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DOMESTIC WELL EXEMPTION IN OKLAHOMA GROUNDWATER LAW — IMPACT AND IMPLICATIONS

DREW L. KERSHEN*

Introduction

The Western States Water Council has eighteen member states from the central plains of the United States to the Pacific coast plus Alaska. Of these eighteen members, sixteen states, excluding California and Utah, have a provision in their groundwater law that exempts certain groundwater uses from regulatory control to some degree or another.¹

Oklahoma has a statutory exemption in its groundwater law for “domestic use” that reads:

Any landowner has a right to take groundwater from land owned by him for domestic use without a permit. Wells for domestic use shall not be subject to well spacing orders, but are subject to sanctions against waste.²

This article is about this statutory exemption, called the domestic well exemption.

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Professor Kershen thanks the Oklahoma Water Resources Board (OWRB), particularly its General Counsel, Dean Couch, for comments and assistance with this topic. Professor Kershen also thanks Jesse Richardson, Virginia Tech, for conversations about well exemption issues. Of course, Professor Kershen is solely responsible for the content and comments in this article and his views can in no way be attributed to the OWRB or Professor Richardson.

1. For a comprehensive discussion, see Nathan Bracken, *Exempt Well Issues in the West*, 40 ENVTL. L. 141 (2011).

2. 82 OKLA. STAT. § 1020.3 (2011). The OWRB has language similar to section 1020.3 in its administrative regulations:

Any landowner has a right to take groundwater from land owned by him for domestic use as defined herein without a permit. Wells for domestic use are not subject to well spacing orders but are subject to sanctions against waste. [82:1020.3] If the well is located within a municipality, the landowner may be required to obtain a municipal permit.

OKLA. ADMIN. CODE § 785:30-13-1 (2011).

Why Discuss Well Exemption

Well exemptions exist in the laws of the various states based on dual rationales.³ First, the legislatures assumed that the amount of water that exempt wells were likely to pump was de minimis in comparison to the overall amount of groundwater available in each state. Second, in light of that de minimis amount, legislatures assumed that requiring exempt wells to comply with full regulatory control would create excessive costs and burdens on both the well owner and on the administrative agency tasked with regulating groundwater. If the impact of exempt wells was minimal, legislatures rightly assumed that there was minimal reason to subject these wells to full groundwater regulatory controls.

In recent years, various persons—private interests and regulatory officials—have questioned whether the two rationales for the exemption of certain wells continues to have validity. More particularly, three states have recently experienced litigation relating to the exempt well provisions in those states. In Montana, The Clark Fork Coalition sued the State Department of Natural Resources, the groundwater administrative agency, seeking judicial relief to prevent rural subdivision developers from using the groundwater exemption as the water supply for rural housing developments.⁴ In New Mexico, a senior prior appropriator on the Mimbres River sued the State of New Mexico (i.e., the State Water Engineer), claiming that the exempt well provision facially violates the state constitutional provision protecting senior rights within New Mexico's interconnected prior appropriation legal system for stream and groundwater.⁵ In Washington, the State Department of Ecology, the groundwater regulatory authority, contested the Kittitas County growth management plan that allowed rural subdivision developers to use the well exemption for county housing developments.⁶ At the same time in Washington, though a totally independent legal matter, Five Corners

3. Bracken, *supra* note 1, at 146.

4. Clark Fork Coalition v. Sexton, Civ. No. BDV-2010-874 (First Jud. Dist., Lewis and Clark County, Nov. 8, 2010). Based on the latest information available to the author, this litigation is presently in abeyance awaiting legislative and administrative action under a Stipulation and Order of Dismissal (Nov. 8, 2010). For information, consult CLARK FORK COALITION, <http://www.clarkfork.org> (last visited Aug. 22, 2012).

5. Bounds v. State, 252 P.3d 708, 709 (N.M. Ct. App. 2010), *cert. granted*, 263 P.3d 902 (N.M. 2011). The Supreme Court of New Mexico heard oral arguments in this case in October 2011. The Supreme Court should render a decision soon.

6. Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd., 256 P.3d 1193, 1208 (Wash. 2011).

Family Farmers challenged the State of Washington (i.e., Department of Ecology) about its interpretation of the exemption for livestock watering in the Washington groundwater code.⁷

While the litigation in Montana, New Mexico, and Washington is not the focus of this article, the litigation explains how this author became attracted to the topic of the Oklahoma domestic well exemption.

In Oklahoma, the Oklahoma Water Resources Board (OWRB) has prepared slides estimating the number of exempt domestic wells in Oklahoma as compared to the number of permitted wells under the Groundwater Law.⁸ These slides⁹ show the following information:

- On July 1, 1973, OWRB had 4953 permitted groundwater wells. As of 2007, the OWRB had 10,462 active groundwater permits.

- Using black dots, two slides compare the reported groundwater wells (both permitted and domestic wells) prior to 1972 to April 2007. Oklahoma is saturated with black dots in April 2007. Of the 69,921 reported groundwater wells, 49,038 are reported domestic wells.

- Today in 2012, OWRB estimates that approximately 100,000 groundwater wells exist in Oklahoma (including wells drilled prior to the reporting requirement, unreported wells, and wells drilled by non-commercial drillers that do not require reporting).¹⁰ Using the same ratio of reported domestic wells to total reported wells (70%), as shown in the two slides with black dots, this means that about 70,000 domestic wells exist today in Oklahoma.

As these estimated 70,000 domestic wells are exempt from the permit requirements of Oklahoma groundwater law, OWRB does not have a good estimate of the amount of water being withdrawn by these domestic wells. This lack of accurate information, by itself, is a significant impact of the domestic well exemption.

Definition of Domestic Use in Oklahoma

Title 82, section 1020.1(2) of the Oklahoma Statutes defines “domestic use” that is exempt from the permit requirements of Oklahoma groundwater law:

7. *Five Corners Family Farmers v. State*, 268 P.3d 892, 895 (Wash. 2011).

8. 82 OKLA. STAT. §§ 1020.1-1020.22 (2011).

9. The reader can view the OWRB slides at the end of this article. The three slides printed come from an OWRB presentation containing thirteen slides about groundwater rights and groundwater wells in Oklahoma.

10. Telephone Interview with Dean Couch, General Counsel of the OWRB (Mar. 16, 2012).

“Domestic Use” means the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land and for the irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards and lawns, and for such other purposes specified by the Board rules, for which de minimis amounts are used.¹¹

Building upon the statutory exemption language, the OWRB defined “domestic use” for an administrative exemption as follows:

“Domestic use” means the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land whether or not the animals are actually owned by such natural individual or family, and for the irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards, and lawns [82:1202.1(2)]. Domestic use also includes: (1) the use of water for agriculture purposes by natural individuals, (2) use of water for fire protection, and (3) the use of water by non-household entities for drinking water purposes, restroom use, and the watering of lawns, provided that the amount of groundwater used for any such purposes does not exceed five acre-feet per year.¹²

Reading the statutory exemption and the administrative exemption reveals several possible implications and impacts of the domestic well exemption that are worthy of comment.

Both the legislature and OWRB apparently thought of the exemption as having four distinct components:

- household use for natural individuals, families, households;
 - farm and animal use to the normal grazing capacity of the land;
 - irrigation use for gardens, orchards, lawns not exceeding three acres;
- and
- other purposes specified by OWRB in de minimis amounts.

11. The Oklahoma statutes contain an identical definition of “domestic use” in the stream water laws. 82 OKLA. STAT. § 105.1(2). This article does not discuss domestic use in the stream water laws. The author cautions the reader that the impact and implications of domestic use in Oklahoma stream water law are likely to be quite distinct, although similarities may exist too, from the impact and implications of the domestic use exemption in Oklahoma groundwater law.

12. OKLA. ADMIN. CODE § 785:30-1-2 (2011).

By thinking of the domestic use exemption as four distinct components, landowners¹³ should be able to stack the exemptions. Landowners should be able to use each exemption independently of the other exemptions and thereby increase the amount of water that the landowner can withdraw by drilling an exempt well. Landowners can thus dig an exempt well and provide water for the home, the animals on the acreage, the orchards, gardens and lawns, and for the water allowed by the administrative exemption. Realizing the implication of stacking the exemptions, the possible impact becomes immediately clear: what might be thought de minimis for a landowner using just one exemption may not be de minimis when the landowner uses all four exemptions together.

Using stacked exemptions, the impact about how de minimis the withdrawal is becomes a larger concern if every landowner stacked all four exemptions. The cumulative impact of all landowners (the estimated 70,000 exempt domestic wells presently in Oklahoma and growing in number) using all four exemptions may well not be a de minimis amount of water. Of course, this cumulative impact can justifiably be considered a worst-case scenario because the reality is that not every landowner is going to drill a domestic well withdrawing water for all four domestic uses.

By comparing the language of the statutory exemption with the language of the administrative exemption, the legislature apparently meant for the initial three exemptions (household, domestic animals, gardens-orchards-lawns) to be governed solely by a narrative statement regarding the amount of water exempt from permit requirements. In other words, so long as a landowner uses the exempt domestic well to pump water for those uses, the landowner does not face a limitation in the amount of usable water. The narrative statutory language thus allows use of water by both the subsistence farmer and the gentry. For example, the landowner can have a household with a large extended family and servant quarters with a swimming pool, putting green, manicured lawn, and three acres of irrigated vineyards. Whatever water is needed for these purposes, so long as it is not wasted, is allowed.

Nor does the narrative statutory language set a limit on the number of domestic exempt wells. The landowner can drill a well for the household uses (house, swimming pool, putting green) and a second well for the irrigated vineyard. Indeed, the landowner can drill a third exempt well for

13. As used in this article, the term "landowner" means a natural individual and does not include an entity landowner whether corporate, partnership, trust, cooperative, or other entity.

water for the animals on the remaining land (greater than the three orchard acres) where the horses, goats, and llamas graze.

Another impact of this narrative approach is that the OWRB does not have authority to use administrative rules to limit the initial three domestic uses. If public policy indicated a need to limit the amount of water allowable for domestic uses for household, domestic animals, and gardens/orchards/lawns, the legislature would have to pass new legislation to change the narrative language.

Turning to the language in the administrative exemption quoted above, OWRB has possibly created additional ambiguity about the domestic well exemption. The OWRB language clearly indicates three administrative exemptions—agricultural purposes by natural individuals, fire protection, and non-household entities for drinking water, restrooms, and lawns. But at that point, the language has a comma after “lawns” and in the following phrase limits the amount of water to “five acre-feet per year . . . for any such purposes.”

The ambiguity is whether the five acre-feet per year for any such purposes refers to non-household entities only or to all three categories of the administrative exemptions. If the five acre-feet per year does not apply to agricultural purposes for natural individuals, OWRB has apparently allowed an individual farmer to withdraw as much water as the farmer wants for crop irrigation without being required to get a permit for the irrigation well(s). As the Legislature granted OWRB the power to create an administrative exemption for domestic uses “for which de minimis amounts are used,” allowing a sole-proprietor farmer to be exempt for crop irrigation wells appears to exceed the power the Legislature granted to OWRB.

The status of animal agriculture as within the administrative exemption for “use of water for agricultural purposes by natural individuals” is possibly even more problematic. While larger animal operations are almost assuredly a corporate or partnership entity, the OWRB exemption, as written, would apparently allow natural individuals to have substantial chicken, swine, cattle, or other animal operations under this administrative exemption for domestic uses. Whether these animal operations satisfy the statutory limitation to “de minimis” amounts is questionable.

The same analysis applies to the administrative exemption for fire protection. If the five acre feet per year limitation does not apply, a landowner could use a domestic well to supply, assuredly for a price,¹⁴ rural

14. The author has heard unsubstantiated rumors that the landowner from whose pond an Oklahoma National Guard helicopter scooped water in a bucket to fight a wild fire, in the

fire districts with as much water as the district needs to use when wild fires erupt in dry conditions with high winds in Oklahoma. While allowing a landowner to supply fire districts with water for wild fires may well be a very wise use of water, the OWRB needs to clarify whether any quantity limitation applies to fire protection use. Furthermore, the OWRB needs to clarify how the fire protection exemption satisfies its authority to create administrative exemptions for which de minimis amounts are used. An emergency exemption for fire protection for as much water as needed to fight a wild fire may well be a de minimis amount because wild fires are (hopefully) not ordinary and common events in the same geographical location. One time emergency use may well be de minimis usage.

What OWRB did make clear in the administrative exemption is that non-household entities are limited to five acre feet per year. However, several implications merit discussion.

In the statute, the Legislature defined “domestic use” while including “such other purposes specified by Board rules.” Some readers might consider it odd that the OWRB has extended “domestic use” to include non-household entities. One could argue that non-household entities are categorically outside the legislative authorization for “domestic uses.” While it is understandable why OWRB may not want to require rural churches, rural grocery stores/gas stations, or rural tourist stores (apple cider, corn field mazes, and made-in-Oklahoma foods) to get a permit for their water wells, it is a debatable question whether the legislature meant for “domestic use” to extend to these rural non-household entities through OWRB rule-making. Maybe the Legislature meant for “such other purposes specified by Board rules” to mean such other domestic purposes.

Even assuming favorable to OWRB that non-households can be granted an administrative exemption for their water wells, the ability to stack these

spring of 2011, has considered filing a reverse condemnation lawsuit for that physical water. Without discussing the merits of the landowner’s claims, the author reminds the reader that the State of Oklahoma has sovereign power over stream, pond, and lake water because such water is public water. 60 OKLA. STAT. § 60 (2011). If the landowner filed a reverse condemnation lawsuit, the determinative issue would be whether the landowner had a property interest in the pond water or whether the National Guard only scooped Oklahoma’s own public water.

By contrast, Oklahoma law states, “The owner of the land owns water . . . under its surface but not forming a definite stream.” *Id.* Water under the surface but not forming a definite stream is groundwater. 82 OKLA. STAT. § 1020.1(1). Therefore, in Oklahoma, landowners own the groundwater under their land. Consequently, if a fire district took a landowner’s groundwater to fight a fire, the landowner assuredly has suffered a “taking” of physical water for which the state owes just compensation.

exemptions means that non-trivial amounts of water might well be used, singly or cumulatively, by non-household entities. If the reader recalls to mind the gentrified household earlier described, the landowner now adds to the three acre vineyard a winery and wine-tasting room, a spa, and several cottages for bed & breakfast as a non-household entity. OWRB allows this lovely non-household business as long as the non-household entity does not exceed using five acre-feet per year of water. Stacking the non-household use with the narrative uses specifically allowed by statute means that singly the landowner is using a non-trivial amount of water. If a goodly number of nearby landowners decide to use their land similarly (e.g., gas station/grocery store, restaurant, tourist store, live-music saloon in order to meet the needs of the visiting tourists at the gentrified homestead) the cumulative impact uses additional non-trivial amounts of water.

When, if ever, these stacked and non-household uses exceed “de minimis” amounts of water is the crucial legal question that the statutory and administrative definitions bring to the forefront for further consideration and discussion.

As a final point about the definition of domestic use, the OWRB estimates “the amount of water required to satisfy domestic use to be six acre-feet per household or three acre-feet per non-household domestic use.”¹⁵ While these amounts may be de minimis in law, these amounts are not trivial singly or cumulatively.

Maximum Annual Yield and Equal Proportionate Share Determinations

In Oklahoma, the landowner owns the groundwater under the landowner’s overlying acres.¹⁶ However, the landowner can use groundwater only as governed by the Oklahoma Groundwater Law.¹⁷ Specifically, the public policy for groundwater is

to utilize the ground water resources of the state, and for that purpose to provide reasonable regulations for the allocation for reasonable use based on hydrologic surveys of fresh ground water basins or subbasins to determine a restriction on the

15. OKLA. WATER RES. BD., OKLAHOMA COMPREHENSIVE WATER PLAN SUPPLEMENTAL REPORT, INSTREAM FLOW ISSUES & RECOMMENDATIONS 1 (Feb. 1, 2011) [hereinafter OCWP SUPPLEMENTAL REPORT].

16. 60 OKLA. STAT. § 60.

17. 82 OKLA. STAT. §§ 1020.1-1022.

production, based upon the acres overlying the ground water basin or subbasin.¹⁸

To carry out the policy statement, after completing hydrological surveys, the OWRB has the mandate to make a determination of maximum annual yield (MAY) using the following standard:

The maximum annual yield of each major ground water basin or subbasin shall be based upon a minimum basin or subbasin life of twenty (20) years from the effective date of the order establishing the final determination of the maximum annual yield.¹⁹

Once OWRB tentatively determines the MAY of an aquifer, OWRB holds hearings that lead to OWRB making “its final determination as to the maximum annual yield of groundwater which shall be allocated to each acre of land overlying such basin or subbasin by issuing a final order containing findings of fact and conclusions of law, which order shall be subject to judicial review.”²⁰

Translated to less technical language, the landowner owns the groundwater in an amount allocated to the landowner based on acres overlying the aquifer. The landowner’s allocated share is called the “equal proportionate part or share” (EPS).²¹ The landowner’s allocation is determined through a hydrological survey, OWRB hearings, and determinations.²² The landowner’s allocated share is subject to OWRB’s reasonable regulation for reasonable use.²³

One definition in the OWRB implementing regulations particularly affects how the domestic use exemption interfaces with the MAY determination. Under title 82, section 1020.5(B) of the Oklahoma Statutes, OWRB must decide the life of a basin and has done so through the following administrative definition:

“Life of a groundwater basin or subbasin” means that period of time during which at least fifty (50) percent of the total overlying

18. *Id.* § 1020.2.

19. *Id.* § 1020.5(B).

20. *Id.* § 1020.6(C).

21. OKLA. ADMIN. CODE § 785:30-1-2 (2011).

22. *See id.* §§ 785:30-9-1-785:30-9-6.

23. The Supreme Court of Oklahoma has upheld the constitutionality of the Oklahoma Groundwater Law and the OWRB procedures by which it determines MAY and EPS. *Kline v. State ex rel. Okla. Water Res. Bd.*, 759 P.2d 210 (Okla. 1988).

land of the basin or subbasin will retain a saturated thickness allowing pumping of the maximum annual yield for a minimum twenty (20) year life of such basin or subbasin, provided that after July 1, 1994, the average saturated thickness will be calculated to be maintained at five feet (5') for alluvium and terrace aquifers and fifteen feet (15') for bedrock aquifers unless otherwise determined by the Board; provided further that after July 1, 1994, whether fifty (50) percent of the total overlying land of the basin or subbasin retains a saturated thickness allowing pumping for a minimum twenty (20) year life of the basin or subbasin need not be considered by the Board.²⁴

By requiring a saturated thickness of five feet for alluvial and terrace aquifers and fifteen feet for bedrock aquifers, while allowing for the MAY for twenty years, OWRB has purposefully created a domestic use reserve in each aquifer. Domestic use from groundwater exists in the reserved saturated thickness.²⁵ Creating a domestic use reserve has several implications that should be made explicit.

The domestic use reserve means that significant amounts of water are left in each aquifer even after OWRB makes a MAY determination and allocates that MAY to each overlying acre in an equal proportionate share (EPS). By having a domestic use reserve, OWRB has made certain that the MAY and EPS do not exhaust the aquifer for domestic use. In effect, the aquifer life should be perpetual, at least in terms of having sufficient water to supply domestic uses.

In light of the domestic use reserve in each aquifer, landowners owning overlying lands have actually two water rights in groundwater. First, the landowner has a water right for domestic use. This domestic use is exempt from the permit requirements of the Groundwater Law²⁶ and located in the mandated saturated thickness. The landowner accesses this domestic use through a statutory right defining domestic use.²⁷ Second, the landowner has a water right for an equal proportionate share (EPS) of the MAY. The landowner accesses this EPS by applying for and gaining a permit from OWRB.²⁸

24. OKLA. ADMIN. CODE § 785:30-1-2.

25. Telephone Interview with Dean Couch, *supra* note 10.

26. 82 OKLA. STAT. § 1020.3 (2011).

27. *Id.* § 1020.1(2).

28. *Id.* §§ 1020.7, 1020.8, 1020.9, and 1020.11. See generally OKLA. ADMIN. CODE §§ 785:30-1-4, 785:30-3-1 to 785:30-3-6, 785:30-5-1 to 785:30-5-9.

By separating the landowner's groundwater rights into two rights of domestic use and an EPS of the MAY, OWRB has also implicitly exempted domestic use from other regulatory controls over groundwater. This broad exemption from regulatory controls occurs because OWRB's regulatory authority appears tied to its permit authority.²⁹ For example, OWRB requires an annual report of water use from permit holders.³⁰ As domestic wells are exempt from obtaining a permit, landowners using domestic wells do not have an obligation to report. Thus, OWRB does not have accurate information about the amount of water that a domestic well withdraws from the aquifer nor accurate information for precisely how the landowner uses the withdrawn water.

Domestic Wells and Commercial Well Drillers

Though landowners are exempt from OWRB permit requirements for their domestic wells, commercial well drillers must meet certain licensing and regulatory requirements before drilling or plugging any well, including domestic wells.³¹ Except for domestic wells exempt from obtaining a permit, commercial well drillers can lose their license if they construct a groundwater well without the Board having issued a permit authorizing the well and its specific location.³²

OWRB expresses the purposes of the well driller statute and its regulations as follows: "These requirements are primarily promulgated to protect the quantity and quality of the fresh groundwater in the state from contamination and waste, and to provide public protection by enforcing proper construction, plugging and installing activities."³³

OWRB achieves these purposes by requiring commercial well drillers to provide data about the proposed well prior to construction and, when constructed, to file a completion report about the well.³⁴ Well drillers face similar obligations with respect to activities to plug a groundwater well. In

29. *E.g.*, 82 OKLA. STAT. § 1020.12.

30. OKLA. ADMIN. CODE § 785:30-5-9 ("[F]ailure to report may result in cancellation of the permit.")

31. 82 OKLA. STAT. § 1020.16; *see also* OKLA. ADMIN. CODE § 785:35. OWRB defines a "groundwater well" as "any excavation that is drilled, cored, bored, washed, driven, dug, jetted or otherwise constructed which is used or is capable of being used for the production of groundwater." OKLA. ADMIN. CODE § 785:35-1-2.

32. OKLA. ADMIN. CODE § 735:35-5-1(8).

33. *Id.* § 785:35-1-1(b).

34. 82 OKLA. STAT. § 1020.16(D); *see also* OKLA. ADMIN. CODE §§ 785:35-5-1, 785:35-5-3.

addition, OWRB has set forth minimum standards for construction,³⁵ pump installation,³⁶ and plugging and capping.³⁷ Finally, OWRB controls an indemnity fund that can only be used to prevent pollution or potential pollution from groundwater wells improperly constructed or that have been abandoned.³⁸

Through the licensing and regulation of commercial well drillers, OWRB indirectly acquires information about domestic wells exempt from OWRB permit requirements. OWRB learns from the completion reports the number of domestic wells being drilled by commercial well drillers. (The slides at the end of this article show these reported domestic wells.³⁹) Moreover, from the completion reports, OWRB has information on the capacity of the pump installed in each domestic well. By knowing the pump capacity, OWRB can make a solid estimate of the maximum amount of water domestic wells can withdraw from Oklahoma's aquifers. Of course, OWRB does not know the exact amount withdrawn because OWRB does not know how often the domestic user is using the well. OWRB does not have any authority to meter domestic wells.⁴⁰

OWRB's management of the indemnity fund allows OWRB to take action to protect against pollution arising from improperly constructed domestic wells or abandoned domestic wells. Domestic wells are not exempt from "sanctions for waste."⁴¹ The Legislature has defined prohibited waste and the enforcement powers OWRB has related to waste.⁴² Waste by pollution is a specific form of waste within the statute.⁴³ Consequently, OWRB's management of the indemnity fund is a means by which OWRB takes action against domestic wells causing waste. However, unlike wells subject to permit, the OWRB acts against domestic wells after-the-fact, upon acquiring knowledge of waste problems, not before-the-fact while making a determination as to whether to grant a well permit. Of

35. OKLA. ADMIN. CODE § 785:35-7.

36. *Id.* § 785:35-9.

37. *Id.* § 785:35-11.

38. 82 OKLA. STAT. § 1020.16(B); *see also* OKLA. ADMIN. CODE § 785:35-1-5.

39. OWRB has "reported" wells beginning with the 1970s and, more completely, from the 1980s when the Legislature adopted statutes about commercial well drilling. *E.g.*, 1972 Okla. Sess. Laws 529; 1982 Okla. Sess. Laws 270 (eff. Oct. 1, 1982). OWRB does not have information on file about wells drilled in earlier decades.

40. OWRB has very limited, and likely unavailable, authority related to metering permitted wells. 82 OKLA. STAT. § 1020.19.

41. *Id.* § 1020.3.

42. *Id.* § 1020.15.

43. *Id.* § 1020.15(7).

course, OWRB indirectly controls waste from domestic wells by imposing minimum standards on well drillers related to the construction, pump installation, and plugging of domestic wells.

Domestic Wells and Well Spacing

The statutory exemption for domestic wells from permit requirements is also explicit that OWRB cannot subject domestic wells to well spacing orders.⁴⁴ With respect to landowners who must seek a permit for non-domestic wells, OWRB requires the application to provide information on the location of existing wells and the proposed location for the well for which a permit is sought.⁴⁵ OWRB also limits the maximum number of wells that an applicant may drill to pump the amount of water being granted to the applicant in the permit.⁴⁶ As the statute authorizing well spacing powers to OWRB states, the OWRB may “establish a proper spacing of wells which, in its judgment, is necessary to an orderly withdrawal of water in relation to the allocation of water to the land overlying the basin or subbasin.”⁴⁷ Through well spacing orders, the OWRB works to prevent one permitted well from interfering with another permitted well.

As domestic wells are not subject to well spacing, landowners who drill exempt wells possibly could interfere with neighboring wells—either other exempt wells or permitted wells. As OWRB does not have any power to address this potential conflict prior to the drilling of the domestic well, the question arises as to how Oklahoma law resolves a well interference conflict.

Oklahoma jurisprudence has four cases involving facts of well interference.⁴⁸ Each of these four cases involves the same fact pattern. A city purchased rural land to drill wells for its municipal water supply. The city began to pump its municipal wells. Neighboring landowners, who had nearby domestic wells, complained that the municipal wells caused either a

44. *Id.* § 1020.3.

45. OKLA. ADMIN. CODE § 785:30-3-1(c)(1)-(3) (2011).

46. *Id.* § 785:30-3-1(c)(4) (“Absent information to the contrary, a maximum of three wells will be authorized for each 100 acre-feet of groundwater to be withdrawn per year.”); *cf.* *Messer-Bowers Co. v. State ex rel. Okla. Water Res. Bd.*, 8 P.3d 877 (Okla. 2000). The Oklahoma Supreme Court briefly and indirectly discussed OWRB’s well spacing power. *Id.* at 11-13.

47. 82 OKLA. STAT. § 1020.17.

48. *City of Enid v. Crow*, 316 P.2d 834 (Okla. 1957); *Bowles v. City of Enid*, 245 P.2d 730 (Okla. 1952); *City of Stillwater v. Cundiff*, 87 P.2d 947 (Okla. 1939); *Canada v. City of Shawnee*, 64 P.2d 694 (Okla. 1936).

total cessation or a significant diminution in water supply from the domestic well. In all four instances, the Supreme Court of Oklahoma found the city liable to the neighbor with the domestic well.

As for the legal rule used to find the city liable to the neighbor with the domestic well, the Oklahoma Supreme Court most often used language identifying the “American rule” or “the rule of reasonable use.”⁴⁹ Under the American reasonable use rule, a landowner can use groundwater from a well on his property without liability to a neighbor for well interference.⁵⁰ However, a landowner (the city) does not escape liability to a neighbor if the landowner transports the water to non-overlying land (the distant city), especially when the water will be sold to customers (domestic, industrial, and commercial water users in the city).⁵¹

If Oklahoma follows the American reasonable use rule for groundwater interference cases, the landowner with the exempt domestic well would not incur liability if the domestic well interfered with another well. Domestic wells in Oklahoma are for use on the owner’s land overlying the aquifer where the domestic well sits. By the same legal rule, the landowner with the exempt domestic well would have no cause of action for well interference against a neighbor landowner with a well, either domestic or permitted, if the neighbor landowner used the water solely on his land overlying the aquifer where the well sits.

But a caveat. While the Supreme Court of Oklahoma most often used the terms “American rule” and “rule of reasonable use” in the four litigated disputes between cities and domestic well owners, the Supreme Court also used the term “correlative rights” and cited the California case of *Katz v. Walkingshaw*,⁵² the foundational “correlative rights” case for groundwater.⁵³ If Oklahoma adopted “correlative rights” as the legal rule for well interference cases, the competing landowners would have to share the groundwater by accommodating one another in some fashion determined by the court as equitable.⁵⁴

49. *Bowles*, 316 P.2d at 838-39; *Canada*, 64 P.2d at 696.

50. Joseph Dellapenna, *Chapter 21: Correlative Rights Today*, in 2 WATERS AND WATER RIGHTS § 21.01 (Robert E. Beck & Amy Kelley eds., 3d ed. 2009).

51. *Id.*

52. 74 P. 766 (Cal. 1903).

53. *Bowles*, 245 P.2d at 732; *Canada*, 64 P.2d at 697. The author believes that most Oklahoma water lawyers, including the author, classify Oklahoma, for well interference cases only, as an “American reasonable use rule” jurisdiction.

54. *Cf.* Dellapenna, *supra* note 50, § 21.04.

At least one other way of thinking about well interference between private individuals is possible. One can make a distinction between well interference involving two domestic exempt wells and well interference between a domestic exempt well and a private landowner's permitted well. As between two domestic exempt wells, one could argue that both uses have equal public value. If each had equal public value, then the court could apply either the American reasonable use rule or the correlative rights doctrine, depending upon how the court interprets the governing law in prior Oklahoma cases between a domestic well and a municipal well.

However, as these four litigated well interference cases between domestic wells and municipal wells occurred from 1936 to 1957, prior to the current Groundwater law adopted in 1972,⁵⁵ the court could interpret that a landowner with a domestic well has a statutory right⁵⁶ to take water, implying a preference for domestic wells over a permitted well in the Oklahoma Groundwater Code.⁵⁷ The court could give priority preference to the domestic well in the dispute with the permitted well. Other issues would assuredly come into play. Who drilled their well first? Should priority in time have any legal significance in well interference cases?⁵⁸ By separating groundwater rights into two distinct rights—one for domestic use and one by OWRB permits—OWRB may impliedly give a preference to domestic wells under statutory right over non-domestic wells accessed through the formal permit system.⁵⁹ This entire discussion about a preference for a domestic well as against a permitted well in well interference disputes is purely speculative.

How a well interference case involving an exempt domestic well against another non-municipal landowner's private well would be resolved is quite unclear. No such case exists in the jurisprudence of Oklahoma—neither at the appellate level in a judicial opinion nor at the trial level by a filed petition.⁶⁰ Maybe this dearth of litigation means that well interference cases between private individuals will be very rare. Of course, if exempt domestic wells continue to increase in number and amount of water

55. 1972 Okla. Sess. Laws 529 (eff. July 1, 1973).

56. 82 OKLA. STAT. § 1020.3 (2011).

57. *Id.* §§ 1020.1-1020.22.

58. *Cf.* Prather v. Eisenmann, 261 N.W.2d 766 (Neb. 1978). Prather had a domestic artesian well that went dry after Eisenman drilled an irrigation well. *Id.* at 767-68. The Supreme Court of Nebraska ruled for Prather relying heavily on a statutory preference for domestic wells and the fact that the domestic well preexisted the irrigation well. *Id.* at 771-72.

59. *See supra* notes 22-26 and accompanying text.

60. Telephone Interview with Dean Couch, *supra* note 10.

withdrawn, assuredly a well interference case will arise sometime, someplace in Oklahoma. What is clear is that the OWRB does not have any administrative power through well spacing orders to act to prevent or mitigate well interference cases involving domestic exempt wells. Courts will resolve this issue when, and if, it arises in the future.

Domestic Wells and the Oklahoma Comprehensive Water Plan 2012

In the stakeholder consultation stages for the development of the Oklahoma Comprehensive Water Plan 2012 (OCWP-2012), not a single person at local, regional, or state-wide consultations mentioned domestic exempt wells.⁶¹

However, in the Final Water Policy Recommendations & Implementation of the OCWP-2012,⁶² two recommendations suggest that there is the need to consider domestic exempt wells clearly and carefully.

Instream/Environmental Flows: “The establishment of an instream flow program should be investigated and evaluated The OWRB should seek express authority from the State Legislature prior to promulgating rules to accommodate and protect instream flows.”⁶³

In the technical study prepared for instream/environmental flows, the document extensively discussed the domestic use set-aside used by OWRB in fulfilling its obligation to protect domestic uses in stream water by riparian landowners.⁶⁴ This domestic use set-aside may be sufficiently large to satisfy, partially or fully, the instream flow goals for Oklahoma water.⁶⁵

61. *Id.* For a chart indicating the levels of policy development using stakeholder participation, see OKLAHOMA COMPREHENSIVE WATER PLAN: 2007 STATUS REPORT 11 (Okla. Water Res. Bd. 2007) (“Plan Implementation”).

62. OKLA. WATER RES. BD., OCWP EXECUTIVE REPORT, FINAL WATER POLICY RECOMMENDATIONS & IMPLEMENTATION (July 8, 2011 Draft) [hereinafter FINAL WATER POLICY].

63. *Id.* at 4.

64. OCWP SUPPLEMENTAL REPORT, *supra* note 15, at 1-2, 4-5, 7 n.6, 17-18, 31-33.

65. OWRB has a domestic use set-aside from stream water for riparian landowners of 1.648 million acre-feet/year. The 2007 estimated domestic use from stream water is 29,543 acre-feet/year with a projected demand in domestic use from stream water of 41,200 acre-feet/year in 2060. *Id.* at 5. Even projected to 2060, OWRB’s domestic use set-aside leaves 1.6 million acre-feet/year in Oklahoma’s streams.

Readers need to distinguish the domestic use set-aside⁶⁶ related to stream water from the domestic use reserve for groundwater. As previously discussed,⁶⁷ the domestic use reserve for groundwater is within the saturated thickness of aquifers that OWRB uses as part of its definition of “life of a groundwater basin or subbasin.” Consequently, the technical report on instream/environmental flows never explicitly considered or discussed the domestic use groundwater reserve. This omission from consideration may be particularly significant when one turns to the second recommendation impacted by domestic uses of water.

Water Management and Supply Reliability. The OWRB should conduct a prioritized comprehensive hydrologic evaluation of groundwater basins across the state to characterize valid groundwater/surface water interactions as well as the suitability of a potential conjunctive management program in Oklahoma.⁶⁸

In the technical study prepared for conjunctive use water management,⁶⁹ the document discusses only non-domestic groundwater well permits and persons expressing concerns about the “potential of conjunctive management to infringe upon property rights and existing water permits.”⁷⁰ Domestic exempt wells were not mentioned in the technical study.

Domestic wells pumping from alluvial and terrace aquifers can affect the flow of seeps and springs into streams and affect the flow of streams that gain water from aquifers when the water table of the aquifer is, at points, higher than the bed of the stream. Hence, for a comprehensive consideration of conjunctive use management, OWRB almost assuredly needs to take into account the impact of domestic exempt wells. Of course, if the overall amount of water withdrawn through domestic exempt wells is in fact *de minimis*, the impact on stream flows will also likely be considered *de minimis*. But OWRB cannot know the impact and implications of domestic exempt wells until domestic exempt wells are consciously brought forward for consideration and evaluation.

66. 82 OKLA. STAT. § 105.2 (2011). The surface water definition of domestic use is identical to the groundwater definition of domestic use.

67. *See supra* notes 15-26 and accompanying text.

68. FINAL WATER POLICY, *supra* note 62, at 6.

69. OKLA. WATER RES. BD., OCWP 2011 UPDATE, TECHNICAL MEMORANDUM: CONJUNCTIVE WATER MANAGEMENT IN OKLAHOMA AND OTHER STATES (Nov. 2010) [hereinafter TECHNICAL MEMORANDUM].

70. *Id.* at 4.

Additionally, one possible implication of the fact that domestic exempt wells do not appear in the technical report about conjunctive use management needs to be made explicit. Without mentioning domestic exempt wells, the authors of the technical report and OWRB may be subconsciously considering domestic exempt wells as outside the scope of any conjunctive use management program. Just as OWRB considers domestic exempt wells outside the maximum annual yield determination, and just as OWRB appears to see its regulatory authority, except for waste, tied to permits for non-domestic wells, OWRB could be thinking that domestic wells, exempt from a permit, are beyond OWRB's regulatory power for any conjunctive use management program that OWRB might someday design.

If the OWRB is thinking along the lines speculated in the preceding paragraph, the impact of that thinking would mean that the conjunctive use management program would burden permitted wells only. Domestic exempt wells would escape any burden or reduction to satisfy conjunctive use management obligations to provide water for instream/environmental flows. If this disparate impact comes to pass, OWRB can expect to hear protests loudly and vigorously from Oklahoma water users with permitted groundwater wells. Landowners, municipalities, rural water districts, and industrial-commercial-utility entities with permitted wells may think that this disparate treatment violates fairness, economic costs, and equal protection of law. Moreover, disparate treatment between domestic exempt wells and permitted wells also creates the perverse incentive for landowners and small rural commercial entities to attempt to avoid the permit process and seek water through domestic wells. If landowners and small rural commercial entities moved to domestic wells, OWRB would face even further complicated and exacerbated conjunctive use management issues.

Domestic Wells and the Arbuckle-Simpson Aquifer

Oklahoma groundwater law presently handles surface water and groundwater through distinct legal water regimes, though surface water and groundwater are hydrologically connected.⁷¹ Oklahoma water law does have one exception—the Arbuckle-Simpson aquifer operates under statutes⁷² that command a conjunctive use management policy.⁷³ As a consequence, an OWRB technical study commented, “These issues

71. *Id.*

72. 82 OKLA. STAT. §§ 1020.9(A)(1)(d), 1020.9(A)(2)(d), 1020.9A, 1020.9B (2011).

73. TECHNICAL MEMORANDUM, *supra* note 69, at 5.

[potential of conjunctive use management to infringe upon property rights and existing water permits] are now being highlighted as OWRB implements the legislative directives of Senate Bill 288⁷⁴ in the Arbuckle-Simpson basin.”⁷⁵

For this article, the issue that needs careful and explicit discussion is the impact of the domestic well exemption upon the conjunctive use management of the Arbuckle-Simpson aquifer.

In 2003, the Legislature passed Senate Bill 288 that imposed a moratorium as follows:

A. The Legislature finds that a moratorium is necessary on the issuance of certain temporary permits on certain sensitive sole source groundwater basins or subbasins to protect the health, safety and welfare of the people of Oklahoma.

B.1. A moratorium is hereby established on the issuance of any temporary permit that would lead to any municipal or public water supply use of groundwater from a sensitive sole source groundwater basin or subbasin outside of any county that overlays in whole or in part said basin or subbasin. “Sensitive sole source groundwater basin” means a major groundwater basin or subbasin . . . designated as a “Sole Source Aquifer” by the United States Environmental Protection Agency

B.2. Said moratorium shall be in effect until such time as the Oklahoma Water Resources Board conducts and completes a hydrological study and approves a maximum annual yield that will ensure that any permit for the removal of water from a sensitive sole source groundwater basin or subbasin will not reduce the natural flow of water from springs or streams emanating from said basin or subbasin.⁷⁶

74. 2003 Okla. Sess. Laws 365 (codified at 82 OKLA. STAT. §§ 1020.9(A)(1)(d), 1020.9(A)(2)(d), 1020.9A, 1020.9B).

75. TECHNICAL MEMORANDUM, *supra* note 69, at 4.

76. 82 OKLA. STAT. § 1020.9A. The Legislature also imposed an identical moratorium on any municipality or other political subdivision of Oklahoma from entering into any contract for the use of water from a sensitive sole source aquifer until the OWRB has completed a hydrological study and approved a MAY. *Id.* § 1020.9B. Like the section 1020.9A moratorium, the section 1020.9B moratorium applied “only to municipalities or political subdivisions which are located outside of any county that overlays in whole or in part said basin or subbasin.” *Id.* § 1020.9B(A).

Conjunctive use management exists under section 1020.9A because OWRB cannot grant a groundwater permit that reduces the natural flow of water emanating from the aquifer into springs and streams. Section 1020.9A explicitly is about the hydrological connection between groundwater and stream water.

On March 13, 2012, the OWRB began the process to approve a MAY for the Arbuckle-Simpson consistent with the statutory standard that groundwater permits “will not reduce the natural flow of water from springs or streams emanating” from the aquifer.⁷⁷ The OWRB determined that the words “will not reduce the natural flow” did not mean that OWRB was prohibited from issuing groundwater permits.⁷⁸ Rather, the OWRB decided that a reasonable interpretation of the “will not reduce the natural flow” was to focus on the natural habitat of the Arbuckle-Simpson streams by identifying indicator fish species that could serve as proxies for the health of the streams.⁷⁹

The OWRB determined that the Arbuckle-Simpson stored about 11,000,000 acre-feet of water with an average saturated thickness of 3400 feet.⁸⁰ If the OWRB used the usual approach for determining a MAY,⁸¹ OWRB concluded that the Arbuckle-Simpson would recharge at the rate of 182,288 acre-feet per year, with a twenty-year basin life recharge of 3,645,760 acre feet.⁸² However, OWRB decided that the Legislature meant for sections 1020.9A and 1020.9B to require a different criterion—“will not reduce the natural flow”—for the Arbuckle-Simpson MAY and, therefore,

The Supreme Court of Oklahoma upheld the constitutionality of these statutory provisions against challenges alleging invalid special laws, uncompensated takings under the Fifth Amendment, and equal protection under the Fourteenth Amendment. The Supreme Court of Oklahoma read the statute as applying to any and all EPA designations of sole source aquifers in the State of Oklahoma. *Jacobs Ranch, L.L.C. v. Smith*, 148 P.3d 842, 854 (Okla. 2006). As of April 2012, the Arbuckle-Simpson aquifer is the only aquifer in Oklahoma that the EPA has designated as a sole source aquifer.

77. OKLA. WATER RES. BD., OWRB BOARD MEETING DOCUMENT PACKET, TENTATIVE DETERMINATION OF MAXIMUM ANNUAL YIELD OF GROUNDWATER FROM THE ARBUCKLE-SIMPSON GROUNDWATER BASIN 5001-19 (Mar. 13, 2012) [hereinafter TENTATIVE DETERMINATION]. See *id.* at 1115-20 for the Board discussion of this Tentative Determination.

78. *Id.* at 5008.

79. *Id.* at 5004, 5008.

80. *Id.* at 5003.

81. For a discussion of the usual approach to determining a MAY, see *supra* notes 15-26 and accompanying text.

82. TENTATIVE DETERMINATION, *supra* note 77, at 5003.

the usual MAY approach did not apply.⁸³ Using the special criterion for the Arbuckle-Simpson, the OWRB concluded that the health of the streams could be protected by allowing groundwater permits for 78,404 acre-feet per year as the MAY. When allocated to overlying acres in the equal proportionate share (EPS), each landowner could apply for 0.20 acre-foot per year (equivalent to 2.4 inches per acre of land).⁸⁴

When the Legislature passed the Arbuckle-Simpson legislation, the Legislature also amended title 82, section 1020.9 (“Approval of Applications”) to mandate that the OWRB, before granting a permit, specifically find whether: “[T]he proposed use is likely to degrade or interfere with springs or streams emanating in whole or in part from water originating from a sensitive sole source groundwater basin or subbasin as defined in [section 1020.9A].”⁸⁵

In the Tentative Determination of the MAY for the Arbuckle-Simpson, the OWRB interpreted this no-degradation and no-interference standard to apply to specific permit applications, not to the Arbuckle-Simpson MAY determination. In other words, even when an applicant applies for a MAY permit for 0.20 acre-foot of water, the OWRB must determine whether the permitted well, e.g., by its location or pumping rate or time of pumping, will degrade or interfere with the springs and streams of the aquifer.⁸⁶ To implement the no-degradation and no-interference standard, OWRB intends to invoke its power to develop well spacing rules for the aquifer.⁸⁷ As of April 2012, the OWRB is in the initial stages of taking comments and holding the required hearing in order to develop the well spacing rules for the Arbuckle-Simpson aquifer.⁸⁸

By combining the Arbuckle-Simpson MAY determination with the no-degradation and no-interference finding for a specific application, the OWRB has acted to protect the health of the springs and the streams emanating from the aquifer.

The domestic well exemption interfaces with the legislation focused on the Arbuckle-Simpson in several ways. Sections 1020.9A, 1020.9B, and 1020.9 deal with the granting of a permit to groundwater from the Arbuckle-Simpson. As domestic exempt wells do not require a permit, domestic exempt wells have been outside the moratorium from the

83. *Id.* at 5006-07.

84. *Id.* at 5005.

85. 82 OKLA. STAT. § 1020.9(A)(1)(d), (A)(2)(d) (2011).

86. TENTATIVE DETERMINATION, *supra* note 77, at 5008-09.

87. 82 OKLA. STAT. § 1020.17.

88. TENTATIVE DETERMINATION, *supra* note 77, at 5011-12, 5015-19.

beginning. Those who qualify for domestic use, by drilling a domestic well, have not been affected by the Arbuckle-Simpson legislation one whit. Landowners overlying the Arbuckle-Simpson could continue to drill new domestic wells after the 2003 passage of Senate Bill 288 just as they drilled prior to 2003.

Moreover, the Legislature did not amend the statutory exemption for domestic wells⁸⁹ to state that there is no domestic well exemption for the Arbuckle-Simpson basin. Consequently, the OWRB Tentative Determination of the MAY and EPS for the Arbuckle-Simpson also has no effect on future domestic exempt wells. The Arbuckle-Simpson MAY and EPS only apply to those who seek a permit for groundwater from the aquifer. Landowners overlying the Arbuckle-Simpson can continue to drill domestic wells after the OWRB MAY and EPS determinations just as they did before the OWRB determinations.

Furthermore, by determining the MAY based on the specific legislation applicable to the Arbuckle-Simpson, and not by the usual MAY determination, OWRB did not build into the MAY a domestic use reserve. Without building in a domestic use reserve, landowners drilling domestic exempt wells have the potential of undermining OWRB's MAY determination for the aquifer. Indeed, by concluding that a landowner seeking a permit can seek only 0.20 acre-foot per year as the EPS for the overlying land, the OWRB has created a perverse incentive for landowners to ignore the permit process and to rely upon the domestic well exemption. The perverse incentive is easily understood when one does the mathematical calculations.

Under the Arbuckle-Simpson MAY, the landowner is allowed 0.20 acre-foot per year. That amount of water is equivalent to 178.55 gallons per day.⁹⁰ An individual American averages 120 gallons per day for home use.⁹¹ Using figures developed by the OWRB in compiling data for the Oklahoma Comprehensive Water Plan 2012, the OWRB estimated that for the six counties that overlie the Arbuckle-Simpson, the daily use of water per individual at home ranged from eighty-four gallons (Coal County) to

89. 82 OKLA. STAT. § 1020.3.

90. One acre-foot of water equals 325,851 gallons. JOSEPH L. SAX, BARTON H. THOMPSON, JR., JOHN D. LESHY & ROBERT H. ABRAMS, *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 26 (4th ed. 2006). Take 0.20 of that amount and the OWRB Arbuckle-Simpson MAY is 65,170.2 gallons per year. Divide that amount by 365 days equals 178.55 gallons/per day.

91. *Id.* at 2.

114 gallons (Murray County).⁹² One can thus safely conclude that an average Oklahoman living above the Arbuckle-Simpson uses between eighty-four and 120 gallons per day for home use. By limiting the Arbuckle-Simpson MAY to 178.55 gallons per day, a landowner quickly concludes that her household can have at most two persons (168 gallons per day in Coal County) and only one person per household if she is an average American (120 gallons per day).

Landowners, aware of the domestic exempt well, quickly calculate that if they drill a domestic well they can pump an amount equivalent to the domestic use as narratively described in the statute and as expanded in the administrative definition.⁹³ The OWRB itself estimates the amount of water required to satisfy domestic use to be six acre feet per year per household.⁹⁴ If one adds to the household use the OWRB administrative non-household domestic use of up to five acre feet per year, the gentrified landowner with the house, the vineyard, the animals, the winery, spa and bed & breakfast—six acre-feet (domestic) plus five acre-feet (rural non-household entity)—will opt for the eleven acre-feet per year domestic use.

If a goodly number of landowners decided to use a domestic well for eleven acre-feet per year, the domestic well exemption might undermine the OWRB Arbuckle-Simpson MAY, designed specifically to protect the health of the springs and streams emanating from the aquifer. Obviously, the scenario described is a worst-case description because the factual question is: how many landowners will use the domestic well exemption and drill a domestic well into the Arbuckle-Simpson? In an OWRB fact sheet about the Arbuckle-Simpson, OWRB estimates that the domestic household use above the Arbuckle-Simpson is 209 acre-feet per year and the carrying capacity for livestock uses an additional twenty-five acre-feet per year. Therefore, OWRB estimates the domestic use in the Arbuckle-Simpson basin to be 234 acre-feet per year.⁹⁵

In light of the present estimated domestic use (234 acre-feet) per year, one could conclude that domestic use is very unlikely to undermine the

92. OKLA. WATER RES. BD., OCWP 2012 UPDATE, WATER DEMAND FORECAST REPORT tbl.3 (Dec. 2011). The six counties having lands that overlie the Arbuckle-Simpson aquifer are Carter, Coal, Garvin, Johnston, Murray, Pontotoc. TENTATIVE DETERMINATION, *supra* note 77, at 5012, 5014.

93. For discussion of the narrative statutory definition and administrative definition of domestic use, see *supra* notes 11-14 and accompanying text.

94. OCWP SUPPLEMENT REPORT, *supra* note 15, at 5.

95. OKLA. WATER RES. BD., GROUNDWATER USE IN THE ARBUCKLE-SIMPSON AQUIFER 2 (post-2008). OWRB assumes each person uses eighty-five gallons per day.

Arbuckle-Simpson MAY that allows the utilization of 78,404 acre-feet per year. However, landowners above the Arbuckle-Simpson may have been thinking of the default rule for groundwater withdrawal that allowed a landowner two acre-feet per year.⁹⁶ Thus, the OWRB MAY determination of 0.20 acre-foot per year is a ninety percent reduction from the default rule. OWRB realizes that landowners (and others, like municipalities) with temporary permits will have to adjust and, therefore, has developed a five year phased implementation before full enforcement of the Arbuckle-Simpson MAY.⁹⁷ It is harder to predict the behavioral consequences of the ninety percent reduction in “expected” withdrawals per acre upon the conduct of overlying landowners who have not yet sought to use groundwater from the Arbuckle-Simpson aquifer.

If the OWRB were to decide that overlying landowners might begin to use the domestic well exemption much more often and at much higher withdrawal rates, the OWRB has several options it could consider to protect the health of spring and streams emanating from the Arbuckle-Simpson aquifer.

Upon further consideration, OWRB could decide to adopt a stricter interpretation of the statutory mandate that “approves a maximum annual yield that will ensure that any permit for the removal of water from a sensitive sole source groundwater basin or subbasin will not reduce the natural flow of water from springs or streams emanating from said basin or subbasin.”⁹⁸ OWRB could conclude that the Arbuckle-Simpson should be considered a closed basin—i.e. a basin in which OWRB will not approve additional permitted groundwater wells.

Declaring the Arbuckle-Simpson a closed basin only indirectly addresses the domestic well exemption because the closed basin would affect only permitted wells. But by OWRB closing the aquifer to new permits, OWRB would be removing the MAY of 78,404 acre-feet per year from future permits.⁹⁹ Domestic wells would have to increase tremendously to reach

96. 82 OKLA. STAT. § 1020.11(B)(2) (2011).

97. TENTATIVE DETERMINATION, *supra* note 77, at 5009-11.

98. 82 OKLA. STAT. § 1020.9A(B)(2).

99. Of course, if OWRB closed the basin, several other impacts immediately arise. For example, municipal water supply from new permitted wells would become unavailable and Landowners would have only a domestic use and would lose an EPS based on a MAY allocation.

If landowners did not have an EPS, it is unclear whether landowners would have a stronger claim that the state (through the OWRB) has taken their groundwater without just compensation. 60 OKLA. STAT. § 60 (2011). The landowner would still have the domestic use right to water.

any domestic usage even close to that amount of water. Without a MAY, domestic wells would likely never threaten the springs and streams emanating from the Arbuckle-Simpson aquifer.

In addition to closing the basin, or as an alternative option, the OWRB could act directly against the domestic well exemption. Although the OWRB cannot change the statutory narrative definition of domestic use,¹⁰⁰ the OWRB has the power to change its own administrative definition of domestic use.¹⁰¹ Specifically, OWRB could decide that allowing an administrative domestic use, above and beyond the statutory narrative, would not be a de minimis use from a sensitive sole source aquifer. If the OWRB decided that its administrative definition of domestic use did not apply to the Arbuckle-Simpson, landowners would only have access to the statutory narrative for domestic use. By so limiting the definition of domestic use, OWRB would insure that landowners with domestic exempt wells would be much less likely to impact negatively the springs and streams emanating from the Arbuckle-Simpson.

OWRB could also opt to change its administrative definition of domestic use in just two of its three attributes. The OWRB could decide that no administrative domestic use should be allowed for “(1) the use of water for agricultural purposes by natural individuals” and for “(3) the use of water by non-household entities.”¹⁰² If OWRB eliminated these two administrative definitions of domestic use, landowners would still have water for emergency fire protection, but they would not be able to operate irrigated farms or small rural businesses relying upon domestic exempt wells.¹⁰³

With respect to the “takings” issue, see *Jacobs Ranch, L.L.C. v. Smith*, 148 P.2d 842 (Okla. 2006) (upholding the constitutionality of 82 OKLA. STAT. §§ 1020.9A, 1020.9B against a takings claim, but focusing on the moratorium and the OWRB duty to study the aquifer) and *Franco-American Charolaise Ltd. v. Okla. Water Res. Bd.*, 855 P.2d 568 (Okla. 1990) (finding that a riparian landowner has a vested property right to access stream water for future, unquantified uses) for two Oklahoma cases of particular relevance. See also *Edwards Aquifer Auth. v. Day*, No. 08-0964, 2012 WL 592729 (Tex. Feb. 24, 2012). It is beyond the focus of this article to discuss the “takings” issue in any depth.

100. 82 OKLA. STAT. § 1020.1(2).

101. OKLA. ADMIN. CODE § 785:30-1-2 (2011).

102. *Id.*

103. If the OWRB changed its administrative definition of domestic use to limit, as a practical matter, landowners to the statutory domestic use, the economic impact upon the six counties overlying the Arbuckle-Simpson could be significant. This article does not explore the economic impact of the various options presented in the text.

While closing the basin or changing the administrative definition of domestic use allows OWRB to control the amount of water withdrawn through domestic exempt wells, these options do not address the concern about domestic exempt wells degrading or interfering with the spring and streams of the Arbuckle-Simpson basin. As previously indicated, OWRB plans to use well spacing orders to address the legislative mandate to protect the springs and streams from degradation and interference.¹⁰⁴ But domestic wells are exempt from OWRB well spacing orders.¹⁰⁵

To address the no-degradation and no-interference policy for springs and streams emanating from the Arbuckle-Simpson, the OWRB option would be to work with local city and county governments to implement zoning restrictions¹⁰⁶—e.g., minimum lot sizes and set-back restrictions for private domestic exempt wells from springs and streams. Once adopted, OWRB would have the power to enforce these zoning restrictions when the commercial well driller fulfills the duty to report, pre-drilling and post-drilling, about any domestic well.¹⁰⁷ In addition, municipalities within the Arbuckle-Simpson basin have the authority, as do all Oklahoma municipalities, “to regulate or permit the drilling of domestic and industrial water wells within its corporate limits.”¹⁰⁸ The municipal regulations could be minimum lot sizes and/or set-back restrictions. Municipalities could even prohibit the drilling of domestic wells within the corporate limits and require their inhabitants to use the municipal water supply. By combining rural zoning with municipal regulatory power over domestic wells, the OWRB could achieve the no-degradation and the no-interference policies that the Legislature has mandated for permitted wells, also for domestic exempt wells.

The options presented above all meant to protect the springs and streams emanating from the Arbuckle-Simpson. However, human behavior and political pressures may give rise to a very different option.

By limiting the MAY to 0.20 acre-foot per year, OWRB has reduced the supply of water available from the Arbuckle-Simpson for permitted uses. Basic economics predicts that as the supply of anything decreases while the demand remains steady or increases (assumed growth in the six counties

104. *See supra* notes 79-82 and accompanying text.

105. 82 OKLA. STAT. § 1020.3.

106. Oklahoma has two statutory models by which OWRB could cooperate with counties and cities in the Arbuckle-Simpson basin. *See* 19 OKLA. STAT. §§ 865.51-865.69 (2011); 19 OKLA. STAT. §§ 866.1-866.35.

107. 82 OKLA. STAT. § 1020.16(D).

108. *Id.* § 1020.21.

overlying the Arbuckle-Simpson) then the price of the “anything” (water) will rise. Municipalities in particular are likely to bear the brunt of this price increase for water. Municipalities must now buy ten acres of water rights (0.20 acre-foot per year) to gain the two-acre feet per acre that had been the default assumption¹⁰⁹ for water rights purchases prior to the OWRB MAY for the Arbuckle-Simpson.¹¹⁰

While predicting the price of water rights is not possible, one can imagine that landowners could demand a price for their groundwater rights that puts municipal authorities under significant political pressure as the municipal cost for water to its customers escalates. If the price per acre-foot of water reached an unsustainable level politically, municipalities could have the incentive to urge their inhabitants to use domestic exempt wells for their water supply rather than to attach to the municipal water supply. As a slight variation, municipalities could urge that housing developments locate on rural, unincorporated lands with each house drilling its own domestic exempt well.¹¹¹

Conclusion

The Oklahoma domestic well exemption has drawn no academic analysis and very limited public attention. Aside from the statutes and the administrative regulations about the domestic well exemption, Oklahoma jurisprudence has never discussed the domestic well exemption. Even in the OCWP 2012 and in the OWRB Tentative Determination of the Arbuckle-Simpson MAY, the domestic well exemption does not appear. The OCWP 2012 estimates domestic uses for planning purposes but has no discussion of the domestic well exemption. Only in the three slides accompanying this article—only in the black dots representing reported wells—does the domestic exempt well make an appearance.

Maybe Oklahoma needs to pay more attention to domestic exempt wells, particularly in light of the Arbuckle-Simpson aquifer and the OCWP 2012

109. *Id.* § 1020.11(B)(2).

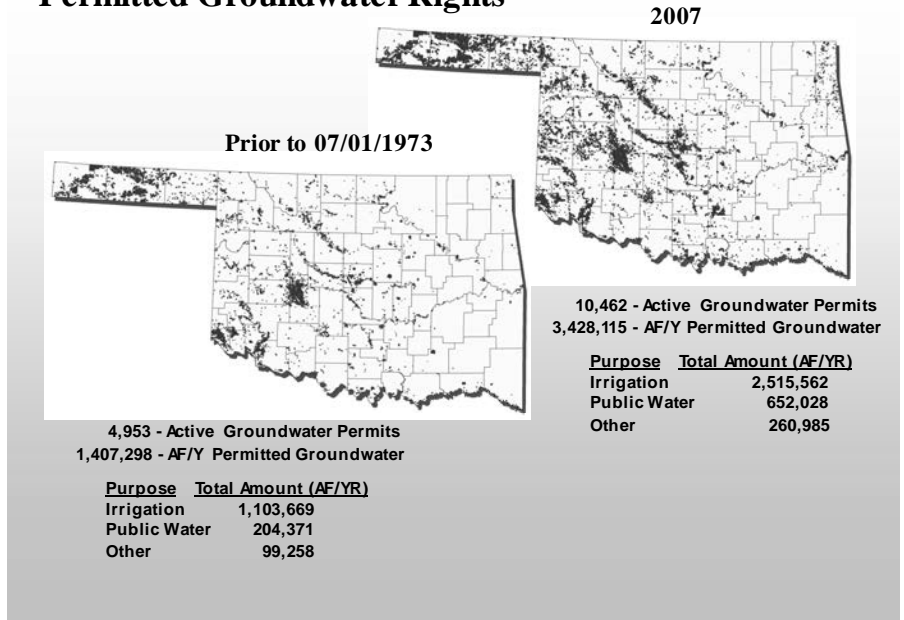
110. The economic impact of the OWRB Arbuckle-Simpson MAY upon municipalities must be one factor in the discussion about the phased implementation from temporary permits to regular permits. OWRB Board Meeting, Board Discussion 1116-17 (Mar. 13, 2012); *see also* TENTATIVE DETERMINATION, *supra* note 77, at 5009-11, 5015-19.

111. If the OWRB Arbuckle-Simpson MAY sufficiently increases the price per acre-foot of water rights, some landowners may lose interest in filing a lawsuit alleging a “taking” of their water rights. Just the opposite, those selling landowners may rejoice that the Legislature has turned an aquifer with a storage capacity of 11,000,000 acre-feet into a scarce resource.

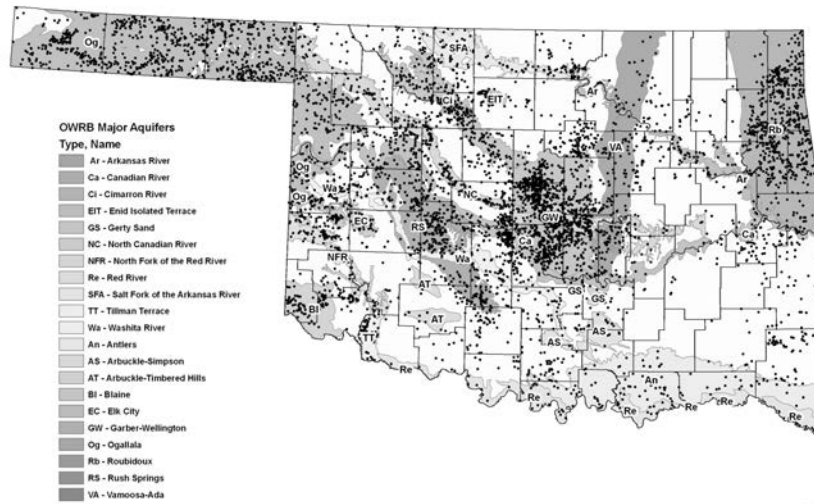
that looks forward to 2060 for planning and management. On the other hand, it may well be that domestic exempt wells are using amounts of water that, though not trivial, are factually and legally *de minimis* in comparison to Oklahoma's water supply, water demand, and water availability. Certainly, one can easily argue that domestic exempt wells are not a priority on the list of issues related to water in Oklahoma. But maybe Oklahoma needs to pay more attention to domestic exempt wells. Other states have learned that domestic exempt wells have become a significant issue in the legislatures and in litigation.

The author of this article hopes that his presentation and discussion provides Oklahomans with information, analysis, and options that are helpful and worthwhile for Oklahoma water law and Oklahoma water planning. If Oklahoma needs to pay more attention to domestic exempt wells, the author hopes that this article contributes suitably and sensibly to that attention.

Permitted Groundwater Rights



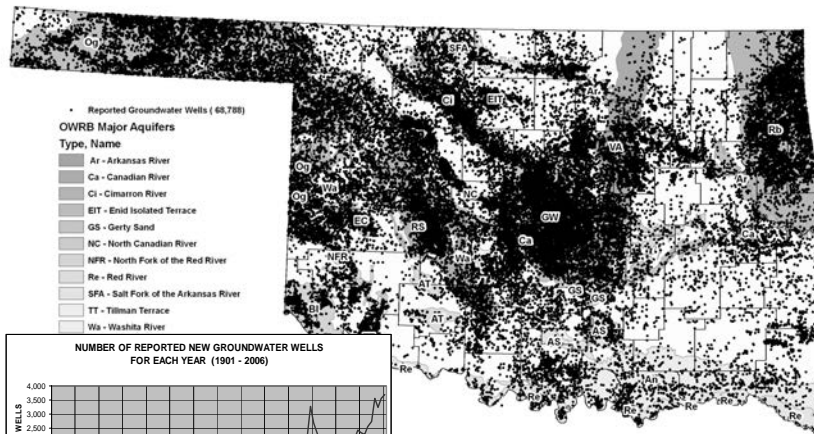
Locations of Reported Groundwater Wells
Prior to 1972 - (6,035 Wells)



20070227



Locations of Reported Groundwater Wells



20070308

As of April 2007:
 ■ 69,921 total wells (49,038 domestic)

