



OKLAHOMA MUNICIPAL LEAGUE, INC.
***MUNICIPAL POLICY
REVIEW***

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**WHISKEY IS FOR DRINKING
- - - WATER IS FOR FIGHTING OVER
- Mark Twain**

Oklahoma is preparing a new comprehensive water plan. This plan may significantly change how municipalities and other water interests obtain and use water. For this reason, the planning process is already triggering rivalry among competitors for this liquid treasure.

Collectively, municipalities supply Oklahomans, directly or indirectly, more than 80% of their water. It is likely, however, that cities and towns will not have a proportionate influence on the water plan or the changes in water policy that are developing in the legislature, the courts and the regulatory agencies.

Why is this?

Unfortunately, water is a divisive issue for cities and towns. Consider the warning attributed to Benjamin Franklin: *If we don't hang together, we will assuredly hang separately.* The upshot could be that, as cities and towns focus on local or regional issues, the State's emerging water policy will snub municipal interests in favor of more unified voices.

Currently, municipalities are on both sides of court battles over available water resources and on both sides of legislative measures that create protectionist barriers against out-of-area municipal use. The 2007 legislature has already introduced numerous bills to stop water development, to establish preferences for agricultural and recreational water uses and to reduce groundwater availability where its consumption impacts environmental, recreation or local uses.

THE CHALLENGE FOR OKLAHOMA'S CITIES AND TOWNS IS TO DEVELOP AND PROPOSE A MUNICIPAL POLICY FOR WATER SUPPLY AND USE WITHIN THE STATE. In doing so, it is well to be guided by another adage: *Those who cannot remember the past are condemned to repeat it.*

WHAT DO WE HAVE NOW – AND WHY?

The current and future water conflicts are eerily similar to the water wars of the 1930's, 1940s and 1950s: urban vs. rural, east vs. west, agriculture vs. industry caused constant litigation, unstable water rights and delayed economic development projects. All factions lost as rivers and streams carried badly needed water out of state to Texas and Louisiana or remained unused underground.

It got so bad that in the 1960's and 1970's the various water adversaries compromised and constructed our current water law. The new stream water statutes provided for priority to use the water based on time of application rather than use preferences. It allowed water to be used throughout the State so long as waste did not occur. This policy stopped the constant fighting among agricultural, industrial, recreational and municipal interests to gain a legislative preference or priority to take the water. The new groundwater statutes regulated the amount of water property owners could take from their wells so as to provide a systematic use of aquifers.

Our current system is based on a policy to use the water rather than conserve it. Although this seems startling at first blush, it is based on the prior experience that unused stream water flows out of state without benefit to Oklahomans unless it is captured and stored for allocation to users and unused groundwater is an unproductive deposit if it remains stored in basins. Until recently, water users have experienced more than 35 years of stability under the existing system.

This stability is rapidly dissipating. More and more, questions arise: May water be transported from its geographical locality to an out-of-area user? Whose water is this anyway?

CURRENT STATUTES

The Oklahoma Statutes actually answered these questions decades ago. The answers differ for ground water and water in a definite stream.

WHOSE WATER IS IT ANYWAY?

GROUND WATER belongs to the surface owner of the property overlying it. 60 O.S. §60. It may be taken for use by its owner in quantities determined by hydrologic study to be the owner's proportionate share of the basin. Ground water is to be used and may be used even to the point of depletion so long as waste does not occur.

STREAM WATER belongs to the people of the State – not to the builder of the lake or reservoir or to the locality in which it is found. The statutes provide for allocation to users under a permit system on a first-come-first-served basis. There are no use priorities among stream water appropriators – first in time rules the day. Stream water, like ground water, is to be used. 82 O.S. 105.2, at para. B, D.

CAN IT BE MOVED FOR USE AWAY FROM ITS LOCALITY?

Ground water is the surface owner's property and it may be sold for transportation or other use off the overlying property. An appropriator may divert or impound stream water for use outside the watershed in accordance with terms of the permit and subject to the prohibition against waste.

A FAILURE TO PLAN

The feasibility of the statutes enacted in 1963 and 1972 may be a thing of the past. The previous water compromises bought time but their framers knew that this peace would not last unless the state obtained additional reservoirs. This has not happened in sufficient numbers.

At the same time, the legislature has not adequately funded and OWRB has not been able to timely perform the hydrological studies that are the necessary component on which the mining of groundwater

relies. Therefore, the reasonable allocation of groundwater to preserve the basin life is simply unknown in many areas. This is the situation more than 30 years after the water mining policy was instituted and nearly 14 years after the original statute would allow the basins to go dry. (!)

This failure of supply management is made worse by another factor. Oklahoma's statutes do not provide for circumstances where groundwater and stream water are interrelated. Increased demand now causes us to recognize that water does not fit into neat categories. It can flow as stream water either under or upon the surface of the earth, fall underground and collect in pools of groundwater, then emerge from the pool as a definite stream.

Tapping into this water at any point reduces the amount of both stream water and groundwater all along the way. Despite this interdependence, water rights to groundwater and stream water arise from different bases under current law. There is no process to manage ground and stream water withdrawal as an integrated system.

THE PRESENT

These are not theoretical problems. The strains from ongoing growth and drought are already fueling a return to the "water wars" of previous years. Growth, especially in urban areas, brings pressures for water usage in larger quantities and for different purposes than was the norm in 1972. Fear of loss of local water supply highlights the disconnection of need from location.

Competition for water creates the kind of pressure to create priorities that led to the water wars of our earlier history. It also fosters haphazard policies that merely react to local situations rather than forge a blueprint for the future.

Oklahoma's water laws are being changed piecemeal in reaction to the growing competition for supply and reliability. Short-term solutions can mask serious implications for municipalities' water resources in the future.

TOO IMPORTANT TO LEAVE TO THE LEGISLATURE

With municipalities fighting each other, legislators have already begun to dismantle current water policy without creating a substitute framework for reliability of supply. For this reason, all cities and towns risk an adverse impact from the precedent established by a 2003 moratorium to protect Arbuckle Simpson groundwater in southeastern Oklahoma from municipalities in central Oklahoma. 82 O.S.Supp.2003 §1020.9, 1020.9A and 1020.9B.

Due to important regional needs, this legislation was supported by some municipalities and opposed by others but all are affected because this legislation also imposes significant restrictions on the immediate property owner's right to use its groundwater – including all municipalities participating in the dispute.

Just as important, a significant policy change will continue after the moratorium ends. No permit may issue for the removal of water from the basin if the withdrawal will reduce the natural flow of water from springs and streams emanating from said basin or subbasin. 82 O.S. Supp.2003, § 1020.9B, para B. For the first time, ground water rights are made subordinate to stream water rights –even for municipalities in the Arbuckle Simpson.

Bills introduced in this upcoming legislative session impose similar moratoria for other water reserves. Other bills would significantly reduce the viability of groundwater rights and sources for cities and towns.

TOO IMPORTANT TO LEAVE TO THE COURTS

Two recent cases and one older case make significant, piecemeal changes to fundamental water policy. In both recent cases, cities and towns are on opposite sides in the litigation. In both, water rights and reliability for cities and towns are put at risk.

JACOBS RANCH, L.L.C. v. SMITH, 2006 OK 34. This is a ground water case that allowed municipalities to be singled out for special restrictions that do not apply to other water users. It also has implications for all groundwater owners because the owner's property right is restricted in order to allow enough water to sustain stream flows.

Heldermon v. Wright, 2006 OK 86. This is a stream water case that endangers the reliability of virtually all municipal stream water permits by nullifying the statute under which they are granted. It does so by resurrecting a prior case that dismantled the statutory water rights system established in 1963. This case is one that many water lawyers thought had been isolated by subsequent legislation. See, *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*, 1990 OK 44, 855 P.2d 568. A petition for rehearing is pending.

OWRB'S CONUNDRUM

STREAM WATER: The revitalized specter of *Franco* throws into doubt the reliability of any stream water permit. It is predictable that the competition for stream water will accelerate in time and intensity.

GROUND WATER: Several applications for groundwater have presented the regulatory agency with new theories not squarely within the contemplation of ground water regulation under the current statutes. OWRB's reaction has been to opt for restricting new groundwater uses. In light of the legislature's approach to local controversy, OWRB may be reading signals that other, permanent policy changes are on the horizon.

A MUNICIPAL CONSENSUS?

The process for developing the new comprehensive water plan is multi-faceted. Input from the public and water users is a very prominent part of the procedure. Of course, the political component will not be as transparent but likely it will be determinative. Recent developments from the legislature, the courts and the regulatory agency suggest that a new comprehensive water plan will not automatically preserve municipal interests.

Municipalities are most vulnerable when they are not unified in the face of single-interest forces. Is it feasible for cities and towns to create a "process within a process" to develop a consensus municipal water plan and a strategy for use as a blueprint for the public input program?

The brunt of water policy changes in the comprehensive plan is likely to fall on cities and towns. What will be the cost going forward?