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A MONTHLY MAGAZINE JUNE 2010 VOLUME 14,

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Water, Water Everywhere?

By **Mary Ellen Ternes** and **Gerald Hilsher**

A few months ago, we talked about water treatment and how lovely it is to receive such nice, clean water in our homes at such a bargain price. Because we tend to not worry about actually having water as long as it's flowing from our taps, maybe it's helpful to understand the new thought and policy, and even something about the court battles involving water and how to distribute it. Many of us believe we'll be litigating over water more and more in the future regarding how we allocate water resources as our demands increase, and the supply doesn't.

Oklahoma has a lot of water, with 34 major reservoirs storing about 13 million acre-feet of water. The largest lake in Oklahoma, by surface area, is Lake Eufaula, and the largest in water storage is Lake Texoma. The largest underground aquifer is the Ogalla, with enough water to cover the entire state with two feet of water.

With so much water in Oklahoma, why would we ever argue about it? Well, not every place in Oklahoma has all the water it needs. Plus some places in Oklahoma with an excess of water have tried to sell it out of state, while local Oklahoma communities want first "dibs." So, we do argue about water, and knowing the law governing water supply is helpful in understanding these disputes.

The law of water is very old, as you can imagine. In the U.S., we adopted English common law which says that groundwater is owned "absolutely" by the owner of the property above it. In 1890, we first adopted this rule in Oklahoma, as "the owner of land owns water standing... or flowing under its surface." Then, in 1949, we



adopted Oklahoma's groundwater law intended to conserve and protect groundwater resources, establishing a priority system and a "grandfather" clause for continuing those beneficial uses prior to the adoption of the statute. The idea was to adopt a system where only a safe amount of water could be withdrawn each year, thus restricting landowners' use of their groundwater.

Now, generally speaking, while the landowner owns the groundwater under his property and flowing under or standing on the surface, as restricted and regulated by the State of Oklahoma, water running in a definite stream is public water subject to appropriation for the benefit and welfare of all the people of the State of Oklahoma. This "stream water" use regulation is called "prior appropriation," and does not require ownership of the land under the stream. The earlier the right was created, as measured by the date of its appropriation or use, the more priority it has. Also, you can't just waste it. To keep the right, you have to use the water beneficially. Any stream water that is not subject to a stream water right is the State of Oklahoma's to distribute.

In addition to state law, however, is federal law. Water running through states is generally subject to an "interstate compact," or an agreement, enforceable as federal law upon ratification by Congress. This compact governs how water is distributed among the states through which the water passes and ensures that upstream states don't use all the water before it reaches downstream states. The compact is also adopted as state law by the states it governs. Oklahoma is governed by four interstate compacts that cover all the surface water that flows into or out of the state, including the Canadian River Compact for New Mexico, Texas and Oklahoma; the Arkansas River Basin Compact for Kansas and Oklahoma; the Arkansas River Basin Compact for Arkansas and Oklahoma; and the Red River Compact for Arkansas, Louisiana, Oklahoma and Texas.

So, if we can use the groundwater under our property, and use stream water as long as we have a valid permit issued in a manner that is consistent with any applicable interstate compact, then what happens when somebody decides that they want to pump water from underground, or from streams, and sell it out of the state?

In 2006, the town of Irving, Texas and the Tarrant County, Texas Regional Water District both wanted to obtain water from Oklahoma, claiming our water was in excess of our needs and being wasted by mixing with the salty waters of the Red River. This plan ran afoul of Oklahoma's statutory moratorium against the sale or export of water out of state, which Oklahoma adopted initially in 2002 to address Oklahoma's concern that water resources in Oklahoma may become strained due to growing population, increased demand, competition for water resources, deteriorating infrastructure, variable climate and drought. Allowing Oklahoma water to be conveyed to Texas was also argued as contrary to a 1978 attorney general's opinion advising Oklahoma to develop water use within Oklahoma to the maximum extent possible for the benefit of Oklahomans.

The Texas entities sued the State of Oklahoma in Oklahoma federal court, alleging that the statute banning the out-of-state sale or export of water was unconstitutional, as a burden on interstate commerce, among other claims. While there have been developments in the litigation as well as the Oklahoma moratorium and legislation at issue, the case is not yet resolved.

Also, in 2006, the Oklahoma Legislature committed funds over a five-year period to update Oklahoma's Comprehensive Water Plan. The updated plan should take Oklahoma through 2060. Then, in 2007, the U.S. Congress passed the Water Resources Development Act, or WRDA, which authorized \$6.5 million in federal matching funds to support Oklahoma's Water Plan update.

While disputes may linger, rest assured that Oklahoma's water use is being carefully studied with an eye towards the future, a future that, some believe, may find the price of clean, fresh water far surpassing the price of oil. ■

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For information about interstate stream compacts:
www.owrb.ok.gov/supply/compacts/compacts.php

To review the status of Oklahoma's Water Plan:
www.owrb.ok.gov/supply/ocwp/ocwp.php