

2009 OML/OMUP WATER SUMMIT

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Will There be a Drop to Drink?

*Will changes in Oklahoma's water law and regulations
"dry up" municipal water supplies?*

Pressure is mounting to reduce the amount of water available for use in Oklahoma. This pressure stems from a more far-reaching proposal to change Oklahoma's fundamental water policy that now promotes USE of water.

If state lawmakers and the State's regulatory agencies no longer believe in USE as the underlying objective, it really doesn't matter how much water is made available for use. There are legitimate arguments to favor NON-USE, whether the rationale is conservation, aesthetics, tribal claims or fear of big users like you.

However, if the basic policy of use is abandoned, municipalities' ability to rely on their existing and planned sources of water is diminished. Costs for operating a public water supply system would necessarily go up. It is hard to imagine how many rural water districts and small municipal systems could manage higher expenses of operation on top of the added burdens from federal regulation.

CHANGE IS AFOOT!

What are the signs that Oklahoma's water laws are changing to reduce municipal access to affordable water supply and uses?

I. A TALE OF TWO CITIES.

An example can be drawn from presentations given at two different times and under distinct circumstances but, nevertheless, containing the same elements of change.

A. STILLWATER (OSU), JULY 2008. OML joined representatives of several large water users for a presentation of a model to be used for environmental flows funded as part of the Oklahoma Comprehensive Water Plan (OCWP). The study was conducted by a group made up of Oklahoma State University, U.S. Geological Survey and Oklahoma Cooperative Fish & Wildlife Research Unit with assistance from The Nature Conservancy.

The study group presented us with their proposed paradigm shift for Oklahoma water policy:

“Traditional approach: How much water can be *taken from* streams and lakes for human use?’

Contemporary approach: How much water needs to be *left in* streams and lakes to sustain critical water-dependent natural resources?”

So, what is the impact of such a paradigm shift on municipal water supplies?

The study’s definition for environmental flows is: “Quality, quantity, and timing of stream flows required to maintain the components, functions, processes, and resilience of aquatic ecosystems which provide goods and services to people.”

This means that:

- a) environmental flow management alters the natural flow of the stream and restricts withdrawals from the stream, especially in dry seasons or any time of year constituting the breeding season of aquatic life;
- b) water amounts available for use from the stream will be determined by flow needs of species and habitats of concern rather than the needs of a public water supply system;
- c) withdrawals allowed under a stream water permit will vary from season to season without regard to human consumption patterns;
- d) to compensate for such withdrawal restrictions, municipalities would have to construct pipelines and offsite storage to move and contain water from streams at times of surplus high flows.

Implementation of the environmental flow study’s recommendations likely would require a change in state law. It certainly runs counter to existing policy for use that is embedded in current statutes. How?

- i) It creates a priority for environmental uses over all other uses even though current statutes do not recognize any priority among uses.
- ii) It renders water unavailable for appropriation for reasons not authorized by state law and contrary to the statutory purpose to use the water.
- iii) It curtails beneficial use of water under a permit for reasons not authorized by state law;
- iv) It depends on seasonally-adjusted permits not currently authorized by law.

Needless to say, OML and the other large users voiced these concerns to OWRB but we were assured that the environmental flow recommendations would not be part of the final comprehensive water plan . . . except . . . well, maybe . . . for scenic rivers. But then, something very like the environmental flow model showed up in Ada as the very basis for establishing use parameters for the Arbuckle Simpson Aquifer.

B. CITY OF ADA, AUGUST 2009. OML attended OWRB’s public hearing held to explain the results of a hydrological study mandated by statute for the Arbuckle Simpson Aquifer. That same legislative Act expressly changed Oklahoma law for owners of groundwater in that sole source aquifer.

- It provides that permits must be based on a maximum annual yield (MAY) that will not allow withdrawals to reduce the natural flow of water from the basin area.
- This MAY, in turn, determines the basis for an individual landowner's equal proportionate share (EPS), which is the amount per acre that the owner can take for use.
- But an individual permit applicant may not use its EPS unless it can also show that its withdrawal will not degrade or interfere with streams and springs emanating in whole or in part from the basin. 82 O.S. §1020.9B, para B.

As reported at the public hearing, the new amount available for use will likely be as much as 80-90% less than a landowner can now use under its temporary permit.

This amount is based on science. The results of the study, however, are based on assumptions. Different assumptions could have satisfied the statutory requirements. It is important to ask where these assumptions came from.

Assumption # 1. The most influential assumption was the basis for measuring the point at which a withdrawal will degrade or interfere with the stream. At the public hearing, the presenter characterized the statutory test as meaning the effect on habitat.

Assumption # 2. On the basis of this assumption, the study group (including employees of U.S. Geological Survey, Oklahoma Cooperative Fish & Wildlife Research Unit and The Nature Conservancy) decided to use as the basic indicator of interference the factor of *ecological integrity* without reference to any of the beneficial uses recognized by statute.

Assumption # 3. On the basis of that assumption, their unit of measurement was a fish. Applying the environmental flow model, they measured the level at which lower stream flows would not interfere with that fish. As one municipal official present at the hearing remarked, "I thought the statute was for protecting people, not fish."

Assumption # 4. Another significant assumption was the aquifer would become fully developed and cause all landowners to actually use their full allocation. There is no historical or empirical basis for this assumption. To the contrary, groundwater permit allocations far exceed amounts actually taken for use. In the Arbuckle Simpson basin, as in many other parts of the State, much of the overlying land is agricultural in nature and not conducive to high-use development. Nevertheless, that acreage will be used in the calculations to determine the ultimate science-based numbers.

The Effect of Change. Thus, we already have a dramatic change in Oklahoma's groundwater law. How? a) It gives a priority to stream water over groundwater. b) It greatly reduces the amount of water the owner of the groundwater can actually use regardless of need for beneficial use. c) It allows administrative adjustments of amounts that can be taken for use based on seasonal, climatological or even regional factors.

Although the changes for the Arbuckle Simpson basin are limited to that area, the resulting groundwater management plan is being touted by some strong advocates as a template for use statewide through the OCWP. In addition, the suggestion was raised at the public hearing that there could be limitations on appropriations from the streams that emanate from the aquifer. Is it fair, it was asked, to let stream water users take the base flow after that flow is preserved for the stream by reducing the amount groundwater owners can pump out of the aquifer? Could this even impact prior rights?

II. OCWP PROCESS AND ISSUES

Several proposals for changing Oklahoma's water use policy are gaining credence through the structure of the OCWP process. The many-tiered design of the planning meetings gives added weight to proponents who do not hold water permits or do not have a responsibility to make water available for use. Many proponents do hold strong beliefs that Oklahoma is pursuing a wrong-headed policy that is not sustainable for the future. A sampling of ideas for change:

- Abolish private ownership of groundwater
- Institute in-stream (environmental) flow management for all streams throughout the State
- Apply the Arbuckle Simpson model of conjunctive use throughout the State
- Limit stream uses in order to maintain minimum lake levels for recreation
- Adopt adaptive management for stream and groundwater to allow seasonal, climatological or regional adjustments of use under a permit
- Confer increased discretion on OWRB to limit or deny permits on the basis of an undefined "public interest"
- Abandon the appropriation doctrine that "first in time gives the better right" to allow for priorities among beneficial uses.

III. OTHER FORCES FOR CHANGE

The State of Oklahoma has to face claims to its water from several proponents. In some instances, these claims also have backing from the federal government.

A. TYSON LAWSUIT. For the first time a court has recognized the existence of tribal claims to Oklahoma's water. In on-going litigation over water, parties adverse to Oklahoma raised the issue that a certain tribe was a necessary party because it had asserted claims to the water. The Oklahoma Attorney General agreed with the tribe to represent tribal claims in the litigation. Although the judge ruled that much of Oklahoma's suit could not go forward unless the tribe appeared for itself, the court went on to give legal credence to the tribal claims.

B. TARRANT COUNTY LAWSUIT AND STREAM WATER APPLICATION. Despite amendments to Oklahoma statues last session purporting to give a preference to Oklahoma's water needs before water could be sold or otherwise transferred out-of-state, Tarrant County is pressing its suit to force Oklahoma to consider its application to use Oklahoma's stream water. The Texas applicant is challenging the constitutionality

of the new amendment along with the State's original prohibition against out-of-state transfers.

SLEEPERS AWAKE!

There are strong differences of opinion about the merits of each of the changes discussed in this presentation. It is not the purpose of the paper to promote one side over the other. The purpose is to draw municipal officials' attention to these significant proposals; to encourage them to consider the proposals' potential impact on municipalities' ability to supply water to their citizens at affordable rates; and to urge municipalities to make express policy decisions that they then communicate to their state representatives.

Do not assume that municipal interests are being preserved through the OCWP process. Recall that the moratorium for withdrawals from the Arbuckle Simpson inhibited only public water suppliers.

Do not wait until the Plan is completed to voice concern or opposition to its recommendations. It will be too late to change a completed Plan. Too much time, money and citizen participation is being spent on developing the Plan to alter its final policy decisions.

It is important for municipal officials to actively monitor the OCWP process and the issues being raised. It is essential that municipal officials inform their legislators about any problems proposed changes in state law or policy would cause public water systems. What changes do municipalities need in current law? These matters will not automatically be resolved in favor of municipal needs.

OML is guided by the Municipal Water Policy developed by municipal officials. (A copy is included in your materials for your review.) OML's message to legislators and regulatory agencies was recently articulated by another State's governor as he explained his state's need to resolve its acrimonious dispute over water policy:

"Water is jobs ..,
water is food,
water is our future,
water is our economy."

-- California Gov. Schwarzenegger