the groundwater to beneficial use, and whether waste will occur.<sup>96</sup> If the application meets these criteria, the OWRB will issue a regular permit allocating to the applicant his proportionate share of the maximum annual yield of the basin. This share is calculated by the percentage of the land he owns or leases which overlies the basin.<sup>97</sup> The OWRB determines the maximum annual yield to be produced from each basin in the state based on information in the Oklahoma hydrologic survey.<sup>98</sup>

Landowners have a recognized property interest in the fresh water underlying their lands.<sup>99</sup> The 1973 Groundwater Law modifies these rights by the concepts of beneficial use and waste.<sup>100</sup> In addition, it regulates the landowner's groundwater use by the allocation in the permit.<sup>101</sup> The owners of these property rights, even as modified, deserve constitutional protection.

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95. *Id.* § 1020.8. If the application meets the rules and regulations of the OWRB, then the applicant must comply with requirements for notice of the hearing. Any interested party is entitled to attend the hearing and present evidence supporting a protest of the application. *Id.*

96. *Id.* § 1020.9.

97. *Id.*

98. *Id.* § 1020.5.

The OWRB is charged with conducting hydrologic surveys of each fresh groundwater basin in the state at least every ten years. *Id.* § 1020.4. In determining the maximum annual yield of a basin, the OWRB must consider the land area overlying the basin, the amount of water stored in the basin, the rate of natural recharge to and discharge from the basin, the transmissibility of the basin, and the possibility of pollution of the basin from natural sources.

The Supreme Court of Oklahoma has held that despite practical problems in determining the maximum annual yield of a fresh groundwater basin, the OWRB permit to use fresh groundwater must meet all the statutory requirements including "allocation for reasonable use" and "restriction of the production" based on the hydrologic survey. *Oklahoma Water Resources Bd. v. Texas County Irrigation & Water Resources Ass'n*, 711 P.2d 38, 47-48 (Okla. 1984).

99. OKLA. STAT. ANN. tit. 60, § 60 (West Supp. 1993).

100. The OWRB defines beneficial use as the reasonably intelligent, diligent, and economically necessary use of groundwater to accomplish a lawful purpose. It defines waste as inefficient use of groundwater such that excessive losses occur, as a use that is not beneficial, or as use in excess of amounts authorized by permit. OWRB, Rules, Regulations, Modes of Procedures § 125.2 (1990). Additionally, the 1973 Groundwater Law lists ten methods of committing waste. OKLA. STAT. ANN. tit. 82, § 1020.15 (West 1990).

For discussions of beneficial use and waste, see Robert H. Anderson, *Oklahoma's 1973 Groundwater Law: A Short History*, 43 OKLA. L. REV. 1, 16-17 & 20-21 (1990); Mark D. Dickey, Note, *Effect of the Oklahoma Groundwater Law on the Common Law Right to Use Water*, 37 OKLA. L. REV. 157, 162 (1984).

101. OKLA. STAT. ANN. tit. 82, § 1020.9 (West 1990). The permit allocates to the applicant an amount of groundwater proportional to the percentage of land that the applicant owns or leases which overlies the producing basin.

## B. *Enhanced Recovery Operations and Water Pollution*

The Court relied on the fact that OCC orders do not authorize the appropriation of fresh water and, consequently, dismissed the assertion that fresh water rights were at stake in the OCC proceedings.<sup>102</sup> Therefore, the water rights owners were held not to be entitled to notice.<sup>103</sup>

### 1. An Overview of an Enhanced Recovery Operation

Enhanced recovery operations are designed to increase the quantity of oil recovered from an oil formation.<sup>104</sup> An enhanced recovery operation is the "introduction of fluid or energy into a common source of supply for the purpose of increasing the recovery of oil therefrom."<sup>105</sup> The attraction of enhanced recovery wells is obvious. The enhanced recovery operation proposed by Mobil at the hearing on its application before the OCC was estimated to produce a "significant — a very significant increase in production and the ultimate oil recovery, resulting in a positive cash flow for the conversion of the wells [into injection wells]."<sup>106</sup>

In a typical recovery operation using an injection well, a fresh water strata<sup>107</sup> lies below the surface and above the oil formation at a depth of perhaps 575 feet to 700 feet.<sup>108</sup> Beneath the fresh water strata is an oil formation, the target of the operation.<sup>109</sup> Between the fresh water strata and the oil formation is interbedding of other materials such as sand,

102. *Oklahoma ex rel. Corporation Comm'n*, 818 P.2d at 452.

103. *Id.* at 452.

104. *Id.* at 450 (discussing purpose of enhanced recovery operations).

Oil is a hydrocarbon compound that was formed millions of years ago, it has been hypothesized, by the death and accumulation of minute floating marine plants and animals such as diatoms. ARTHUR N. STRAHLER & ALAN H. STRAHLER, ENVIRONMENTAL GEOSCIENCE: INTERACTION BETWEEN NATURAL SYSTEMS AND MAN 199-200 (1973). At death, the diatoms released a small quantity of oil. *Id.* at 201. Over time, many of these small oil-containing animals accumulated in the sea water along with sedimentary rock. WILLIAM W. PORTER II, BASIC OIL GEOLOGY 104 (1974). Through complex chemical reactions, the accumulated organic materials were converted to oil and gas. EDWIN E. LARSON & PETER E. BIRKELAND, PUTNAM'S GEOLOGY 730 (4th ed. 1982).

Geologic action, "folding and faulting[.]" of oil-containing strata caused the oil to migrate to pockets or formations between rocks. PORTER, *supra*, at 104-05; LARSON & BIRKELAND, *supra*, at 731. Further migration is prevented by impermeable "roof rocks." LARSON & BIRKELAND, *supra*, at 731. These accumulations are oil pools and are the pools sought after in oil production today. *Id.* at 730-31.

105. OKLA. ADMIN. CODE 165:10-1-2 (1992).

106. Transcript I, *supra* note 62, at 57, lines 17-19.

107. A fresh water strata is one "from which fresh water may be produced in economical quantities." OKLA. ADMIN. CODE 165:10-1-2 (1992).

108. Fresh water existed at depths of 575 to 700 feet at some of the well sites at issue in the instant case. Initial Report of the Hearing Officer at 4-5, *In re Mobil Oil Corp.* (Okla. Corp. Comm'n Nos. 16480, 16481, 16832-16838, 16861) (Dec. 3, 1985) (application for enhanced recovery injection wells) [hereinafter Initial Report].

109. Interview with Ekrem Kasap, Ph.D. (Sept. 17, 1992).

shale, lime, or dolomite.<sup>110</sup> In an enhanced recovery operation, such interbedding is usually a minimum of 5,000 feet.<sup>111</sup>

A steel pipe, through which recovery fluid will be injected, is inserted into the well bore.<sup>112</sup> An outside casing and collars are placed around the pipe, and the pipe is surrounded by a shield of cement to contain the injection fluid to the formation.<sup>113</sup> Holes in the injection pipe are opened at its base next to the oil formation to allow the entry of the recovery fluid.<sup>114</sup> Recovery fluid<sup>115</sup> is injected into the well to increase the pressure in the formation.<sup>116</sup> The increased pressure in the oil formation will move or sweep the oil through the formation to other producing wells.<sup>117</sup>

## 2. Pollution Problems and Water Loss

Enhanced recovery operations present two primary problems. The first such problem is the possibility that nearby fresh water strata may be polluted by a breach of the integrity of the operation such as a crack in the protective shielding used for containment.<sup>118</sup> A crack in the protective shielding could allow injection fluid and/or oil to escape the system and migrate to a nearby<sup>119</sup> fresh water strata or to the surface.<sup>120</sup>

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110. Initial Report at 4-5.

111. Interview with Ekrem Kasap, PhD. (Sept. 17, 1992).

112. *Id.* In some of the wells at issue in the instant case, the tubing was to be two and three-eighths inch tubing. Transcript I, *supra* note 62, at 45, lines 4-9 (testimony of engineering expert for Mobil).

113. Transcript I, *supra* note 62, at 74, lines 14-15 & 25 (testimony of expert witness in engineering for Mobil that cement would be about one inch in diameter).

114. Interview with Ekrem Kasap, PhD. (Sept. 17, 1992).

115. Recovery fluids include such fluids as fresh water, salt water, carbon dioxide, residue gas, surfactants, and polymers. *Oklahoma ex rel. Corporation Comm'n*, 818 P.2d at 450. A surfactant, or surface-active agent, is "any substance that when dissolved in water or an aqueous solution reduces its surface tension or the interfacial tension between it and another liquid." *THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE* 1914 (Stuart Berg Flexner et al. eds., 2d ed. 1987). A polymer used in such an operation increases the viscosity of the water. Interview with Ekrem Kasap, PhD. (Sept. 17, 1992). Viscosity is "the property of a fluid that resists the force tending to cause the fluid to flow." *THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, supra*, at 2126.

116. Interview with Ekrem Kasap, PhD. (Sept. 17, 1992). In the instant case, Mobil proposed injecting into each well at its Postle field operation "2000 barrels of [salt] water per day at a surface pressure of 2000 psi [pounds per square inch]." Transcript I, *supra* note 62, at 40, lines 16-17; Initial Report at 4-5.

117. Transcript I, *supra* note 62, at 54, lines 21-25, and 55, lines 1-6.

118. Interview with Ekrem Kasap, PhD. (Sept. 17, 1992).

119. "Nearby" is most likely to be a distance of at least 5,000 feet. *Id.*

120. *Id.* One route to the surface may be through an abandoned well that has been improperly plugged. Before the 1930s, abandoned wells were apparently often plugged with drill dirt, mud, and, sometimes, logs. Interview with Ekrem Kasap, PhD. (Sept. 17, 1992). This type of plug effectively provides a channel through which fluids can surface. *Id.* Today, abandoned wells are plugged with cement. *Id.*

Pollution danger from a contaminant is increased if that contaminant infiltrates moving water.<sup>121</sup> For example, a contaminant may infiltrate fresh water that is within a zone of saturation of an aquifer.<sup>122</sup> Also, a contaminant that has surfaced may infiltrate a stream or other moving body of water at ground level. Infiltration of a contaminant into a moving body of fresh water could increase the scope of pollution.

Enhanced recovery operations present a second problem involving the interests of fresh water rights owners. If fresh water is used as an injection fluid, then that water, once injected, is lost from the water system if it is not recovered. If it is commingled with salt water before being injected and recovered, then the fresh water is polluted if it is not treated.

Injection fluid is used in enhanced recovery operations to replace the volume of oil produced.<sup>123</sup> In this case, the injection fluid consisted of fresh water combined with salt water.<sup>124</sup> It is injected and, if not recovered, it is permanently removed from the operation of the water cycle because it is trapped in the oil formation.<sup>125</sup> One way to determine the volume of water lost is to consider the volume of oil produced by the operation.<sup>126</sup> The amount of recovery fluid injected and, ultimately, left in the oil formation is roughly equal to the amount of oil produced.<sup>127</sup> If fresh water is mixed with salt water, injected, and recovered, then it is polluted if not treated.<sup>128</sup> Mobil's expert testified that water recovered was not treated to render it fresh.<sup>129</sup>

Enhanced recovery operations use considerable amounts of fresh

121. Interview with Ekrem Kasap, PhD. (Sept. 17, 1992).

122. *Id.* An aquifer is a formation consisting of permeable material that contains a significant quantity of producible water. A zone of saturation is a strata of water that allows water from the hydrological cycle to enter the aquifer. Anderson, *supra* note 100, at 8 (discussing hydrology and the water cycle in Oklahoma).

123. Transcript I, *supra* note 62, at 7, lines 18-24; interview with Ekrem Kasap, PhD. (Sept. 22, 1992).

124. Transcript I, *supra* note 62, at 68, lines 1-6; Transcript II, *supra* note 64, at 140-41, lines 1-7, 15-24.

125. When fresh water is used as part of the recovery fluid, it is injected into the oil formation. Interview with Ekrem Kasap, PhD. (Sept. 17, 1992). By definition, the oil of an oil pool is contained in a permeable reservoir rock capped by impermeable roof rocks which retain the oil in the pool. LARSON & BIRKELAND, *supra* note 104, at 730-31. Therefore, the water, if not recovered by the operation of a well, is lost as it remains in the formation just as did the oil before it.

126. Interview with Ekrem Kasap, PhD. (Sept. 22, 1992).

127. *Id.* This rough estimate does not, of course, consider water lost in other ways such as by spillage. Generally, the salt water is left in the formation because it is uneconomical to recover it. *Id.* The salt water is in the same predicament as the oil that it was injected to retrieve and would require that something else be injected for its recovery. *Id.* Nothing else is injected because salt water is generally the least expensive recovery fluid. *Id.*

128. "'Pollution' means contamination or other alteration of the physical, chemical or biological properties of any natural waters of the state. . . ." OKLA. STAT. ANN. tit. 82, § 926.1 (West 1990).

129. Transcript II, *supra* note 64, at 141, lines 11-14.

groundwater. At the 1985 hearing on Mobil's application to convert ten wells into injection wells,<sup>130</sup> Mobil proposed to inject 2,000 barrels of injection fluid at a surface pressure of 2,000 p.s.i. per day into each well.<sup>131</sup> The proposed injection fluid was to consist of a combination of approximately fifteen to twenty parts salt water and one part fresh water.<sup>132</sup> The fresh water was to be taken from the Ogallala<sup>133</sup> from local water supply wells.<sup>134</sup>

At the 1986 hearing on Mobil's application to amend the orders authorizing the injection of salt water to permit the injection of enhanced recovery fluids,<sup>135</sup> Mobil stated that it planned to conduct water-after-gas recovery operations<sup>136</sup> in which salt water and carbon dioxide gas are alternately injected.<sup>137</sup> Again, the salt water to be injected was a mixture of salt water and fresh water.<sup>138</sup> Mobil stated that the proposed project would last about twenty-three years,<sup>139</sup> and, this time, approximately 10,000 of the 74,000 barrels of the recovery fluid to be injected each day would be fresh water.<sup>140</sup> Mobil's proposed salt water and gas injection plan would increase its recovery over what it could produce with salt water alone by thirty million barrels.<sup>141</sup>

Thus, enhanced recovery operations present dual problems of water depletion and potential pollution to the fresh water strata when water is used as an injection fluid. Owners of water rights are affected by OCC orders authorizing enhanced recovery operations and should be notified of the OCC proceedings.

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130. Transcript I, *supra* note 62, at 10.

131. *Id.* at 40, lines 13-17.

132. *Id.* at 68, lines 1-6. Fresh water is mixed with the salt water for two reasons. First, fresh water is used to provide replacement volume for the oil being produced by the operation. *Id.* at 71, lines 18-24. Second, the fresh water is mixed with salt water to adjust its salinity level. Interview with Ekrem Kasap, PhD., (Sept. 22, 1992). The salinity level of the injection fluid must be compatible with that of the clay in the oil formation or the clay will swell and inhibit the oil production. *Id.*

133. Transcript I, *supra* note 62, at 68, lines 1-6.

134. *Id.* at 51, lines 15-22.

135. Transcript II, *supra* note 64, at 96. Such a change would have permitted Mobil to inject not only salt water but also anything else usable as an injection fluid including substances made available by new technology. *Id.* at 139, lines 10-13.

136. *Id.* at 140, lines 2-9.

137. Interview with Ekrem Kasap, PhD. (Sept. 22, 1992).

138. Transcript II at 140-41, lines 1-7, 15-24.

139. *Id.* at 141, lines 8-10. Injection projects began in the Morrow formation around 1964. *Id.* at 141-42, lines 1-4, 23-25.

140. *Id.* at 153, lines 6-10.

141. *Id.* at 131, lines 12-22. The 30 million barrels is not the total amount recovered by the injection operation; rather, it is the incremental increase using the water-after-gas method. *Id.*



### C. Oklahoma Corporation Commission

The court held that the OCC's hearings on the applications for permission to conduct recovery operations and its police power to control water pollution constitute due process.<sup>142</sup> Some of the OCC's authority and procedures in these areas will be discussed in this section.

The Oklahoma Constitution created the OCC.<sup>143</sup> The state legislature conferred all the authority and duties of the state government over the oil and gas industry upon the OCC exclusively.<sup>144</sup> This authority includes "the conservation of oil and gas and the drilling and operating of oil and gas wells and the construction and regulation of oil and gas pipelines."<sup>145</sup>

The Oklahoma legislature declared that it is in the public interest to protect the waters and lands of the state against pollution from oil and gas development.<sup>146</sup> Accordingly, the OCC has the authority to enact regulations for the protection of fresh water strata that might be endangered by the drilling of oil and gas wells.<sup>147</sup> The OCC has, therefore, enacted a rule prohibiting pollution by persons in the industry<sup>148</sup> and has promulgated a series of rules for pollution abatement.<sup>149</sup> With regard to the state water supply, the OCC has adopted the water quality standards of the OWRB.<sup>150</sup> The OCC has also adopted rules requiring OCC approval to engage in enhanced recovery operations,<sup>151</sup> testing and monitoring of injection wells,<sup>152</sup> and reporting of test results.<sup>153</sup>

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142. *Oklahoma ex rel. Corporation Comm'n*, 818 P.2d at 453-54.

143. OKLA. CONST. art. IX, § 15 (creating a commission of three people who serve six year terms).

144. OKLA. STAT. ANN. tit. 17, § 52 (West 1986).

145. *Id.*

146. *Id.* at tit. 52, § 309 (West Supp. 1965). For a current declaration of the policy, see *id.* (West Supp. 1992) (allowing the OCC to plug, replug, or repair oil and gas wells including injection wells).

147. *Id.* §§ 243, 273 (West 1991); *Ashland Oil, Inc. v. Corporation Comm'n*, 595 P.2d 423, 425 (Okla. 1979).

148. OKLA. ADMIN. CODE 165:10-7-5 (1992).

149. *Id.* at 165:10-7-1.

150. *Id.* at 165:10-7-4.

151. *Id.* at 165:10-5-2 to 10-5-5.

152. *Id.* at 165:10-5-6 (requiring initial and subsequent periodic mechanical tests and setting standards for those tests).

153. *Id.* at 165:10-5-7.

Pursuant to its authority, the OCC regulates enhanced recovery operations.<sup>154</sup> A person intending to engage in an enhanced recovery operation of oil must obtain an order from the OCC.<sup>155</sup> Before an order is issued there must usually be notice to interested parties and a hearing.<sup>156</sup> Interested persons have fifteen days to object to an application proposing the injection operation necessary for enhanced recovery.<sup>157</sup>

The OCC's rules require that notice of the hearing on the proposed injection well be mailed to the owner of the surface of the land where the injection well is located and to each operator of a producing leasehold within one-half mile of the well.<sup>158</sup> Additionally, the notice is to be published once in a newspaper in Oklahoma City, Oklahoma, and once in a newspaper published in the county or counties of the location of the well.<sup>159</sup> Therefore, nearby owners of rights in the water underlying the land are only accorded notice by publication.

This method of notice should be found insufficient to meet the due process rights of the water rights owners because it is not reasonably calculated to actually notify them.<sup>160</sup> Notice by newspaper publication is generally found to be insufficient as applied to those interest holders whose names and locations can be ascertained with due diligence.<sup>161</sup> The owners of the rights in the nearby groundwater are the surrounding landowners,<sup>162</sup> and their names and addresses are readily ascertainable with due diligence by a search of local deed records.<sup>163</sup> Therefore, these interested persons are entitled to personal service or, at least, service by mail.<sup>164</sup>

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154. The OCC classifies all producing oil pools and projects. One such classification is an enhanced oil recovery project. *Id.* at 165:10-15-1(a)(4). Another OCC rule specifies that "[a]n enhanced recovery project shall be permitted only by order of the Commission after notice and hearing." *Id.* at 165:10-5-4(a).

155. "For any project to qualify for an enhanced oil recovery allowable, an order of the Commission authorizing the project must be obtained." *Id.* at 165:10-15-14(b). An oil allowable is that amount of oil authorized to be produced from a well. *Id.* at 165:10-1-2.

156. *Id.* at 165:10-5-4(a).

157. *Id.* at 165:5-7-27(e).

158. *Id.* at 165:5-7-27(c). Such notice was given in the instant case. *Oklahoma ex rel. Corporation Comm'n*, 818 P.2d at 451 n.3.

159. OKLA. ADMIN. CODE 165:5-7-27(d),(e) (1992); *Oklahoma ex rel. Corporation Comm'n*, 818 P.2d at 451 n.3.

160. Notice must be reasonably calculated to actually notify interested persons of the pendency of the proceedings. *Mullane*, 339 U.S. at 314; *Bomford*, 440 P.2d at 718.

161. *Mullane*, 339 U.S. 316-316; *Schroeder*, 371 U.S. at 212; WRIGHT & MILLER, *supra* note 14, § 1074, at 461-62.

162. OKLA. STAT. ANN. tit. 60, § 60 (West Supp. 1993).

163. *Bomford*, 440 P.2d at 717-18.

164. Notice by personal service would be constitutionally adequate. *Mullane*, 339 U.S. at 313. However, they are, at least, entitled to notice by mail. *Id.* at 318.

According to OCC rules, notice of the hearing on the proposed injection well must include:

- (1) PD number [an identification number].
- (2) Name and address of applicant.
- (3) Location of proposed well to nearest 10 acre tract.
- (4) Well name.
- (5) The geological name of the injection formation.

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- (9) The type of well (injection, disposal, commercial).<sup>165</sup>

The notice does not contain information from which a person unfamiliar with injection operations could determine that fresh water might or would be used as an injection fluid.<sup>166</sup> Therefore, it does not adequately inform water rights owners that their rights are at stake in the OCC proceedings.<sup>167</sup> In fact, the court stated that if water rights owners were entitled to notice that the notice would have to specify that fresh water was used as an injection fluid.<sup>168</sup>

The court found that the OCC's procedures regarding the hearings on the applications and its authority to control water pollution constitute due process for the water rights owners.<sup>169</sup> The OCC possesses authority over the oil and gas industry within the state<sup>170</sup> and is charged with a public policy similar to its charge with respect to water pollution, namely to foster efficient development of the state's oil and gas resources.<sup>171</sup> However, operators of producing leaseholds within one-half mile of the injection wells are accorded notice of the proceeding, while water rights owners are not. Therefore, the treatment of water rights owners is not consistent with the treatment of mineral rights owners even though the interests of both groups are involved in the proceedings.

Most importantly, the right to be heard has an intrinsic value in the relationship of a government and its people.<sup>172</sup> It acknowledges the people's dignity and recognizes the accountability of the government to the

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165. OKLA. ADMIN. CODE 165:5-7-27(d) (1992) (requirements for disclosure of technical specifications omitted).

166. *Oklahoma ex rel. Corporation Comm'n*, 818 P.2d at 454.

167. *Mullane*, 339 U.S. at 314; SCHWARTZ, *supra* note 49, § 6.5, at 304 ("Specification of the issues is one of the basic elements of fair procedure and, as such, an elementary and fundamental due process requirement.").

168. *Oklahoma ex rel. Corporation Comm'n*, 818 P.2d at 453-54.

169. *Id.*

170. OKLA. STAT. ANN. tit. 17, § 52 (West 1986); *TCIWRA*, 818 P.2d at 453.

171. *See, e.g.*, OKLA. STAT. ANN. tit. 52, § 86.2 (West 1991) (prohibiting waste in the production of oil within the state and authorizing the OCC to promulgate regulations to prevent waste).

172. *TRIBE*, *supra* note 10, § 10-7, at 666.

governed.<sup>173</sup> As owners of surrounding producing leaseholds are accorded notice,<sup>174</sup> so too should the owners of fresh water rights.

#### VII. CONCLUSION

Enhanced recovery operations pose identifiable threats to fresh water and, thus, to the interests of the owners of rights in the water. The OCC conducts hearings to authorize such operations, and fresh water rights owners are entitled to notice of those hearings. Presently, the OCC's rules do not provide for notice to water rights owners. The Oklahoma Supreme Court should recognize the interests of water rights owners in the OCC hearings and their right to be accorded notice and an opportunity to be heard.

*Christopher L. Barnes*

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173. *Id.*

174. OKLA. ADMIN. CODE 165:5-7-27(c) (1992).

