



OKLAHOMA MUNICIPAL LEAGUE, INC.
MUNICIPAL POLICY
REVIEW

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BILLS IMPACTING MUNICIPAL WATER RIGHTS

Oklahoma is preparing a new comprehensive water plan slated for completion in 2010. See **HB 1613** and **SB 850**. This plan appears likely to 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 producing over 40 water bills in the 2007 Legislature – including **SB 630** which seems to be an attempt to pre-empt the water plan itself!

REINTRODUCING PRIORITIES . . . BUT NOT FOR CITIES AND TOWNS

Under current water laws, there are no priorities among users. All uses that do not constitute waste are permitted as beneficial uses. General ground water statutes provide that the owner of the surface owns the ground water beneath and may use the water for industrial, commercial, agricultural, domestic or municipal purposes. The only priorities recognized for stream water users is (1) domestic use, which is narrowly defined; or (2) a priority for time of application to take water for a beneficial use. Several introduced bills would change these rules without substituting a new framework for overall water policy.

As an example, agricultural interests are given an advantage in **HB 1425** by giving them a water use preference for ground water. Recreational interests are included in bills to guarantee them seats on OWRB (**HB 1047 & HB 1079**). Likewise, oil and gas interests are guaranteed OWRB Board membership in **HB 1455**. **HB 2065** removes OWRB's authority over groundwater, stream water and establishing vested rights and gives this power to the OWRB Director.

Environmental interests are included in **HB 1031** and **HB 1656** which create a "Local Water Control Act" to provide active oversight to monitor acceptable lake levels. Studies are proposed to evaluate the beneficial use of water to generate electricity in **SB 127** and a hydropower fee is proposed in **SB 122**. Several bills, including **HB 1470** aid farmer and ranchers by prohibiting manure from being defined a hazardous substance or a hazardous waste and by **HB 1515** modifying setback requirements for animal feeding operations (CAFO). These and other bills are described in further detail in the attached List of Water Bills.

NOTE: none of these priorities are for drinking water, sanitary systems, fire suppression or other municipal uses. There is no bill that seeks to assist public water systems.

Collectively, municipalities supply Oklahomans, directly or indirectly, more than 80% of their water. Unfortunately, however, water is a divisive issue for cities and towns. 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 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.

2003 LEGISLATIVE PRECEDENT FOR CURRENT BILLS

This split among municipalities has already created the predicate for significant statutory changes impacting municipal water interests. It began with the controversy over a ground water permit application by a rancher to sell his ground water from the Arbuckle Simpson aquifer for an out-of-area use by municipalities in a public water system. In reaction to the application, which was opposed by several municipalities and other property owners in the area, legislation was introduced in 2003 to protect groundwater in southeast Oklahoma from use by municipalities in central Oklahoma by imposing a moratorium on such sales. It passed by one vote.

Regional Uses. For the first time since the water wars of the 30's, 40's and 50's, the legislature departed from the system it had established in the Ground Water Act of 1972. Regional interests to conserve the water for the future trumped an existing plan for water development. Importantly for the future, the 2003 moratorium **singled out municipal use as a prohibited use**. As the law now stands, should agricultural, industrial or recreational users come forward with a plan exactly like the plan proposed by central Oklahoma municipalities, **their plan could be approved!**

This session, bills have been introduced to single out the use of stream water for generation of electricity, **SB 122** and **SB 127**. Also, a similar moratorium is proposed for stream water use from Lake Eufaula, **HB 1050**. Unfortunately, the moratorium is being inaccurately touted as a safeguard against water sales to Texas. Instead, it prohibits in-state uses in order to advance the interests of recreational users over other uses. See also, **HB 1047** and **HB 1656**.

Restrictions on Rights. Under the 2003 legislation, all municipalities can be adversely affected because the statute establishes the precedent that the legislature can impose significant restrictions on the immediate property owner's right to use its groundwater. Perhaps reading the tea leaves, OWRB in the Application of Sparks has recently restricted the amount of groundwater this landowner in the Arbuckle Simpson can use for a pecan orchard. Under current law, the property owner is entitled to use the water. To what extent, then, will cities and towns similarly situated be told that they cannot rely on their groundwater?

This session, several bills seek to change the nature or extent of ground water rights. **HB 1425**, in effect, transforms groundwater into public water. Water now owned by the surface owner would become available for appropriation by OWRB if not used within specified parameters. **SB 893** could limit the amount of groundwater available for use to the amount of recharge of the basin. Recharge is that amount of new water that seeps into the aquifer from rain or run-off. It has been discussed that allowing only this "new water" to be utilized could be a way to so limit groundwater use that the overall depth of the aquifer is never decreased. These bills would significantly decrease municipalities' ability to rely on ground water for their public water supplies.

Unified Water System. The 2003 legislation created a significant policy change within Arbuckle Simpson that will continue after the moratorium ends. No permit may issue for the removal of groundwater 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. This is a noteworthy policy shift to make **groundwater rights subordinate to stream water rights** – for all municipalities and all other users as well.

In this session, **SB 893** proposes to extend this groundwater limitation statewide. It makes a determination of reasonable use of groundwater dependent on consideration of recharge and hydrologic

connection between groundwater and surface water. This means that a municipality or other property owner may have to stop pumping ground water from their wells if pumping would diminish a stream.

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The 2003 legislation prohibits groundwater pumping from impeding the natural flow of water in a stream. The implications of a “unified” water system have profound implications for all municipalities with water wells.

Consider the example of Optima Lake in Northwestern Oklahoma. In the years between the start of the lake project and its end, increased use of groundwater by landowners reduced the amount of surface water to such a degree that Optima has never filled. Would this bill require the pumping to cease? The bill does not give groundwater users rights to replacement water from the stream.

Note that the Oklahoma Supreme Court has held that Oklahoma does not follow the “natural flow” standard for taking stream water. Instead, it allows withdrawals for a “reasonable use”. Nevertheless, this legislation imposes a “natural flow” standard for measuring the effect of ground water use on stream water.

A related issue is **minimum in-stream flows**. Maintaining in-stream flows has been a long-term goal of environmentalists even where streams naturally diminish during summer months. This issue has impacts on recreational interests as well as stream water and ground water users whose rights to take water could become subordinate to maintaining flows.

Impending Water Wars? Depending on what happens, the possibility exists that the Oklahoma water wars of 50 to 70 years ago will once again rule water use and development. Different regions of the state and/or different water users sued each other and fought in the legislature for a competitive advantage. Meanwhile, the resulting delay caused economic development opportunities and available public water supply for health and safety to go unrealized as the stream water flowed out of state and the groundwater lay unused.

USE IT OR CONSERVE IT?

The fundamental question for municipalities to resolve going forward is this: Do municipalities favor a water law policy that encourages water development and use or one that focuses on conserving ground and stream water for possible future use? Current law is based on use. Many of the 2007 legislative proposals and current legal cases aim to erect barriers to use in order to preserve the water by keeping it undeveloped.

GROUNDWATER PROTECTION Two examples of ground water protectionist bills introduced this session are **SB 893** by Paddack (D.Ada) and **HB 1425** by Turner (D. Holdenville). In a significant shift, SB 893 changes the policy on groundwater development from current laws “mining” standard to “sustainably manage and conserve. HB 1425 has use it or lose it groundwater requirements and establishes new priority based on use in the following order: (1). Domestic use; (2). Agricultural stability; (3). Municipal use; (4). Health and welfare; (5). Industrial Uses.

SB 893 purports to not amend the “law of prior appropriation of surface water, or the permitting of the use of groundwater,” but rather it seeks to “harmonize these uses” with “proper attention given to the sustainable use, conservation and replenishment of our water resources.” A “determination of reasonable” share of available supply of groundwater “shall take into consideration annual aquifer and surface water replenishment and recharge and any hydrologic connection between groundwater and surface water resources.”

HB 1425 mandates litigation by the Attorney General, following the determination of the maximum annual yield of groundwater in a groundwater basin or subbasin, for the “determination of all existing right to the use of the water”. The court shall make findings on (1) the maximum yield of the groundwater basin or subbasin; (2) the priority of existing claims to appropriate water from the basin or subbasin; (3) the amount

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of water allocated for each claim; (4) any other matters necessary to adjudicate the existing rights of all claims to the groundwater basin or subbasin.”

SURFACE WATER PROTECTION. **HB 1050** by Cannaday (D.Portum) creates a moratorium on the transfer of water outside of the “watershed area surrounding Lake Eufaula” until the state “completes a comprehensive scientific hydrological study of the water resources of this state.”

Please note that this bill is not needed to ban water sales to Texas. Such sales are already prohibited by a moratorium passed in 2002 prohibiting water sales to Texas users. Instead, it applies to all in-state water users, so long as they are not in the watershed area surrounding Lake Eufaula. See also, its companion bill **HB 1080** by Cannaday (D.Porum) and Renegar (D.McAlester).

This bill reflects newspaper articles from last summer reporting that recreational users and marinas proposed a summer stoppage of electric generation in order to preserve lake levels. Note that hydrological studies are not done on lakes.

This bill creates an exception to the 1963 stream water policy established in 82 O.S. Section 1086.1 that establishes a policy to “encourage the use of surplus and excess water”. Stream water was to be “developed to the maximum extent feasible” so that “out-of-state downstream users will not acquire vested rights to the detriment of the citizens of this state”. The “primary purpose governing “water use “shall be to maximize and not to minimize the alternatives available to all citizens, municipalities and other water-user entities in acquiring water for beneficial use.”

A MUNICIPAL CONSENSUS?

The bills introduced in the current session have municipal adherents and opponents. In such a circumstance, cities and towns do not have a single voice that OML can present to the legislature. Municipalities are most vulnerable when they are not unified in the face of single-interest forces. The Oklahoma Municipal Utility Providers was established by the OML Board of Directors to allow cities and towns to develop positions on matters of mutual interest. The OMUP Steering Committee is evaluating the pending legislation. More challenging, they have accepted the task of analyzing the fundamental issues raised by the new bills and the process to develop a comprehensive water plan. Is it feasible for cities and towns to achieve a consensus for future water policy?

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LIST OF WATER BILLS

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SB 869: This bill by Coffee (R.OKC) and Morgan (D.Stillwater) gives DEQ exclusive jurisdiction over waste by permitting or causing the pollution of fresh water strata or basin through any act that will permit fresh groundwater polluted by minerals or other waste to filter or otherwise intrude into such basin or subbasin except for individual proceedings involving the suspension of an OWRB permit. Please note that the authors are the leader of the Senate republicans and the leader of the Senate democrats.

SB 75: This bill by Gumm (D.Durant) removes the requirement of notice from the OWRB for those who knowingly violate the state’s groundwater laws.

SURFACE WATER. HB 1050: This bill by Cannaday (D.Portum) creates a moratorium on the transfer of water outside of the “watershed area surrounding Lake Eufaula” until the state “completes a comprehensive scientific hydrological study of the water resources of this state.” Please note that this bill does much more than prohibit water sales to Texas. It is not an extension of the moratorium passed in 2002 preserving water from being used by Texas water users. It applies to all in-state water users as well, so long as they are not in the watershed area surrounding Lake Eufaula. See also, its companion bill **HB 1080** by Cannaday (D.Porum) and Renegar (D.McAlester).

OWRB. HB 2065: Beginning November 1, 2007 this bill by Ennis (R.Waukomis) grants the OWRB executive director the authority to examine “applications for and granting of permits to construct water use works, appropriate groundwater, appropriate stream water, and establish vested water rights. This authority is removed from the OWRB. In addition, the director shall have the power to “issue final orders and assess administrative penalties according to the Administrative Procedures Act, this title, and rules promulgated by the Board.” The director cannot delegate this authority to other employees of the Board except as specifically provided by law.

HB 1047: This bill by Cannaday (D.Porum) increases the OWRB board by one additional member. Also, the Board “shall have represented on it one member who is well versed in recreational water use and resides in the watershed area of Lake Eufaula.”

HB 1455: This bill by Johnson (R.Kingfisher) expands OWRB board from 9 to 11 members adding an oil and gas interest group member.

HB 1079: This bill by Cannaday (D.Porum) and Renegar (D.McAlester) increase the OWRB board by one additional member. In addition, “at all times the membership of the Board shall have represented on it two members who are well versed in recreational water use.”

CITIZEN LAKE COMMITTEES. HB 1656: This bill by Harrison (D.McAlester) creates the “Oklahoma Citizens Local Water Control Act” for each lake or reservoir under the jurisdiction of the U.S. Corps of

Engineers. The advisory group consists of 5 persons appointed by the governor who reside within the watershed area of each lake or reservoir. The committee will be an active oversight committee for monitoring acceptable practical lake levels, roads and other lake or reservoir conditions. Members shall meet with local, state and federal officials to discuss issues of importance regarding the management of the lake or reservoir. Members are to represent "recreation, tourism, rural and municipal water supplies, agriculture, fish, wildlife, marinas and other crucial local water-related economic interests."

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HB 1031: This bill by Reynolds (R.OKC) authorizes the creation of citizen lake committees and creates a Task Force on Oklahoma Hydropower. Each lake or reservoir constructed by the Corps is authorized to create a citizens lake committee appointed by the Governor, Speaker and President Pro Tempore. The members shall reside within the watershed representing recreation, tourism rural and municipal water supplies, agriculture, fish, wildlife, hydroelectric power generation, marinas and other crucial local water-related economic interests. The committee shall be an "oversight committee for monitoring acceptable lake levels, roads and other conditions affecting the lake or reservoir."

They are authorized to make recommendations to appropriate local, state, and federal officials on issues relating to "tourism, recreation, agriculture, water supply, wildlife and other aspects of the local economies". There is a reference to the governor calling a meeting of "all citizen lake committees in the state and the appropriate local, state and federal entities."

Additionally, the bill creates a "Task Force on Oklahoma Hydropower" to 'study the economic and environmental impact hydropower has in the state and to analyze the comparative value of the beneficial use of water for generation of electricity versus other beneficial uses.'" The language mirrors SB 127 including a 13 member Task Force authorized to make recommendations on a fee for the use of water for electricity generation.

HYDROELECTRIC POWER. SB 127: This bill by Lerblance (D.Hartshorne) sets up a Task Force on Oklahoma Hydropower with OML having one representative on the 13 member Task Force. Also, specifically included are the OWRB, OWRB Research Institute, Corporation Commission, GRDA, REC, 2 lake associations, 2 holders of a permit.

The Task Force is to "analyze the comparative value of the beneficial use of water for generation of electricity versus other beneficial uses." This includes the economic and environmental impact on the areas surrounding the lakes or reservoirs, what "type of hydrological and geohydrological studies that need to be conducted" for lakes and reservoirs and the Task Force is to make recommendations on the "assessment of a fee" for the use of water for electric generation.

SB 122: This bill by Sparks (D.Norman) sets up a Task Force on Oklahoma Hydropower with OML having one representative on the 13 member Task Force. Also, specifically included are the OWRB, OWRB Research Institute, Corporation Commission, GRDA, REC, 2 lake associations, 2 holders of a permit.

The Task Force is to "analyze the comparative value of the beneficial use of water for generation of electricity versus other beneficial uses." This includes the economic and environmental impact on the areas surrounding the lakes or reservoirs, what "type of hydrological and geohydrological studies that need to be conducted" for lakes and reservoirs and the Task Force is to make recommendations on the "assessment of a fee" for the use of water for electric generation.

POLLUTION. SB 569: This bill by Easley (D.Tulsa) allows a tax credit for "a taxpayer who owns or leases property in the Eucha/Spavinaw Watershed, who buys fencing materials to prevent livestock from polluting the waterway, who conveys environmental easements to the state to prevent livestock pollution, or who buys nitrogen fertilizer demonstrating a reduction of phosphorous and constructs a riparian buffer

strip. The bill requires a “certified land management plan” meeting the specifications of the Act. For another bill on this watershed see **SB 601**.

HB 1491: This bill by Sullivan (R.Tulsa) directs DEQ to develop and implement a TMDL standard to ensure attainment of site-specific phosphorous standards for the Eucha/Spavinaw Watershed.

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HB 1300: This bill by Ellis (D.Valliant) prohibits DEQ from engaging in “litigation against agricultural nonpoint sources of pollution by targeting certain water bodies or watershed areas unless the water body . . . has been (a) Listed on the 303(d) list of the state of impaired waters and it is determined that nonpoint source pollution contributed to the impairment; (b). A TMDL has been performed or a 319 Watershed Implementation Plan has been prepared by the Oklahoma Conservation Commission; (c). A 319 Watershed Implementation Plan has been prepared for the water body or watershed area targeted. (d). State and federal cost-share resources for conservation practices to remedy the nonpoint source problems in the water body of watershed area have been sought and implemented, and (e) A reasonable amount of time has elapsed in order for the 310 Watershed Implementation Plan to be implemented and to show improvement in the water body or watershed area targeted.” The amendment “does not prohibit administrative or legal action against individual agricultural producers who are not complying with state law.”

HB 1470: This bill by Hyman (D.Leon) prohibits manure from being defined or considered as a hazardous substance or hazardous waste. This bill has implications for lawsuits with the poultry industry regarding excess phosphorus falling under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). If phosphorus was determined to be a hazardous substance then compensatory and punitive damages are possible. For similar bills see **HB 1517** and **SB 126**.

SB 498: This bill by Paddock (D.Ada) declares it the goal of the legislature to encourage recycling of at least ten percent of the entire solid waste stream of the state by December 31, 2009. **SB 613** by Rabon (D.Hugo) builds on SB 498 by also requiring 15% by 2011 and 20% by 2013. DEQ would be required to coordinate with the Oklahoma Recycling Association and any other interested parties to report the amount of municipal solid waste diverted every year and encourage continued efforts to recycle and reduce municipal solid waste in the state.

HB 1797: This bill by Armes (R.Faxon) is one of several that modify requirements of the Oklahoma Concentrated Animal Feeding Operations Act (CAFO). For similar bills see **HB 1515**, **HB 1796**, **SB 506**, **SB 705**, **SB 709** and **SB 773**.

SB 504: This shell bill by Wyrick (D.Fairland) clarifies language related to the Oklahoma Pollutant Discharge Elimination System Act.

SB 509: This bill by Wyrick (D.Fairland) permits the use of funds for landfill closures.

REAP FUNDS. HB 1400: This bill by Liebmann (R.OKC): Removes the cap from gross production REAP water funds. For a similar bill see **HB 1514** by DeWitt (R.Braman).

SB 841: This bill by Laster (D.Shawnee) removes the cap from the gross production REAP funds and allocates in thirds to OWRB, Tourism and the Oklahoma Corporation Commission.

STATEWIDE WATER PLAN. HB 1613: This bill by Roan (D.Tishomingo) provides funding for the Comprehensive Water Plan and assistance programs administered by OWRB by creating the OWRB Second Century Water Planning and Development Revolving Fund.

SB 850: This bill by Laster (D.Shawnee) appropriates \$50 million to fund loans and to implement the statewide water plan.

SB 630: This bill by Gumm (D.Durant) creates this committee with broad powers to recommend in all areas of water policy with a report due in January 15, 2009. Note that this is prior to the planned completion of the Statewide Water Plan in 2010.

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WATER FEE. HB 1081: This bill by Shoemake (D.Morris) authorizes rural water districts to charge consumers an amount not to exceed 10 cents per 1,000 gallons of water sold. This fee is authorized to be distributed to “any entity or entities selected by the board for the purposes that will assist or aid the board in the performance of its duties and which will benefit the members of the district. For a similar bill see **SB 88.**

HB 1990: This bill by McAffrey (D.OKC) mandates a fee of \$5 per month for municipalities of 100,000 or more in addition to any water charges paid by the municipal customer. The proceeds go to the Emergency Medical Service District holding a majority of the population within the corporate limits of the municipality to be used to pay for emergency ambulance service charges,

