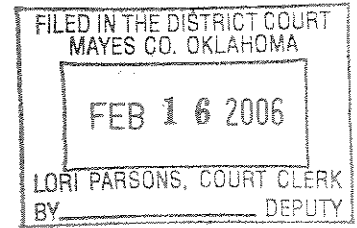


IN THE DISTRICT COURT IN AND FOR MAYES COUNTY  
STATE OF OKLAHOMA



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 James D. Goodpaster

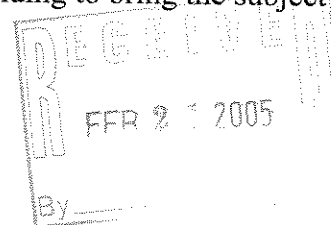
JOURNAL ENTRY OF JUDGMENT

Plaintiff's Motion for Summary Judgment came on for hearing on January 20, 2006. Plaintiffs appeared through their counsel, Gerald L. Hilsher and Charles W. Shipley. Defendants appeared through their counsel, Scott Boughton and James V. Barwick. Having considered the arguments of counsel, the briefs, and the law, the Court finds that Plaintiffs' Motion for Summary Judgment should be GRANTED.

The Court makes the following findings in support of its Order:

**A. There are no disputed material facts at issue. Specifically, the Court finds:**

1. Plaintiff Spring Creek Conservation Coalition is an unincorporated association of individual members who each own real property situated adjacent to Spring Creek in Delaware, Cherokee, and Mayes Counties or who use Spring Creek for business, educational research, and recreation, and are dedicated to the preservation of its natural biointegrity and the protection of the Spring Creek ecosystem. The Plaintiff has standing to bring the subject action.



2. Spring Creek is designated as a “High Quality Water” by Oklahoma’s Water Resources Board. Additionally, although not presented as an undisputed material fact in the Plaintiff’s Motion, Plaintiff did present argument concerning the importance of Spring Creek as a “Reference Stream.” That assertion was not challenged by defendants. Further, documentation presented by Plaintiff (and authored by Defendant Department) stating the reasons behind the Department’s 1999 denial of a trout stocking permit for Spring Creek, discussed the fact that: “Spring Creek has frequently been listed as “a reference stream” by researchers and biologists who have worked on the stream, citing the sampling conducted by University of Tulsa, Oklahoma State University, Northeastern State University and Bacone College collectors. Heth [one of the biologist/researchers] indicated that he ‘would like to discourage any attempts by an outside group to introduce, however limited, a new species into this watershed.’”

3. Pursuant to 29 O.S. § 6-504(A), no person may release, deposit or place fish in a public stream without the consent of the Wildlife Conservation Director. An internal Department memorandum, dated October 21, 2003, recommended a proposed administrative rule implementing Section 6-504(A) that would create a standardized method for review of applications for fish stockings. The “Purpose/Justification/Explanation” section of that memorandum stated:

Streams and other aquatic systems in Oklahoma are delicate and susceptible to damage by unregulated fish stockings. The proposed rule lowers the risk of compromising our native biotic communities except in situations where we are confident the potential for negative impact is minimal. Using a standardized method for review allows the Department of Wildlife Conservation to evaluate each application in a manner that is not arbitrary or capricious prior to the introduction of fish into waters of this state.

The potential negative impacts of introducing fish in natural systems are well documented. Principal concerns include the potential for introduced fish to displace native species or cross with genetically distinct stocks thereby compromising their genetic integrity. In other situations, introduced species can out compete with native stocks for

available food and habitat resources. This is of chief concern in areas containing threatened or endangered species, strains of fish that are genetically isolated from other systems or in important native fisheries. The loss of genetic information or decline of native fish densities or condition could be devastating to our natural stream aquatic resources. Promulgation of these rules will describe the process by which applications are submitted and evaluated to enable the Department of Wildlife Conservation to better regulate introduction of fish into waters of this state. (Emphasis added)

4. On December 1, 2003, the Department published a public notice of proposed rulemaking in the Oklahoma Register, which included, among other proposed rules, a proposed rule concerning the establishment of a protocol on how determinations for fish stocking permits will be made.

5. The text of the Rule on Procedures and Guidelines on Fish Introductions in Waters of the State (the “Fish Introductions Rule”) as proposed and finally adopted appears below:

**OAC §800:20-2-2 Procedures and Guidelines**

(a) No person shall release, deposit, place or permit to be released, deposited or placed fish in any of the waters of this state without having submitted a written application to the Department of Wildlife Conservation and granted an approved fish introduction permit. General restrictions will apply to all approved fish stocking permits and, in some cases, special conditions deemed appropriate by the Department will be required on fish introduction permits.

(b) The written application process and guidelines are:

(1) only persons with a valid Oklahoma fishing license may apply;

(2) a fish stocking permit application must be completed and submitted to the Director;

(3) the application will be reviewed and evaluated by the Department, accepted or denied and a permit or notification of denial will be issued by the Director.

(c) Approval or denial of a fish introduction permit will be based on:

(1) the presence or absence of critical habitat for threatened and endangered species;

(2) the potential of introduced fish to compete with native species in a manner that would negatively impact these populations;

(3) public interest or concerns regarding the issuance of a permit; and

(4) other biological considerations deemed appropriate by the Department.

(d) Approved permits will be subject to the following restrictions:

(1) only the permitted number of fish may be stocked and only at approved sites listed on the fish introduction permit;

(2) introduced fish must be certified as disease free by the vendor;

(3) the fish introduction trip sheet that is attached to the fish introduction permit must be completed and submitted to the Department of Wildlife Conservation;

(4) applicants must agree to allow Department of Wildlife Conservation staff to access the property where fish introductions occur to assess impacts of the introduction;

(5) and other restrictions deemed appropriate by the Department and listed on the fish introduction permit shall be followed. (Emphasis added)

6. Public comments were received by the Department. The comments concerning the Fish Introductions Rule included comments that were *not* supportive of the Rule as written. The comments reflected three general categories of concern (i) that healthy streams should be exempt from non-native fish species introductions, (ii) that there was a need for more stringent biological protocols relating to non-native fish species introductions, and (iii) that there was a need for a method by which social concerns could be gathered and incorporated into the consideration process. For instance, the following comments were made:

1) "Do not support, this should go to committee."

2) "Only sterile non-native species should be allowed for release to prevent adversely impacting native fish or stream ecology."

3) "Permitting for the release of non-native species should require public announcement prior to approval. Specifically, landowners within maximum possible migration of fish."

4) “Predator fish should not be released into waters that contain threatened or endangered species.”

5) “Non-native fish should not be released in waters designated as high quality waters by Oklahoma Water Resources Board (OWRB).”

6) “Permitting should include a fee to establish an impact study on stream by OWDC.”

7) “Fish count and invertebrate baselines should be conducted a minimum of 1 year prior to approval to establish baseline of stream inhabitants. (Without, adverse impacts cannot be determined.)”

8) “Stomach contents [studies] should be required on non-native species to determine extent of impact on stream ecology.”

9) “Non-native fish should not be allowed in Oklahoma streams.”

10) “If the stream is a Scenic River, then the Scenic River Commission should be notified and have veto power over stocking.”

11) “It should be spelled out how public concern is gathered (*i.e.*, public hearings.”

12) “ODWC should be present or do the stocking to assure the numbers and fish being stocked.”

13) “Non-native fish should not be release[d] into healthy viable streams. ODWC should focus on protection and conservation of the state’s natural wildlife.”

14) “There should be a process for opposition.” (Emphasis added)

7. By memo dated January 26, 2004, the Department summarized for the Commission the comments received on the Chapter 20 (sport fish) rules from the seven statewide hearings as follows:

“The consensus from those attending was in favor of all recommendations, except for the proposal to make it illegal to fillet fish on the water.”

The memo made no reference to any of the comments suggesting more strict restrictions on the release of non-native fish species or seeking a formal public notice and comment process for the issuance of permits.

8. On February 2, 2004, the Commissioners adopted the proposed Fish Introductions Rule without making any changes, despite the number of comments that suggested that greater restrictions on the permitting process were warranted. The Agency Rule Report, required by 75 O.S. § 303.1(E), reported that “the majority of the comments were in favor of the proposals.” The Agency Rule Report did not identify or describe the comments reflecting concern about the rule, nor did it explain why the proposed rule had not been modified to reflect or address testimony received at the public hearings or comments received in response to the notice of proposed rulemaking.

9. The Rule Impact Statement prepared by the Department reveals that the purpose of the Fish Introductions Rule was to protect native Oklahoma fish populations which could be adversely impacted by undesirable fish introductions.

10. Neither the Governor, who approved the Fish Introductions Rule on March 17, 2004, nor the Oklahoma Legislature was informed of the opposing comments seeking more restrictive provisions, other than by the inclusion of a summary of comments that did not identify the commenter and which were not referenced in the transmittal letter. The final Rule was adopted without change from the original proposed Rule, and was published in the Oklahoma Register on May 17, 2004.

11. Correspondence and reports concerning the trout stocking issue before the Department reflect a long history of scientific research and commentary that rebuts any assertion that the Department could be confident that the potential for negative impacts to native fish

populations from the introduction of rainbow trout into Spring Creek would be minimal. The Brush Creek study relied upon by the Department as support for stocking trout in Spring Creek has important and substantive limitations, limitations which are revealed throughout the Exhibits: The Brush Creek Study focused on sport-fish only and not the entire aquatic ecosystem; Brush Creek is a smaller stream (one-sixth the size of Spring Creek); the potential for trout to oversummer would be enhanced in a larger stream like Spring Creek (and they did, in fact, oversummer); the trout introduced in Brush Creek were 0.5 pound and the trout introduced into Spring Creek are 1-2 pounds; and the stomach contents in trout stocked, and subsequently caught and assessed, in Spring Creek were different from the stomach contents of trout stocked in Brush Creek. Even the Department's executive summary of the Brush Creek Report states that "credible biological concerns were identified in the report."

A later Departmental memo states, "We recognize that it may take several years for the affects to become evident in the sportfish populations if trout primarily feed on aquatic macroinvertebrates and not directly on sportfish. With this in mind, we feel it is important to monitor the macroinvertebrate and non-game fish populations but we also realize that we do not have the time or resources to allocate for such a project."

The Defendants argue that there is no proof submitted by Plaintiff that the introduction of trout will necessarily impact the native species of Spring Creek. The relevant standard drawn from the Department's own statement of purpose, however, is that the proposed rule should lower the risk of compromising our native biotic communities except in situations where we are confident the potential for negative impact is minimal. The facts presented to this Court do not show such a level of confidence. This Court is of the opinion that Spring Creek is of such a great importance to the State of Oklahoma that risks cannot be taken to compromise its very integrity.

12. Minutes of a Commission meeting in November, 2003, prior to the first permitted trout introduction into Spring Creek, reveals an urgency on the part of the Commission, driven by letters written by the angling club that was seeking the trout permit, to get a decision made despite the inconclusive nature of the study. Kim Erickson, Chief of the Fisheries Division of the Department, advised the Commission that impacts on native populations had been observed during the study, that native fish had been displaced, that the results found on Brush Creek would not necessarily be consistent on a larger stream such as Spring Creek, and that more study was required. Commissioner Stonecipher nevertheless took the position that “we have had these people [the anglers] on hold now for five years and said he has been receiving letters recently regarding the situation . . . these people were told we would do research and we would go by our results and that is what we should do.” The Wildlife Director agreed with Commissioner Stonecipher and stated further that “to come up with additional research at this time is extreme.”

13. A trout stocking permit was issued by the Wildlife Director and trout were introduced into Spring Creek in 2004-2005, but only after the Department held public hearings as requested by House Resolution 1045 (Rep. Wilson). The Department analyzed those comments and found that 94% of landowners on Spring Creek opposed the issuance of a trout stocking permit. Despite this outpouring of public opposition, the Wildlife Director issued the permit.

14. A renewal application was issued by the Wildlife Department a few days prior to the filing of the instant Petition for Declaratory Judgment in late September, 2005. No local community meetings were planned or conducted by the Department in connection with consideration of the 2005-2006 permit application.

15. Pursuant to federal law, in October, 2005, the Department published a “Comprehensive Wildlife Conservation Strategy.” The Strategy is meant to identify low and



declining species of wildlife (other than species that are hunted or fished) and to describe the conservation actions determined to be necessary to conserve those identified species and habitats. A “conservation issue” identified with regard to of the “gravel-bottom streams in the Ozark Region of Oklahoma was “invasive and exotic plants and animals” and their detrimental effect upon species of greatest conservation need. (The Arkansas topminnow and plains darter are two species of fish identified in the Strategy as “species of greatest conservation need.” The Department previously referred to those species as part of its reasoning behind the denial of the 1999 trout stocking permit application for Spring Creek.) With regard to the stocking of trout (a non-native or exotic species), that Strategy specifically noted the concern that: “Exotic predatory fish such as trout may compete with native predatory fish such as bass, and create increased predation pressure on stream fish or invertebrates.” The “conservation action” listed in the Strategy to meet the “conservation issue” of invasive and exotic species stated “[a]ll agencies must stop encouraging the planting of invasive and exotics.” This statement of policy by the Department is inconsistent with its actions in permitting the stocking of trout in Spring Creek. (Emphasis added)

16. The Strategy also referenced the importance of broad public participation in developing and implementing the conservation strategy. The Fish Introduction Rule also requires the Department to base its permitting decisions on “public interest and concerns.” Highly troubling to the Court is the Department’s failure to take public comment and concerns into account in making its permitting decisions.

**B. The Court makes the following conclusions of law in support of its Judgment:**

1. Pursuant to 75 O.S. § 306, this Court has jurisdiction to render a declaratory judgment concerning the Defendants’ conduct in promulgating and implementing the Fish Introduction Rule.

2. Section 306(C) places the burden of proof on the agency to show:

(1) that the agency possessed the authority to promulgate the rule;

(2) that the rule is consistent with any statute authorizing or controlling its issuance and does not exceed statutory authority;

(3) that the rule is not violative of any other applicable statute or the Constitution; and

(4) **that the laws and administrative rules relating to the adoption, review and promulgation of such rules were faithfully followed.** (emphasis added)

Defendants have failed to meet their burden of proof that the laws and administrative rules relating to the adoption, review and promulgation of such rules were faithfully followed, and, as a result, the Rule is invalid.

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

4. Although it is permissible for agency personnel to summarize statements made by interested parties regarding a proposed rule prior to submitting the comments to those who will actually decide whether to adopt the rule, it is essential that “the summarization fairly represents the statements made.” 2000 AG 27, ¶13(2). “Whether a particular process constitutes a fair summarization is a factual question.” 2000 AG 27, ¶7. In the instant case, the comments in the opinion of this Court were *not* fairly summarized in the transmittals provided to the Commissioners or to the Governor. The Commission was told that the “consensus from those

attending [public meetings] was in favor of all recommendations, except the proposal to make it illegal to fillet fish on the water.” The Governor was told the same. The Agency Rule Report stated that, “The majority of the comments were in favor of the proposals.” None of these statements are accurate summarizations of the comments urging more restrictions on the introduction of fish to the waters of the State or seeking a public notice and comment period prior to issuance of a permit.

5. Under the Administrative Procedures Act, the agency proposing an administrative rule must consider fully all written and oral submissions respecting the proposed rule. 75 O.S. 303(A)(2); 2000 AG 27, ¶7. The Commission never received the written and oral submissions respecting the proposed rule, and the summary presented to it by the Department did not accurately reflect the comments made. As a result, the Rule is invalid.

6. Under the Administrative Procedures Act, an agency is also required as part of its Agency Rule Report to explain the changes or lack of changes made to the adopted rule as a result of comments received from the public. 75 O.S. 303.1(E)(8). Neither the Department nor the Commission made any attempt to discuss or explain why no changes were made to the adopted rule in response to the comments received at the public hearings urging more restrictions. Accordingly, the Fish Introductions Rule is invalid.

7. The application of the Fish Introductions Rule is arbitrary and capricious. The Rule as promulgated provides, *inter alia*, that “approval or denial of a fish introduction permit will be based on [among other factors] the public interest or concerns regarding the issuance of a permit,” but the Rule provides no mechanism or procedure through which public comment or concerns may be raised to the Wildlife Director concerning any particular permit in advance of its issuance. For instance, there is no requirement that the Commission or any party seeking a fish

introduction permit give public notice to landowners or other interested parties of the fact that a permit application is being presented for approval. There is no requirement for a public hearing or other comment procedure to be employed prior to the issuance of a permit. Further demonstrating the Department's lack of regard for this portion of its Rule, the Department advised that it did not intend to hold, and did not hold, local community meetings in connection with the request for a 2005-06 trout stocking permit involving Spring Creek. All of this unilateral decision-making, unfettered by public considerations, and notwithstanding the Rule's requirement to take public concerns into account and the Strategy's emphasis on the importance of public involvement and participation, renders the Department's conduct arbitrary and capricious. Accordingly, trout stocking permits issued pursuant to the Fish Introductions Rule are invalid.

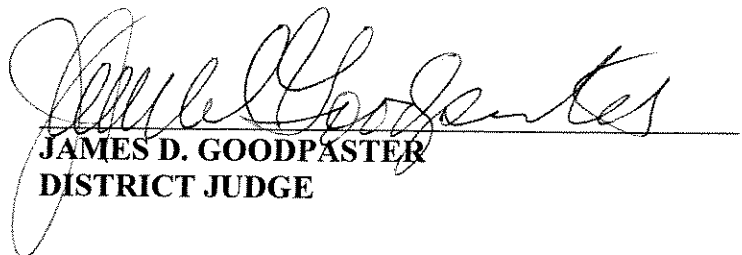
8. Under the laws of Oklahoma, the Defendants are charged with the responsibility of protecting Oklahoma's wildlife. 29 O.S. §3-103(A). The Department has published a Strategy that identifies conservation needs and actions that are inconsistent with the permitting of non-native trout into gravel-bottomed, Ozark streams, such as Spring Creek. By permitting non-native trout to be stocked into Spring Creek where they may interfere with native species, the Department has violated its duty to protect Oklahoma's wildlife in favor of introducing a non-native species. This is especially the case with respect to a Reference Stream. The actions of the Wildlife Department Director must be consistent with the goals of protection, restoration, perpetuation, conservation, supervision, maintenance, enhancement, and management of Oklahoma wildlife. Permitting the introduction of trout into Spring Creek is expressly contrary to the Department's own conservation strategy, *e.g.*, "All agencies must stop encouraging the planting of invasive and exotics." Furthermore, the Department may not place upon an opponent to the stocking of non-native fish the burden of proving that harm will necessarily occur. The

burden of proof should be on the proponent of trout stocking to prove by clear and convincing evidence that the potential for negative impact is minimal. The Department's Wildlife Director cannot, under his existing authority and in light of the Defendants' constitutional and statutory purpose, permit the introduction of non-native fish species into biologically-intact, native Oklahoma habitats (*i.e.*, not tailwaters) absent a demonstration that such an introduction is consistent with the goals of protection, restoration, perpetuation, conservation, supervision, maintenance, enhancement, and management of Oklahoma wildlife.

9. The Defendants, and their agent Director, are enjoined from taking any further action under OAC § 800:20-2-2 as it is currently promulgated. In particular, the Defendants, and their agent Director, are enjoined from issuing permits for the introduction of non-native, predatory fish species into Spring Creek. Pending the promulgation and adoption of a new Rule for the introduction of fish species into waters of the State in a manner compatible with and in compliance with state law, OAC § 800:20-2-2 is hereby declared void and invalid.

10. This Court will retain jurisdiction over this matter pending promulgation and adoption of a new Fish Introductions Rule.

IT IS SO ORDERED THIS 16<sup>th</sup> day of February, 2006.

  
JAMES D. GOODPASTER  
DISTRICT JUDGE

**CERTIFICATE OF MAILING**

**I, Tamela J. Stipes, do hereby certify that on 16<sup>th</sup> day of February, 2006, I did deposit in the United States Mail, at Pryor, OK, together with proper postage thereon prepaid, a true and correct copy of the above and foregoing Journal Entry of Judgment to:**

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**TAMELA J. STIPES  
SECRETARY-BAILIFF**