A Practitioner's Guide to the Oklahoma Groundwater Act: How to Dip Your Bread into the Gravy While It Is Still Hot

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A PRACTITIONER'S GUIDE TO THE OKLAHOMA GROUNDWATER ACT: HOW TO DIP YOUR BREAD INTO THE GRAVY WHILE IT IS STILL HOT

L. PAUL GOERINGER*

I. INTRODUCTION

Water is one of the essential resources needed to grow crops or raise livestock. In Oklahoma, and the rest of the world, water is a valuable resource. While the eastern part of Oklahoma is blessed with abundant water resources, water in the western part of the state is scarce. As a result, many farmers and ranchers in western Oklahoma rely on groundwater to irrigate their crops or water their stock. This raises the question of how a farmer may legally tap into, and use, the groundwater underneath his or her property. This article analyzes state law regulation of this use.

Under Oklahoma law, the surface landowner owns any groundwater under his land. Thus, if a farmer owns land overlying an aquifer, then he also owns the groundwater in the aquifer. However, this "ownership" does not give the farmer the automatic right to use unlimited quantities of groundwater. The Oklahoma Legislature enacted the Oklahoma Groundwater Act of 1973 (hereinafter, the "Act") to govern the use of groundwater. The Act requires a water user to apply to the Oklahoma Water Resources Board (hereinafter, the "OWRB") for a permit

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1 See id.; OKLA. STAT. ANN. tit. 60, § 60(A) (West, Westlaw through the first regular session of the 52nd legislature (2009)) ("The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream.").

to use groundwater.\textsuperscript{3} This paper explores justifications for the permit and limitations on the quantity of groundwater that can be used.

This article will examine the relevant statutory language, regulations, and case law necessary to guide an applicant through the groundwater permit process. In addition, this paper will discuss the definition of "groundwater," the different types of permits available under the Act, and the elements that a potential permit applicant must prove in order to obtain a permit.\textsuperscript{4}

II. WHAT IS "GROUNDWATER?"

In order to qualify for a permit under the Oklahoma Groundwater Act, the water taken must be groundwater. The Act simply defines groundwater as "fresh water under the surface of the earth regardless of the geologic structure in which it is standing or moving outside the cut bank of any definite stream."\textsuperscript{5} The OWRB adopted this statutory definition in its agency's regulations.\textsuperscript{6} As will become apparent from the OWRB's decisions, and the decisions of the Oklahoma courts, the definition is difficult to apply.

The Oklahoma Supreme Court first addressed this issue in Oklahoma Water Resources Board v. City of Lawton.\textsuperscript{7} A temporary permit was approved for Larry Cabelka "to appropriate 400 acre feet of ground water annually for recreation, housing development, and for commercial irrigation use."\textsuperscript{8} Protestors, including the City of Lawton, claimed:

that the water which Mr. Cabelka sought to appropriate comes to the surface of the earth in the form of a spring and enters a channel known as Jimmie Creek at a rate of approximately one million gallons of water per day, and that the City of Lawton is the owner of Lake Lawtonka, which is the major source of water supply for the City of Lawton, and that the water which Mr. Cabelka wishes to

\textsuperscript{3} OKLA. STAT. ANN. tit. 82, § 1020.7 (West, Westlaw through the first regular session of the 52nd legislature (2009)).
\textsuperscript{4} This article will not address the issue of sole source aquifers and the special issues associated with groundwater use in that context. Oklahoma has only one sole source aquifer, the Arbuckle-Simpson aquifer in southeastern Oklahoma. With limited irrigated agriculture in this area of the state, the special issues associated with this aquifer are not illustrative of the general permitting requirements.
\textsuperscript{5} OKLA. STAT. ANN. tit. 82, § 1020.1(1) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
\textsuperscript{6} OKLA. ADMIN. CODE § 785:30-1-2 (West, Westlaw through Dec. 15, 2009).
\textsuperscript{8} Id. at 511.
withdraw is within the watershed of Lake Lawtonka and would normally drain into that Lake.\(^9\)

The City of Lawton argued that when groundwater naturally comes to the surface in the form of a spring and enters a definite stream, the water should be considered surface water and not groundwater.\(^{10}\) The district court agreed with the City of Lawton and reversed the OWRB's decision.\(^{11}\) Consequently, Cabelka and the OWRB appealed to the Oklahoma Supreme Court.\(^{12}\)

On appeal, the OWRB and Cabelka argued that “spring water is not to be considered stream water, although the source of a definite stream, unless upon reaching the surface, it immediately forms a definite stream.”\(^{13}\) The court disagreed, holding “[t]he test is not how immediately spring water forms a definite stream, but rather, whether the spring water forms a definite stream. If it forms a definite stream, it is public water from its inception and may not be diverted for private use unless appropriated as stream water.”\(^{14}\) Thus, the district court's decision was affirmed because the groundwater that Cabelka sought to appropriate came to the surface as a natural spring and formed a definite stream.\(^{15}\)

The Oklahoma Supreme Court has more recently dealt with the definition of “groundwater” under the Act in *Messer-Bowers Co. v. State ex rel. Oklahoma Water Resources Board.* \(^{16}\) The applicants sought groundwater permits to drill new wells and use existing wells to drain water from the groundwater basin.\(^{17}\) Neighboring landowners complained that the pumping of groundwater by the applicants would cause nearby natural springs to go dry.\(^{18}\) The neighbors argued that because the springs would go dry, the OWRB should apply the permitting process for stream water instead of groundwater.\(^{19}\) The OWRB rejected this argument and found the water to be groundwater under the Act.\(^{20}\)

The court agreed with the OWRB and stated that the:

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\(^9\) *Id.*
\(^{10}\) *Id.*
\(^{11}\) *Id.*
\(^{12}\) *Id.*
\(^{13}\) *Okla. Water Res. Bd.*, 580 P.2d at 512 (emphasis added).
\(^{14}\) *Id.* at 513.
\(^{15}\) *Id.* at 513–14.
\(^{17}\) *Id.* at 880.
\(^{18}\) *Id.*
\(^{19}\) *Id.; see Okla. Stat. Ann. tit. 82, §§ 105.1–105.32* (West, Westlaw through the first regular session of the 52nd legislature (2009)) (explaining the permitting process for stream water in Oklahoma).
\(^{20}\) *Messer-Bowers Co.*, 8 P.3d at 880.
holding in *City of Lawton* was that when natural spring water forms a definite stream, the spring from its inception is to be classified as stream water and appropriated as such. The “point of inception” referred to the point at which the spring, and thus the stream began, not to the ultimate source of all spring water which is a groundwater formation.”21

The court found that the applicant “was not making [an] application to withdraw water from a spring or a stream. It sought a permit to drill several new wells and utilize existing wells to drain water directly from the groundwater basin.”22 As a result, the court upheld the OWRB’s decision to apply the groundwater permitting process.23

Both of these cases recognize that groundwater is fresh water under the surface of the earth. The court in *City of Lawton* narrowed the definition of groundwater, while the court in *Messer-Bowers* significantly expanded the definition. According to one commentator:

> before *Messer-Bowers*, a plausible argument existed that a court could equate the inception of a natural spring with the source of the spring. Under this argument, a court could acknowledge that the inception of a spring is groundwater if it forms a stream. As a result, when springs are at issue, stream-water laws would protect the groundwater feeding the springs.24

The decision in *Messer-Bowers* effectively ended this argument and expanded the Act’s application to almost all groundwater, even when it is the source of a natural spring.

The OWRB cannot employ stream water use laws to protect the sources of natural springs.25 The stream water use laws only apply when the groundwater surfaces and then forms a stream. The Act, however, applies to all other forms of groundwater.

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21 *Id.*
22 *Id.*
23 *Id.*
25 See generally OKLA. STAT. ANN. tit. 82, §§ 105.1–105.32 (West, Westlaw through the first regular session of the 52nd legislature (2009)).
III. HYDROLOGICAL SURVEYS

A hydrological survey can be conducted in several ways. The OWRB may conduct the survey itself or it may commission the U.S. Geological Survey (hereinafter "USGS") or another third party, to conduct the survey. The hydrological survey is done to determine the boundaries of the groundwater basin and other basin qualities. This survey also determines whether the groundwater basin is a major or minor groundwater basin or subbasin.

A "major groundwater basin" is defined as "a distinct underground body of water . . . having substantially the same geological and hydrological characteristics and from which groundwater wells yield at least fifty (50) gallons per minute" and at least one hundred fifty gallons per minute on average, depending on the geological make up of the basin. A "minor groundwater basin" means all other basins that are not major groundwater basins, and a "subbasin" is defined as "a subdivision of a major or minor groundwater basin."

IV. MAXIMUM ANNUAL YIELD DETERMINATIONS

The Act sets forth the procedures for determining maximum annual yield determinations for each aquifer in Oklahoma. Prior to establishing a maximum yield determination, the OWRB completes hydrologic surveys and other investigations. The OWRB undertakes similar procedures for major and minor basins and subbasins. Under the Act, the OWRB is required to cooperate with other state and federal agencies engaging in

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28 OKLA. STAT. ANN. tit. 82, § 1020.1(3) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
29 Id.
30 OKLA. STAT. ANN. tit. 82, § 1020.1(9) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
31 OKLA. STAT. ANN. tit. 82, § 1020.1(4) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
32 OKLA. STAT. ANN. tit. 82, § 1020.4(A) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-9-1(a) (West, Westlaw through Dec. 15, 2009).
33 OKLA. STAT. ANN. tit. 82, § 1020.4(A)–(B) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-9-1(b) (West, Westlaw through Dec. 15, 2009).
similar hydrological surveys.\textsuperscript{34} Finally, at least every twenty years, the OWRB will "review and update if necessary the hydrologic surveys."\textsuperscript{35}

Once the hydrological survey is completed for the basin, the OWRB makes "a tentative determination of the maximum annual yield of groundwater to be produced from each groundwater basin or subbasin therein."\textsuperscript{36} The OWRB uses the following information to make this tentative determination:

1. The total land area overlying the basin or subbasin;
2. The amount of water in storage in the basin or subbasin;
3. The rate of recharge to the basin or subbasin and total discharge from the basin or subbasin;
4. Transmissibility of the basin or subbasin; and
5. The possibility of pollution of the basin or subbasin from natural sources.\textsuperscript{37}

This information is used by the OWRB to make a determination on the maximum annual yield of each basin in the state.

The OWRB also considers a minimum life expectancy of the aquifer when determining the maximum annual yield. For major groundwater basins or subbasins, the OWRB bases the maximum annual yield determination "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."\textsuperscript{38}

For minor groundwater basins or subbasins, the OWRB bases the maximum annual yield determination "upon present and reasonably foreseeable future use of groundwater from such basin or subbasin, recharge and discharge, the geographical region in which the basin or

\textsuperscript{34} OKLA. STAT. ANN. tit. 82, § 1020.4(C) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-9-1(a) (West, Westlaw through Dec. 15, 2009).
\textsuperscript{35} OKLA. STAT. ANN. tit. 82, § 1020.4(C) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
\textsuperscript{36} OKLA. STAT. ANN. tit. 82, §1020.5(A) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-9-2(a) (West, Westlaw through Dec. 15, 2009).
\textsuperscript{37} OKLA. STAT. ANN. tit. 82, §1020.5(A)(1)-(5) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see generally Kline, 759 P.2d at 211 (discussing the implementation of these elements).
\textsuperscript{38} OKLA. STAT. ANN. tit. 82, § 1020.5(B) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-9-2(b) (West, Westlaw through Dec. 15, 2009).
subbasin is located and other relevant factors." Although the Act appears to require the OWRB to take into account different minimum life expectancies for basins or subbasins, the OWRB has interpreted the Act to require the same minimum life expectancy analysis for both minor and major basins and subbasins. The maximum annual yield determination is based on the same minimum basin life of twenty years for minor basins and subbasins.

Once the OWRB determines the basin’s tentative maximum annual yield, the OWRB holds public hearings on the determination. However, these public hearings must be formally requested. If such a request is made, a public hearing "will be held in accordance with the Administrative Procedures Act and Chapter 4 of this Title." Prior to any public hearings, the OWRB makes "copies of such hydrologic survey available for inspection and examination by all interested persons and, at such hearings, shall present evidence of the geological findings and determinations upon which the tentative maximum annual yield has been based."

The location of the requested hearings depends on whether the yield determination involves a major or a minor groundwater basin. For major groundwater basins, the OWRB conducts the hearing at a "centrally located [place] within the area of the major groundwater basin or subbasin[.]" For minor groundwater basins, the OWRB holds hearings in the affected counties.

Once the location has been determined, the OWRB is required to give notice of the hearing. According to the Act, notice must be published in a newspaper of general circulation for each county in which the aquifer is located for two consecutive weeks. In addition, the notice must be given "at least thirty (30) days prior to the date of the hearing."

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39 OKLA. STAT. ANN. tit. 82, § 1020.5(C) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-9-2(c) (West, Westlaw through Dec. 15, 2009).
40 OKLA. ADMIN. CODE § 785:30-9-2(d) (West, Westlaw through Dec. 15, 2009).
41 OKLA. STAT. ANN. tit. 82, § 1020.6(A) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
42 See OKLA. ADMIN. CODE § 785:30-9-3(a) (West, Westlaw through Dec. 15, 2009) (this regulation appears to exceed the statutory authority given to the OWRB by the legislature); see also OKLA. STAT. ANN. tit. 82, § 1020.6(A) (West, Westlaw through the first regular session of the 52nd legislature (2009)). Whether the regulation does exceed the statutory authority has not been decided by the Oklahoma Supreme Court.
43 OKLA. ADMIN. CODE § 785:30-9-3(d) (West, Westlaw through Dec. 15, 2009).
44 OKLA. STAT. ANN. tit. 82, § 1020.6(A) (West, Westlaw through the first regular session of the 52nd legislature (2009)); OKLA. ADMIN. CODE § 785:30-9-3(e) (West, Westlaw through Dec. 15, 2009).
45 OKLA. STAT. ANN. tit. 82, § 1020.6(A) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
46 Id.
47 OKLA. STAT. ANN. tit. 82, § 1020.6(B) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
48 Id.
According to the OWRB's regulations, notice is required for all permit holders who use groundwater from the basin subject to the tentative maximum annual yield determination. This notice, sent to permit holders via first class mail or postcard, must include "[c]opies of the order and notices of the tentative determination and how to formally request a hearing." Notice to the general public, as proscribed by the Act, must include "the tentative determination and how to formally request a hearing on the tentative order."

Despite the specific language of the Act requiring a public hearing, this type of hearing is only mandatory if one is requested. The OWRB may be trying to save limited financial resources by only holding costly public hearings when one has been requested. In contrast to limiting the use of public hearings, the OWRB contemporaneously expanded the form of notice required. The OWRB not only requires publication notice in county newspapers, but it also mails notice and information on how to formally request a hearing to each basin permit holder. As will be explored in the next section, current permit holders often have more at stake and are more likely to request a public hearing. Because of this difference between the language of the Act and the regulations, this issue will likely be litigated before the Oklahoma Supreme Court for final clarification.

Once the hearings have been completed, the OWRB must make the final determination of the maximum annual yield that will be allocated to each acre over the aquifer. The regulations limit the amount of time the OWRB has to make this determination. The OWRB has no more than one year from when the tentative determination, discussed above, is approved to issue a final determination. The final determination of the maximum annual yield is a final order issued by the OWRB and is subject to judicial review.

The Oklahoma legislature has clarified that judicial review is pursuant to Article II of the Oklahoma Administrative Procedures Act (hereinafter "OAPA") as amended in 1988. Because this final determination is not a rule, no rulemaking procedures are required, and the

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49 OKLA. ADMIN. CODE § 785:30-9-3(b) (West, Westlaw through Dec. 15, 2009).
50 Id.
51 OKLA. ADMIN. CODE § 785:30-9-3(c) (West, Westlaw through Dec. 15, 2009). Notice by publication has been expanded to include the county newspaper of general circulation as well as the Oklahoma Water News, the periodic newspaper published by the OWRB.
52 OKLA. STAT. ANN. tit. 82, § 1020.6(C) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
53 OKLA. ADMIN. CODE § 785:30-9-4(a) (West, Westlaw through Dec. 15, 2009).
54 Id.
55 See Tex. County Irrigation & Water Res. Ass'n v. Okla. Water Res. Bd. (Texas County II), 803 P.2d 1119, 1121 (Okla. 1990) (stating that Article II governs hearing requirements for individual proceedings); see also OKLA. STAT. ANN. tit. 75, §§ 308a–323 (West, Westlaw through the first regular session of the 52nd legislature (2009)). Prior to these amendments, at least one district court held that a maximum annual yield determination was an invalid agency rule.
OAPA’s declaratory judgment provisions are not available. Finally, this determination of maximum annual yield can never be decreased, but it may be increased upon subsequent basin hearings or additional hydrologic surveys. Such surveys should, if necessary, be performed every twenty years.

The OWRB maximum annual yield determinations have been challenged on a few occasions in the Oklahoma courts. In Kline v. State ex rel. Oklahoma Water Resources Board, a review was sought of the OWRB’s establishment of the maximum annual yield determination of fresh groundwater basin in northwestern Oklahoma. Based upon determinations by the USGS, the OWRB allocated one acre-foot of groundwater in the alluvium and terrace deposits to each acre of land overlying the aquifer. Interested landowners challenged the OWRB’s determination that the aquifer was a “unitary aquifer,” arguing that differences in the aquifer created a “subbasin” or a “sub-subbasin.”

In determining the boundaries of the aquifer, the OWRB set the western boundary at the Beaver and Harper County line and the eastern boundary at the dam at Canton Lake. The western boundary was selected because investigations showed the aquifer to the west was hydrologically connected to another aquifer, the Ogallala Aquifer, and the eastern boundary was chosen “because the dam acts as a hydrologic barrier.”

Based on these boundaries, the OWRB asked the USGS to conduct a hydrological survey of the aquifer. The USGS’s report determined that “there are some [insubstantial] differences in the area and the area is a part of a greater system [aquifer], but the area is substantially the same.” The interested landowners challenged this determination, claiming that the differences were not insubstantial but, rather, that they created a basin or subbasin. Consequently, the landowners demanded that separate maximum annual yield determinations be completed on each new basin.

The Oklahoma Supreme Court found that the interested landowners had not instituted further administrative proceedings allowed under the Act,

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56 OKLA. ADMIN. CODE § 785:30-9-4(b) (West, Westlaw through Dec. 15, 2009).
57 OKLA. STAT. ANN. tit. 82, § 1020.6(D) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
58 OKLA. STAT. ANN. tit. 82, § 1020.4(C) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-9-5 (West, Westlaw through Dec. 15, 2009).
59 Kline, 759 P.2d at 211.
60 Id.
61 Id. at 213.
62 Id.
63 Id.
64 Id.
65 Kline, 759 P.2d at 213 (alteration in original).
66 Id.
67 Id.
which would allow them to look further at the existence of subbasins. The court found that “the identification of all possible subbasins within a basin is impractical and is therefore not possible, nor a strict prerequisite to the validity of an initial investigation of a groundwater basin.” In affirming the decision of the OWRB, the court concluded that the establishment of the groundwater basin was not arbitrary because it was based on the OWRB’s knowledge and expertise.

V. TYPES OF PERMITS

Upon completion of the survey and maximum annual yield determination, an applicant will be granted a regular permit. If the proper conditions are met, the OWRB may issue an applicant one of five different permits under the Act. The available permits are a regular permit, a temporary permit, a special permit, a provisional temporary permit, and a limited quantity permit.

The quantity of water an applicant is allowed to pump is limited to his “proportionate part of the maximum annual yield of the basin or subbasin.” Both the Act and the regulations define a “proportionate part” to be:

that percentage of the total annual yield of the basin or subbasin, previously determined to be the maximum annual yield . . . , which is equal to the percentage of the land overlying the fresh groundwater basin or subbasin which the applicant owns or leases and which is dedicated to the application.

For example, an applicant that owns roughly five percent of the land overlying an aquifer is entitled to pump five percent of the total maximum annual yield. Likewise, if an applicant owns one hundred percent of the land overlying the aquifer, he is entitled to pump one hundred percent of the annual maximum yield.

68 Id. (referring to OKLA. STAT. ANN. tit. 82, § 1020.6(D) which allows for increases in amounts allocated after additional hydrologic surveys in subsequent basin or subbasin hearings.)
69 Id. at 213–14.
70 Id. at 214.
71 See OKLA. ADMIN. CODE § 785:30-5-1(b) (West, Westlaw through Dec. 15, 2009).
72 OKLA. STAT. ANN. tit. 82, § 1020.9(B) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-5-1(c) (West, Westlaw through Dec. 15, 2009).
73 OKLA. STAT. ANN. tit. 82, § 1020.9(B) (West, Westlaw through the first regular session of the 52nd legislature (2009)); OKLA. ADMIN. CODE § 785:30-5-1(d) (West, Westlaw through Dec. 15, 2009).
A. Regular Permit

A "regular permit" is defined as:
an authorization to put ground water to beneficial use for
other than domestic purposes. The regular permit shall be
granted only after completion of the hydrologic survey and
determination of the maximum annual yield for the
appropriate basin or subbasin. It can be revoked or
canceled only as provided in Sections 1020.12 and 1020.15
of this title.74

In order for a regular permit to be granted, a hydrological survey to
determine maximum yield of the overlying aquifer must first be completed.
The regular permit will only be granted after the completion of the survey
and the maximum annual yield has been determined.75

The length of a regular permit is longer than the other permits
allowed under the Act. "A regular permit shall not be granted for less than
the remaining life of the basin or subbasin as previously determined by the
[OWRB]."76 According to the Act and regulations, if the remaining life of
the aquifer is twenty years, then the regular permit will be granted for at
least twenty years, and possibly longer.77 Nothing in the language of the
Act, or the regulations, appears to limit the length of a regular permit to just
the remaining life of the aquifer, and the OWRB typically issues permits
with no termination date.

B. Temporary Permit

An applicant may receive a temporary permit prior to completion of
the hydrological survey and the maximum annual yield determination.78
Although similar to a regular permit, there are important differences
between a regular permit and a temporary permit. One Oklahoma court has
stated "[a] temporary permit is not tantamount to a regular permit in that the

74 OKLA. STAT. ANN. tit. 82, § 1020.11(A) (West, Westlaw through the first regular session
of the 52nd legislature (2009)).
75 OKLA. ADMIN. CODE § 785:30-5-1(b) (West, Westlaw through Dec. 15, 2009).
76 OKLA. STAT. ANN. tit. 82, § 1020.9(D) (West, Westlaw through the first regular session of
the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-5-1(f) (West, Westlaw through
Dec. 15, 2009).
77 OKLA. STAT. ANN. tit. 82, § 1020.9(D) (West, Westlaw through the first regular session of
the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-5-1(f) (West, Westlaw through
Dec. 15, 2009).
78 See OKLA. STAT. ANN. tit. 82, § 1020.11(B)(1) (West, Westlaw through the first regular
session of the 52nd legislature (2009)) ("A temporary permit is an authorization for the same purposes
as a regular permit but granted by the Oklahoma Water Resources Board prior to completion of the
hydrologic survey and the determination of the maximum annual yield of the basin or subbasin."); see
also OKLA. ADMIN. CODE § 785:30-5-2(a)(1) (West, Westlaw through Dec. 15, 2009).
statute provides it must be revalidated annually." Generally, a temporary permit is issued for one year, but it is renewable if proper procedures are followed. The Act states that "[t]he procedures provided for in this chapter for the granting of regular permits shall be applicable to the granting of temporary or special permits except that the determination of the maximum annual yield shall not be a condition precedent." Finally, the same Oklahoma court has found that the application for a regular permit suffices to issue a temporary permit until the hydrologic surveys can be completed.

No hydrologic survey must be completed before a temporary permit can be issued, but an applicant is required to meet other requirements enumerated in the Act and regulations. This is an important distinction between regular and temporary permits. Generally, at the time a temporary permit is issued, numerous hydrological studies have not been completed, and, thus, the maximum annual yield determinations have not yet been made. This allows the temporary permit to function as an important stopgap.

The groundwater allocated under a temporary permit is limited to no less than two (2) acre-feet annually for each acre of land owned or leased by the applicant in the basin or subbasin. Because the maximum annual yield has not been determined, the applicant does not receive a proportionate part of the maximum annual yield of the aquifer with a temporary permit.

The OWRB can issue a temporary permit for an amount greater than two acre-feet annually, if it determines that:

the applicant presents clear and convincing evidence that allocations in excess of two (2) acre-feet annually for each acre of land overlying the basin or subbasin will not exhaust the water thereunder in less than twenty (20) years, then the Board may issue temporary permits in such basin or subbasin in such amounts in excess of said limitation as will assure a minimum twenty-year life for such basin or subbasin.
Without clear and convincing evidence, the OWRB will not issue a temporary permit in excess of two acre-feet annually.

i. Revalidation of a Temporary Permit

A temporary permit lasts for only one year, and it must be revalidated each year.\(^8\) The OWRB mails each temporary permit holder a water use report form.\(^8\) According to the regulations, "[t]he water use report form shall include information about the requirement to return the completed form in a timely manner, and shall specify the date by which the form must be returned."\(^8\) To revalidate a temporary permit, the permit holder must simply complete and return a signed and dated water use report form to the OWRB in a timely manner.\(^8\) Upon return of the water use report form prior to the specified date, the OWRB will revalidate the temporary permit.\(^9\) Thus, the Act and accompanying regulations make revalidation of a temporary permit a straightforward process.

ii. The Oklahoma Water Resources Board v. Texas County Irrigation & Water Resources Ass'n decision

In *Oklahoma Water Resources Board v. Texas County Irrigation & Water Resources Ass'n*, the OWRB granted Mobil Oil a temporary permit for the term of twenty years, subject to annual automatic revalidation by the OWRB.\(^9\) The court found that the regulations allowing for the automatic revalidation of a temporary permit, without the statutory differences between a temporary permit and regular permit, were invalid.\(^9\) More specifically, the court stated that under former OWRB Rule 840.4, "Mobil is entitled to annual automatic revalidation of this permit based solely upon a statement of rate of consumption, without reference to any objective


\(^9\) *Id.* at 46.
standard of reasonable usage."93 Automatic revalidation, according to the court, administratively repealed the safeguards which distinguish a regular and a temporary permit.94 Considering prior precedent, the court found automatic revalidation to be inconsistent with the distinction between a temporary permit and a regular permit. Citing a prior opinion, the court held that "'[a] temporary permit is not tantamount to a regular permit in that the statute provides it must be revalidated annually.'"95

According to the opinion, the regulations regarding allocation of ground water resources should be based upon reasonable regulations.96 The holder of a temporary permit must annually substantiate the legal foundation of his or her original temporary permit.97 Furthermore, the court held that in order to annually substantiate the legal foundation of the original temporary permit, the permit holder each year:

must re-establish (1) that the lands owned or leased by the applicant overlie the fresh ground water basin or subbasin; (2) that the use is a beneficial use; and, (3) that waste (by depletion or pollution) will not occur. Otherwise, in the absence of protest, the routine granting of temporary permits becomes tantamount to the ex parte issuance of a regular permit and the requirements of hydrologic surveys and the determination of annual yields become meaningless.98

For these reasons, the court invalidated OWRB Rule 840.4.99 It appears, however, that the court misread the requirements of the Act.100 The Act does not require a temporary permit holder to reestablish the following: (1) that the lands owned or leased by the holder overlie a fresh groundwater basin, (2) the water is put to beneficial use, and (3) waste

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93 Id. Former OWRB Rule 840.4 stated: "ANNUAL REVALIDATION AND EXPIRATION OF TEMPORARY GROUND WATER PERMITS: A temporary ground water permit must be revalidated annually during its term. Water use report forms will be mailed in January to each temporary permit holder. Return of the completed, signed, and dated water use report form to the Board within thirty (30) days of receipt will automatically revalidate a temporary ground water permit whose revalidation is not protested. If revalidation is protested, the temporary permit will not be automatically revalidated but will be submitted to the Board for consideration. The temporary permit shall lapse at expiration of its term, revocation, cancellation, suspension, or upon the issuance of a regular permit, whichever shall occur first." Id.
94 Texas County I, 711 P.2d at 46.
95 Id. at 47 (citing Lowrey, 555 P.2d at 1024) (alteration in original).
96 Id.
97 Id.
98 Id.
99 Id.
100 See Robert H. Anderson, Oklahoma's 1973 Groundwater Law: A Short History, 43 OKLA. L. REV. 1, 18 (1990) ("Rule 840.4, however, did just what the 1972 Senate committee amendment set out to accomplish: It renewed the temporary permit without the cost to the permittee.").
will not occur. The Act only requires the return of a completed water use report form.

The OWRB would be overworked if it were required to hold hearings for each annual revalidation. As one commenter noted, "annual revalidation would have required evidentiary hearings on over 2,000 temporary irrigation permits issued after July 1, 1973, as well as those of the 6,000 irrigation wells drilled prior to that time whose operators had opted to bring them under the 1973 Act's provisions." The Texas County I court appears to have misunderstood the legislature's intent.

According to the Act, "timely return of the completed, signed, and dated water use report form to the Board shall automatically revalidate a temporary groundwater permit if the revalidation is not protested and if the water use report form does not show or reflect any permit-water use violations." Nothing in the language of the Act requires a temporary permit holder to prove the three factors, cited by the court in Texas County I, to revalidate his permit. Revalidation is automatic, upon completing and returning to the OWRB the water use report, without proving the three factors.

In the current regulations for revalidation and the recent "Annual Water Use Report" (hereinafter "Report"), the OWRB has not changed its current regulations from the Rule that was invalidated twenty-five years ago. Currently, the OWRB’s regulations provide for the automatic revalidation of a temporary permit stating that "the return of the completed, signed and dated water use report on or before the specified return date shall be considered timely and shall be considered a timely request to revalidate the temporary permit." The Report, and the regulations, requires the permit holder to return the Report to the OWRB within 30 days of receipt. However, the Oklahoma courts have reported no cases challenging the current regulations as being inconsistent with Texas County I. Furthermore, the Report only requires the holder to show beneficial use, and not the other two requirements. Apparently, the other

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101 Contra Texas County I, 711 P.2d at 47.
102 Okla. Stat. Ann. tit. 82, § 1020.11(B)(3) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
103 Anderson, supra note 100, at 19.
104 Okla. Stat. Ann. tit. 82, § 1020.11(B)(3) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
108 See Report, supra note 105.
two requirements are only addressed if there is a protest to the permit revalidation filed with the OWRB.

iii. A Protested Temporary Permit Revalidation

If the permit revalidation is protested, the OWRB will hold a limited hearing.\(^{109}\) The revalidation hearing does not review matters that were previously presented, considered, or adjudicated.\(^{110}\) Instead, the hearing is “limited to matters not previously determined.”\(^{111}\) New matters that may be heard at the revalidation hearing include “a material or substantial change in conditions since issuance of the permit; evidence of the applicant’s noncompliance with any of the terms, provisions or conditions of the permit; or subsequent violations of the Oklahoma Groundwater Law, or Board rules and regulations.”\(^{112}\) The statute and regulations require that “any interested person may appear” to present evidence and argue for, or against, the protest and revalidation.\(^{113}\)

As mentioned above, the temporary permit is substantially different from the regular permit. In many cases, an applicant will receive a temporary permit while he or she is waiting for the completion of a hydrologic survey and the eventual issuance of a regular permit. In addition, temporary permits are only valid for one year, and they must be revalidated each year. Finally, the courts and the OWRB have conflicting views on revalidating a temporary permit, and which view is correct may remain unclear for years to come.


C. Special Permit

The Act defines a special permit as a grant “to put ground water to a beneficial use which shall require quantities of water in excess of that allocated under a regular or temporary permit.”\(^{114}\) A special permit is granted by the OWRB in addition to, or in lieu of, a temporary or regular permit.\(^{115}\) The permit may not be issued for a period longer than six months, and it is limited to three renewals.\(^{116}\) A permit holder seeking successive special permits must prove that his or her purpose for the new permit is not that of the original.\(^{117}\) Additionally, he or she must make the same showings as those for a regular or temporary permit.\(^ {118} \)

D. Provisional Temporary Permit

A provisional temporary permit is defined as “a nonrenewable permit granted by and at the discretion of the Executive Director”\(^ {119}\) and the Oklahoma Water Resources Board may grant it immediately.\(^ {120}\) According to the regulations, “[n]o hearings are held, no application notice or data is published and no notice to surface estate owners is required on applications for this type of permit.”\(^ {121}\) Because the decision to grant a provisional temporary permit is based on the ex parte ruling of the OWRB’s Director, the decision is not an appealable order, and a district

\(^{114}\) OKLA. STAT. ANN. tit. 82, § 1020.11(C) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-5-3(a)(1) (West, Westlaw through Dec. 15, 2009).

\(^{115}\) OKLA. STAT. ANN. tit. 82, § 1020.11(C) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-5-3(a)(1) (West, Westlaw through Dec. 15, 2009).

\(^{116}\) OKLA. STAT. ANN. tit. 82, § 1020.11(C) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-5-3(b)(1) (West, Westlaw through Dec. 15, 2009).

\(^{117}\) OKLA. STAT. ANN. tit. 82, § 1020.11(C) (West, Westlaw through the first regular session of the 52nd legislature (2009)); see also OKLA. ADMIN. CODE § 785:30-5-3(b)(2) (West, Westlaw through Dec. 15, 2009).

\(^ {118}\) See infra notes 151-211 and accompanying text. (CER NOTE: im not sure what he wants here.)

\(^{119}\) OKLA. ADMIN. CODE § 785:30-5-4(a) (West, Westlaw through Dec. 15, 2009). “Executive Director” means the Executive Director of the OWRB.

\(^{120}\) OKLA. STAT. ANN. tit. 82, § 1020.10(A) (West, Westlaw through the first regular session of the 52nd legislature (2009)).

\(^ {121}\) OKLA. ADMIN. CODE § 785:30-5-4(c) (West, Westlaw through Dec. 15, 2009).
court lacks jurisdiction to review the decision. Finally, provisional temporary permits are only effective for a period up to ninety days.

E. Limited Quantity Permits

The final type of permit that can be issued by the OWRB is a limited quantity permit. While the Act does not define a limited quantity permit, it provides that “[t]he Executive Director of the Board may administratively issue permits to use limited quantities of groundwater.” The Act is also vague on the quantity of water authorized under a limited quantity permit, providing only that “[i]n no event shall the maximum quantity of water authorized in a limited quantity groundwater permit exceed the amount that would otherwise be allocated by this chapter.”

The OWRB provides further guidance in its regulations by defining a limited quantity permit as “regular, temporary or special permits to use 15 acre-feet or less of groundwater in a calendar year or during its term if the term is less than one year.” Granting this type of permit is left to the discretion of the OWRB’s Executive Director. The regulations provide a limited quality permit:

may be issued or denied summarily and immediately after the ten (10) day period at the discretion of the Executive Director, provided that the Executive Director may require that a hearing on the application be held. After such hearing, the application shall be presented to the Board with proposed findings of fact and conclusions of law for consideration.

Finally, this permit type is limited to a maximum of 15 acre-feet per year.

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122 See Ricks Exploration Co. v. Okla. Water Res. Bd., 695 P.2d 498, 501 (Okla. 1984) (In regard to the review of a provisional temporary permit by the district court, the Oklahoma Supreme Court held that “the district court was without jurisdiction to review the director’s ex parte ruling, because this decision did not amount to an appealable order.”).
124 Id.
125 Id.
VI. PERMIT APPLICATION PROCESS

Limited quantity permits, provisional temporary permits, and special use permits, do not provide sufficient groundwater for most agricultural purposes. This section discusses the procedures for obtaining either a temporary permit or a regular permit, although the procedures are the same for all five types. As stated above, "[t]he procedures provided for in this chapter for the granting of regular permits shall be applicable to the granting of temporary or special permits except that the determination of the maximum annual yield shall not be a condition precedent." Thus, the applicant will have to make the same showings in the application process regardless of the type of permit sought.

A. Domestic Uses

According to the Act, no permit is necessary if the applicant will be putting the fresh groundwater to a domestic use. "Domestic use" includes some farm related uses and is defined as:

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 laws, and for such other purposes, specified by Board rules, for which de minimis amounts are used.

The OWRB expands this definition somewhat in its regulations, providing that 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.

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129 OKLA. STAT. ANN. tit. 82, § 1020.10(A) (West, Westlaw through the first regular session of the 52nd legislature (2009)).

130 See OKLA. STAT. ANN. tit. 82, § 1020.3 (West, Westlaw through the first regular session of the 52nd legislature (2009)). This provision does not take away a municipality's ability to require a domestic fresh groundwater user to get a municipal permit if the well is in municipal limits. OKLA. ADMIN. CODE § 785:30-13-1 (West, Westlaw through Dec. 15, 2009).

131 OKLA. STAT. ANN. tit. 82, § 1020.1(2) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
provided that the amount of groundwater used for any such purposes does not exceed five acre-feet per year.\textsuperscript{132}

Because most farmers need to irrigate more than three acres and/or use more than five acre-feet per year, the domestic purpose exception normally does not apply.

A domestic use may not require a permit, but it is not granted priority over other uses. In an early case interpreting the Act, the Oklahoma Supreme Court held that the Act "does not require the Board to consider domestic priorities before granting a temporary permit."\textsuperscript{133} Two years later, the court clarified this position by stating:

\begin{quote}
We now hold that the fact that it is not necessary to obtain a permit before taking water for domestic use does not give water for domestic use a priority over water put to other beneficial use. If the Legislature had intended such a priority to be given water for domestic use, it would have so stated in the sections of the statute relating to permits. We have no alternative but to hold that no such priority was intended.\textsuperscript{134}
\end{quote}

Thus, a domestic water user does not have priority over a new domestic, or permitted, user of water.

\textbf{B. Permit Application Process}

The application process for a permit is relatively simple, and the permit will be granted if the appropriate elements are shown. The OWRB's regulations allow an applicant to fill out the application electronically or by hand.\textsuperscript{135} The application requires the applicant to describe the purposes for the water to be taken, show ownership of the surface or an agreement with the surface owner, and list the names and addresses of all surface owners within 1,320 feet of the proposed wells.\textsuperscript{136} The signed application may be submitted "to the Board in person, by mail, by readable facsimile transmittal, or through the Board's online application service."\textsuperscript{137}

\begin{footnotes}
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\footnotetext[132]{\textsc{Okla. Admin. Code} § 785:30-1-2 (West, Westlaw through Dec. 15, 2009).}
\footnotetext[133]{\textsc{Lowrey}, 555 P.2d at 1025.}
\footnotetext[134]{Hodges v. Okla. Water Res. Bd., 580 P.2d 980, 983 (Okla. 1978). \textit{See also} 12 Okla. Op. Att'y Gen. 205 (1980) ("There is no statutory provision in the current ground water law today which establishes preferred or prioritized ground water uses. The current ground water law has established a policy of equal proportionate sharing among all overlying landowners.").}
\footnotetext[135]{\textsc{Okla. Admin. Code} § 785:30-3-1(a) (West, Westlaw through Dec. 15, 2009).}
\footnotetext[136]{Oklahoma Water Resources Board, \textit{Application For a Permit To Use Groundwater} (2008), available at \url{http://www.obrb.ok.gov/supply/watuse/pdf_wat/appgw.pdf}.}
\footnotetext[137]{\textsc{Okla. Admin. Code} § 785:30-3-1(a) (West, Westlaw through Dec. 15, 2009).}
\end{footnotes}
C. Notice of Hearing

Following submission of the application, the applicant is required to give proper notice to neighboring landowners at his or her own expense. Any revised notices are also to be given at the expense of the applicant. This notice must include the date and time for the hearing on the permit application, if one is scheduled, and the proper manner in which to protest the application. If no hearing is scheduled, a neighboring landowner or interested party may submit a protest to the OWRB requesting that one be held. Notice should be "published once a week for two consecutive weeks in a newspaper of general circulation in the county where each existing or proposed well is located." Notice by certified mail should be given to all surface owners within 1,320 feet of the proposed or existing wells. No hearing on the application may be held until proper notice is given.

The adequacy and accuracy of this notice is the permit applicant's responsibility, and not that of the OWRB. According to the regulations, within fifteen days of the last date of publication, the permit applicant must provide proof to the OWRB that proper notice was given. Failure by the applicant to provide proper notice and proof of notice to the OWRB will result in dismissal of the application and forfeiture of the application fee.

If no hearing on the application has been scheduled before notice is given, the OWRB will schedule a hearing upon receipt of protests. Any interested party has the right to protest a permit application and present evidence and testimony in support of his or her protest at the hearing. Finally, even if no protests are received by the OWRB, the permit applicant

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138 OKLA. STAT. ANN. tit. 82, § 1020.8 (West, Westlaw through the first regular session of the 52nd legislature (2009)).
139 OKLA. ADMIN. CODE § 785:30-3-4(d) (West, Westlaw through Dec. 15, 2009) (“The Board may require a revised notice to be published at the applicant’s expense in case material error or deviation is made in the description of the land, the well location, or the manner in which a protest to be application may be made [82:1020.8], or if the applicant makes substantial amendments to his application after notice of the original application, or fails to effect proper publication in any manner.”).
140 OKLA. STAT. ANN. tit. 82, § 1020.8 (West, Westlaw through the first regular session of the 52nd legislature (2009)).
141 OKLA. ADMIN. CODE § 785:30-3-4(e)(1) (West, Westlaw through Dec. 15, 2009).
142 OKLA. ADMIN. CODE § 785:30-3-4(a) (West, Westlaw through Dec. 15, 2009).
143 Id.
144 OKLA. STAT. ANN. tit. 82, § 1020.8 (West, Westlaw through the first regular session of the 52nd legislature (2009)).
145 OKLA. ADMIN. CODE § 785:30-3-4(a) (West, Westlaw through Dec. 15, 2009).
146 OKLA. ADMIN. CODE § 785:30-3-4(b) (West, Westlaw through Dec. 15, 2009).
147 OKLA. ADMIN. CODE § 785:30-3-4(c) (West, Westlaw through Dec. 15, 2009).
148 OKLA. ADMIN. CODE § 785:30-3-4(e)(1) (West, Westlaw through Dec. 15, 2009); see also OKLA. ADMIN. CODE §785:4-5-4 (West, Westlaw through Dec. 15, 2009) (requirements of a proper protest)
149 OKLA. ADMIN. CODE § 785:30-3-4(e)(2) (West, Westlaw through Dec. 15, 2009).
will still have the opportunity for a hearing if the OWRB’s staff does not recommend approval of the permit application.\textsuperscript{150}

\textit{D. Application Approval}

Before it may approve a permit application, the OWRB must determine that the evidence presented satisfies the following four elements:

\begin{enumerate}
\item the lands owned or leased by the applicant overlie a fresh groundwater basin or subbasin,
\item the use to which the applicant intends to put the water is a beneficial use,
\item waste as specified by Section 1020.15 of this title will not occur, and
\item the proposed use is not 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 1 of this [A]ct.\textsuperscript{151}
\end{enumerate}

The land over the freshwater aquifer must be either owned or leased by the permit applicant and the fresh groundwater must be put to a beneficial use. Paragraph (d), regarding degradation of a spring or stream originating from a sole source aquifer, is applicable only to the Arbuckle-Simpson aquifer. The Act also requires a showing that waste will not occur.\textsuperscript{152} With respect to the waste determination, not only must the OWRB find that waste will not occur, but if the proposed use falls under another agency’s jurisdiction, then the permit applicant is required to comply with other agencies’ rules as well.\textsuperscript{153} The Act states:

When determining whether waste will occur pursuant to this subparagraph, if the activity for which the applicant intends to use the water is required to comply with rules and requirements of or is within the jurisdictional areas of environmental responsibility of the Department of Environmental Quality or the State Department of Agriculture, the Board shall be precluded from making a

\begin{footnotes}
\textsuperscript{150} \textit{OKLA. ADMIN. CODE} § 785:30-3-4(e)(3) (West, Westlaw through Dec. 15, 2009).
\textsuperscript{151} \textit{OKLA. STAT. ANN. tit. 82, § 1020.9(A)(1)(a)–(d)} (West, Westlaw through the first regular session of the 52nd legislature (2009)).
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{OKLA. STAT. ANN. tit. 82, § 1020.9(A)(2)(c)} (West, Westlaw through the first regular session of the 52nd legislature (2009)).
\end{footnotes}
determination whether waste by pollution pursuant to paragraph 7 of subsection A of Section 1020.15 of this title will occur as a result of such activity. Each groundwater protection agency, as such term is defined by Section 1-1-201 of Title 27A of the Oklahoma Statutes, shall be responsible for developing and enforcing groundwater protection practices to prevent groundwater contamination from activities within their respective jurisdictional areas of environmental responsibility.\textsuperscript{154}

The reasons for limiting OWRB’s jurisdiction in determining if waste will occur will be discussed in subsection iii of this article.

\textit{i. Lands Owned or Leased by the Permit Applicant}

The element that is the easiest for the OWRB to find is a showing that the permit applicant owns, or leases, the lands overlying a freshwater aquifer. The regulations allow the OWRB broad latitude with respect to establishing this element, stating that “[i]n making the determination of whether the lands are owned or leased by the applicant, the Board will only consider language on the face of legal instruments used to support or oppose this element.”\textsuperscript{155} The language of this regulation allows the OWRB to look at any legal instrument to determine if the permit applicant owns, or leases, the lands over the freshwater aquifer.

An applicant may prove land ownership through deeds showing ownership of the surface of the dedicated lands.\textsuperscript{156} To determine if the lands overlay a freshwater aquifer, the OWRB may reference the latest edition of the hydrologic atlas of groundwater resources for the area of the state the surface is located.\textsuperscript{157}

Note that, despite the requirement that the permit applicant own or lease the land over the freshwater aquifer, there is no requirement that the fresh groundwater be used on that land. The Act’s only limitation on

\textsuperscript{154} \textit{Id.}\textsuperscript{155} \textit{OKLA. ADMIN. CODE} § 785:30-3-5(b) (West, Westlaw through Dec. 15, 2009).


\textsuperscript{157} See Order for Rural Water, Sewer & Solid Waste Mgmt. Dist. No. 1, \textit{supra} note 156, at 2.
transporting fresh groundwater off-tract is a ban on allowing excessive losses to occur in transit.\textsuperscript{158}

For example, the Oklahoma Supreme Court found in \textit{Texas County I} that the Act did not prohibit the transportation of water-off tract.\textsuperscript{159} At issue was Mobil Oil's proposed off-tract use of groundwater for secondary and tertiary oil recovery.\textsuperscript{160} The court found that, "the 1972 Act indicates an intention by the Legislature to allow the use of duly allocated ground water at a distance from the land from which the water is produced so long as current use regulations, including waste prohibition, are satisfied."\textsuperscript{161} The court concluded:

that movement of fresh ground water off the producing premises is not precluded by the limitation of reasonable use so long as use regulations now codified in the 1972 Oklahoma Ground Water Law, 82 O.S. 1981, § 1020.1, \textit{et seq.}, have been properly adjudicated and the evidence establishes that the applicant is in compliance therewith.\textsuperscript{162}

Thus, a permit holder will not be limited by the Act to using the fresh groundwater on the property overlying the aquifer, but will be allowed to transport the water off-tract.

\textit{ii. Beneficial Use}

The Act does not provide a clear definition of "beneficial use." In the declaration of policy section that begins the Act, reference is made only to "agricultural stability, domestic, municipal, industrial and other beneficial uses."\textsuperscript{163} The regulations provide some additional guidance by defining the term as "the use of such quantity of stream or groundwater when reasonable intelligence and reasonable diligence are exercised in its application for a lawful purpose and as is economically necessary for that purpose. Beneficial uses include but are not limited to municipal,

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{158} \textit{OKLA. STAT. ANN.} tit. 82, § 1020.15(A)(4) (West, Westlaw through the first regular session of the 52nd legislature (2009)) (prohibiting the OWRB from granting a permit when the user will commit waste by "[t]ransporting fresh groundwater from a well to the place of use in such a manner that there is an excessive loss in transit.").
\item\textsuperscript{159} \textit{Texas County I}, 711 P.2d at 42-43.
\item\textsuperscript{160} \textit{Id.} at 40.
\item\textsuperscript{161} \textit{Id.} at 42.
\item\textsuperscript{162} \textit{Id.} at 42-43; \textit{see also} Messer-Bowers Co. v. State \textit{ex rel.} Okla. Water Res. Bd., 8 P.3d 877, 881 (Okla. 2000) (affirming the holding of the \textit{Texas County I} court allowing transport of water off tract).
\item\textsuperscript{163} \textit{OKLA. STAT. ANN.} tit. 82, § 1020.2 (West, Westlaw through the first regular session of the 52nd legislature (2009)).
\end{enumerate}
\end{footnotesize}
industrial, agricultural, irrigation, recreation, fish and wildlife, etc." Because of this broad definition, most fresh groundwater uses are considered beneficial uses.

The Oklahoma courts have addressed the issue of whether fresh groundwater used for agricultural purposes will always be considered a beneficial use. In Lowrey, the trial court found “that irrigation is not per se a beneficial use under” the Act. The Oklahoma Supreme Court reversed, stating that “the Legislature designated agricultural stability as a beneficial use. It requires little imagination to recognize that the Legislature intended to include irrigation for the purpose of growing food and fiber as a beneficial agricultural use.” Finally, the court looked to the OWRB’s regulations and found that irrigation had been included in the definition of beneficial use. The Oklahoma Supreme Court has consistently held that irrigation is a beneficial use of groundwater.

iii. Waste

After determining that the applicant will put fresh groundwater to a beneficial use, the OWRB determined whether the applicant’s use will result in “waste.” According to the Oklahoma Supreme Court’s holding in Texas County I, the OWRB is “to protect against waste of ground water by depletion, as well as waste of ground water by pollution, a consideration by the [OWRB] of waste in this context is mandatory.” The OWRB has adopted both concepts of waste into its regulations. We will first look at “waste by depletion” and then “waste by pollution.”

a. Waste by Depletion

The Texas County I court did not define “waste by depletion,” but the OWRB has defined the term in paragraphs (1) through (6) and

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165 See Reimer, supra note 156, at 5.
166 Lowrey, 555 P.2d at 1022.
167 Id.
168 Id. at 1022–23. The court cites to former Rule 600.1, which is similar to the current rule stated in § 785:30-1-2. Id.
169 Hodges, 580 P.2d at 982 (citing the holding of Lowrey v. Hodges and finding spray irrigation to be a beneficial use of groundwater).
170 See OKLA. STAT. ANN. tit. 82, § 1020.9(A)(2)(c) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
171 Texas County I, 711 P.2d at 46.
172 OKLA. ADMIN. CODE § 785:30-3-5(e)(2) (West, Westlaw through Dec. 15, 2009) (providing the definition of “waste by pollution”); OKLA. ADMIN. CODE § 785:30-3-5(e)(1) (West, Westlaw through Dec. 15, 2009) (providing the definition of “waste by depletion.”).
 paragraphs (8) through (9) of Section 1020.15(A) of the Act. The OWRB has defined “waste by depletion” as an:

unauthorized use of wells or groundwater; [d]rilling a well, taking, or using fresh groundwater without a permit, except for domestic use; [t]aking more fresh groundwater than is authorized by the permit; [t]aking or using fresh groundwater in any manner so that the water is lost for beneficial use; [t]ransporting fresh groundwater from a well to the place of use in such a manner than there is an excessive loss in transit; [u]sing fresh groundwater to reach a pervious stratum and be lost into cavernous or otherwise pervious materials encountered in a well... drilling wells and producing fresh groundwater therefrom except in accordance with the well spacing previously determined by the Board; [82:1020.15(A)] or [u]sing fresh groundwater for air conditioning or cooling purposes without providing facilities to aerate and reuse such water [82:1020.15(A)].

“Waste by depletion” is a broad category that may include unauthorized uses as well as uses that cause excessive losses of fresh groundwater. In looking at “waste by depletion,” the OWRB may consider:

evidence concerning the manner and method of use proposed, efficiency of system proposed to be used, history and incidents of past waste and applicant’s response thereto and the amount of groundwater needed for the purpose proposed in relation to the amount allocated to the land dedicated to the application may be considered by the Board."
Whenever the applicants are using their wells and appurtenant water system to irrigate, they will check the system visually. The system is also equipped with a low pressure shutoff valve that will prevent undue waste. There was no evidence that the applicants will drill a well, take or use fresh groundwater without a permit; take more fresh groundwater than is authorized by the permit; take or use fresh groundwater in any manner so that the water is lost for beneficial use; transport the water from wells to the place in use in such a manner that there is an excessive loss in transit; use the water in such an inefficient manner that excessive losses occur; or allow any fresh groundwater to reach a pervious stratum and be lost into cavernous or pervious materials encountered in a well. Applicants will not be using the water for air conditioning or cooling purposes.\textsuperscript{176}

If these factors are established, the OWRB concludes that “waste by depletion” will not occur and the application will be approved.\textsuperscript{177}

\subsection*{b. Waste by Pollution}

The Oklahoma courts have created some confusion concerning the proper “waste by pollution” analysis. The OWRB has defined “waste by pollution” as any use:

\[ \text{permitting or causing the pollution of a fresh water strata or basin through any act which will permit fresh groundwater polluted by minerals or other waste to filter or otherwise intrude into such a basin or subbasin . . . or [f]ailure to properly plug abandoned fresh water wells in accordance with rules of the Board [OWRB] and file reports thereof[.]} \textsuperscript{178} \\

This definition of “waste by pollution” incorporates both subsections (7) and (10) of the regulations. On its face, the definition appears simple to understand, but the Oklahoma courts have made a mess of OWRB’s duty to protect against “waste by pollution.”

\textsuperscript{176} Reimer, \textit{supra} note 156, at 3.
\textsuperscript{177} \textit{Id.} at 6.
\textsuperscript{178} \textit{OKLA. ADMIN. CODE} § 785:30-1-2 (West, Westlaw through Dec. 15, 2009) (citing, \textit{OKLA. STAT. ANN. tit. 82, § 1020.15(A)(7), (10) (West, Westlaw through the first regular session of the 52nd legislature (2009))} (alterations in original).
The original view taken by the Oklahoma Supreme Court on "waste by pollution" was in Lowrey v. Hodges. In Lowrey, the protestants claimed that the applicants' use of water for irrigation would be a waste under the Act. The Oklahoma Supreme Court agreed with the OWRB that no waste would occur and stated that the Board's decision was correctly based on the evidence of the applicants. The court placed the burden to prove waste on the protestants. The court found that:

If the plans submitted to the Board do not on their face demonstrate such waste, and the Protestants fail to introduce evidence to substantiate that waste will occur, and the Board finds that waste will not occur, the statute has been satisfied and further questions concerning waste must await completion of the project.

Finally, the court found that Section 1020.15 allows for an after-the-fact determination of waste, and when such waste occurs there are criminal prosecutions, injunctions, and suspension to prevent the waste from continuing.

Two years later, the court upheld Lowrey's reasoning. In Hodges v. Oklahoma Water Resources Board, the court upheld the determination of the OWRB that waste does not occur when fresh groundwater is used for irrigation. The court found:

[the only evidence presented to the Board in the case before us that would suggest waste was evidence that the total mineral content, measured in parts per million, of domestic wells in the area, might be increased when the irrigation water filtered back into the ground water formation. This evidence relating to total mineral content, which is one indication of water quality, was not conclusive.

In looking at the evidence presented by the protestants, the court determined that the total mineral content is only one indication of water

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119 Lowrey, 555 P.2d at 1023.
120 Id.
121 Id.
122 Id.
123 See Hodges, 580 P.2d at 982 (inferring the reason why the OWRB decision was upheld was because waste would not occur by the use of fresh groundwater in irrigation).
124 Id.
The court stated that the higher the mineral content of the water, the lower the quality.\textsuperscript{185} As mentioned above, the OWRB and the Oklahoma courts placed the burden to prove waste on the protestants until 1984. In \textit{Texas County I}, the Oklahoma Supreme Court shifted the burden of proof regarding waste to the applicant. The court found that when looking at Mobil Oil’s use of groundwater, the OWRB’s order contained no “essential findings of fact to support a finding that waste will not occur in the process of tertiary oil recovery.”\textsuperscript{187}

The court stated that the process for tertiary oil recovery required detergents and other additives to be added to the groundwater to aid in the recovery of oil.\textsuperscript{188} The record reflected “no evidence identifying these specific chemical additives; or whether these unidentified chemical additives were harmful or harmless; or whether the water contaminated by these unidentified chemical additives could possibly later be reclaimed through treatment.”\textsuperscript{189} Finding that the record lacked evidence that “waste by pollution” would not occur, the court reversed the OWRB’s approval of the permit.\textsuperscript{190}

The divergence from prior precedent was not lost on all of \textit{Texas County I} justices, as it was even noted in Justice Robinson’s dissent.\textsuperscript{191} Taking the majority’s view, that fresh groundwater utilized to recover oil would undergo chemical changes, he stated that the same would be true for water used in irrigation. More specifically, he explained that:

\begin{quote}
\textit{it is also true that water used in irrigation changes its chemical characteristics as it percolates through fertilizer and other chemicals sprayed on crops and through the surface of the earth. Changes in water also occur during domestic and other industrial uses when fresh water absorbs dirt, sewage, detergents and other chemicals. After use, all groundwater changes its chemical characteristics and composition. Nowhere in the Groundwater Law does it say that the changing of fresh water chemical characteristics is pollution.}\textsuperscript{192}
\end{quote}

\begin{tiny}
\begin{thebibliography}{9}
\bibitem{185} Id.
\bibitem{186} Id. at 982 n.1.
\bibitem{187} \textit{Texas County I}, 711 P.2d at 44.
\bibitem{188} Id. at 45.
\bibitem{189} Id.
\bibitem{190} Id.
\bibitem{189} See id. at 51 (Robinson, J. dissenting in part) (comparing the use of fresh groundwater to recover oil to water used for irrigation).
\bibitem{192} Id. at 51.
\end{thebibliography}
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Relying on the precedent established in Lowrey and Hodges, the dissent found that the evidence showed no waste by pollution with the addition of the chemicals to the fresh groundwater. 193

After the Texas County I decision, the Oklahoma Legislature attempted to limit the OWRB’s ability to look at all forms of “waste by pollution” by passing the Oklahoma Environmental Quality Act (hereinafter “OEQA”) in 1992. 194 The OEQA creates jurisdictional boundaries between the Department of Environmental Quality (hereinafter “DEQ”), the Oklahoma Department of Agriculture (hereinafter “ODA”), the Oklahoma Corporation Commission (hereinafter “OCC”), and the OWRB for the management of environmental resources. 195 The OEQA gives all four agencies the duty to protect groundwater when the planned use is in their respective jurisdictions. 196

The OWRB viewed the OEQA as providing a grant of exclusive jurisdiction to the ODA to determine if “waste by pollution” would occur in agricultural activities, thus superseding the Texas County I requirements on waste by pollution. 197 The Oklahoma Supreme Court reversed the OWRB’s interpretation of jurisdiction under the OEQA and explained that:

[nothing in the Act provides that the Department of Agriculture has exclusive jurisdiction which prevents the OWRB from granting a groundwater permit on a finding that the mixing of fresh groundwater with animal waste and its use of effluent for irrigation will not cause waste by pollution. The Act specifically made the OWRB’s jurisdictional responsibility for pollution of groundwater in addition to that otherwise provided by law. This includes the directives contained in the Texas County I opinion concerning waste by pollution. Further, the text of the Act evidences an intent that the OWRB and the Agriculture

193 Texas County I, 711 P.2d at 52.


196 See id. (giving the DEQ, ODA, OCC, and OWRB duty to protect groundwater when the planned use is in their respective jurisdiction).

197 See Messer-Bowers Co., 8 P.3d at 882; see also Okla. Stat. Ann. tit. 27A, § 1-3-101(D)(1)(a) (West, Westlaw through the first regular session of the 52nd legislature (2009)) (The OEQA provides the Department of Agriculture exclusive jurisdiction for “point source discharges and nonpoint source runoff from agricultural crop production, agricultural services, livestock production, silviculture, feed yards, livestock markets and animal waste.”).
Department have concurrent environmental jurisdiction over livestock facilities which require water permits.\textsuperscript{198}

Because the waste by pollution determinations had not been superseded by the passage of the OEQA, the court remanded the decision back to the OWRB. The court found that the OWRB had concurrent jurisdiction with the ODA to determine if "waste by pollution" would occur.\textsuperscript{199} On remand, the OWRB was required to collect evidence and determine if "waste by pollution [would] occur through all uses of groundwater at Kronseders[see] swine facilities, including the spread of effluent from its swine operation onto its land."\textsuperscript{200}

In Messer-Bowers, the court found that "[n]othing in the Act provides that the Department of Agriculture has exclusive jurisdiction which prevents the Water Board from granting a groundwater permit on a finding that the mixing of fresh groundwater with animal waste and its use of effluent for irrigation will not cause waste by pollution."\textsuperscript{201} The Oklahoma Legislature amended the Act in 2001 to clarify the jurisdictional issues of the Messer-Bowers decision.\textsuperscript{202} The legislature added Section 1020.9(A)(2)(c) to the Act, which reads:

\[\text{[w]hen determining whether waste will occur pursuant to this subparagraph, if the activity for which the applicant intends to use the water is required to comply with rules and requirements of or is within the jurisdictional areas of environmental responsibility of the Department of Environmental Quality or the State Department of Agriculture, the Board shall be precluded from making a determination whether waste by pollution pursuant to paragraph 7 of subsection A of Section 1020.15 of this title will occur as a result of such activity. Each groundwater protection agency, as such term is defined by Section 1-1-201 of Title 27A of the Oklahoma Statutes, shall be responsible for developing and enforcing groundwater protection practices to prevent groundwater contamination from activities within their respective jurisdictional areas of environmental responsibility.}\textsuperscript{203}

\begin{footnotesplit}
\textsuperscript{198} Messer-Bowers Co., 8 P.3d at 882.
\textsuperscript{199} Id.
\textsuperscript{200} Id. at 882-83.
\textsuperscript{201} Id. at 882.
\textsuperscript{202} H.R. 1480, 48 Leg., 1st Sess. (Okla. 2001).
\textsuperscript{203} Id.
\end{footnotesplit}
Finally, the legislature amended Section 1020.15(A)(7) of the Act to include the following language:

The Board shall be precluded from determining whether waste by pollution will occur pursuant to the provisions of this paragraph if the activity for which the applicant or water user intends to or has used the water as specified under Section 1020.9 of this title is required to comply with rules and requirements of or is within the jurisdictional areas of environmental responsibility of the Department of Environmental Quality or the State Department of Agriculture.204

These amendments clarify the jurisdictional issues raised in Messer-Bowers.

The Act now clearly provides that the OWRB is "precluded from making a determination whether waste by pollution pursuant to" Section 1020.15(A)(7) when the intended use of groundwater is within the jurisdiction of the DEQ, the OCC, or the ODA.205 Additionally, the Act now clarifies that each agency with a duty to protect groundwater under the OEQA is responsible for developing, and enforcing, groundwater protection practices in their jurisdictions.206 The Act has taken away the concurrent jurisdiction between either the ODA, DEQ, or OCC and the OWRB, and given exclusive jurisdiction back to the respective state agencies.

Current regulations reiterate the view that the OWRB's "waste by pollution" determination is one of limited scope. Citing the language of the Act, the regulations also require that:

[i]f the activity for which the applicant intends to use the water is required to comply with rules and requirements of or is within the jurisdictional areas of environmental responsibility of the Department of Environmental Quality or the State Department of Agriculture, the Board shall be precluded from making a determination whether waste by pollution will occur as a result of such activity.207

204 Id.
205 OKLA. STAT. ANN. tit. 82, § 1020.9(A)(2)(c) (West, Westlaw through the first regular session of the 52nd legislature (2009)).
206 Id.
207 OKLA. ADMIN. CODE § 785:30-3-5(e)(2) (West, Westlaw through Dec. 15, 2009) (citing OKLA. STAT. ANN. tit. 82, § 1020.9(A)(2)(c) (West, Westlaw through the first regular session of the 52nd legislature (2009))) (alterations in original).
The statute and the regulations reveal that if the intended use of water requires compliance with the regulations of the DEQ or the ODA, the OWRB no longer has jurisdiction to determine if the intended use will cause "waste by pollution."

Depriving the OWRB of jurisdiction when the activity is in the jurisdiction of another state department reduces hurdles for the permit applicant. Under the alternative approach adopted by the Messer-Bowers court, the permit applicant must comply with the regulations of two different agencies, the OWRB and either the DEQ, OCC, or ODA. This could lead to a situation where one agency determines that no "waste by pollution" will occur, while the other finds the opposite. Thus, the legislature and the OWRB have rejected this approach. The legislature has precluded the OWRB from looking at "waste by pollution" in areas exclusively within the jurisdiction of the DEQ, OCC, or ODA. The OWRB is no longer required to reexamine the decisions of the DEQ, OCC, or ODA, and the permit applicant can rely on the agency's determination with regard to "waste by pollution." The Oklahoma courts have yet to speak to the 2001 amendments to the Act, but the new language appears to be abundantly clear.

In reviewing permit applications, the OWRB looks for two forms of "waste by pollution." First, the OWRB looks for any indication that the wells will be drilled in ways to prevent contamination of the groundwater from the surface. In addition, the OWRB looks for evidence of unused or abandoned wells on the property. If any exist, the applicant must have properly plugged the wells to prevent contamination of the groundwater from the surface. If the OWRB finds no evidence of contamination of the groundwater from the surface, it will not find "waste by pollution."

Although the view of the OWRB's role in preventing "waste by pollution" has changed over the years, the legislature and the OWRB have finally settled on a defined role within the expertise of the OWRB. The legislature left the role of determining whether or not pollution will occur to other agencies if they have jurisdiction. But this view could change if the Oklahoma courts ever decide to take up the issue of "waste by pollution" again.

VI. CONCLUSION

Using groundwater for purposes other than domestic uses is as simple as drilling a well and starting to pump. However, the water to be

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208 Reimer, supra note 156, at 3.
209 Id.
210 See id.
211 See id. at 7.
used must first qualify as “groundwater,” and the user must show ownership of the surface, or a surface lease, to have rights associated with the groundwater. In addition, the user must also apply for a permit and the type of permit available will depend on a variety of factors, including work already done by the OWRB. Finally, the applicant must prove the elements required by the Act and give the proper notice to neighboring water users.

Because a landowner owns the groundwater under his land, the landowner will be granted a permit if the statutory and regulatory requirements are met. As this article has shown, seeking a groundwater permit is a relatively straightforward process if the proper burdens are met. However, as this article has further revealed, the Oklahoma courts have muddled the burdens at times and have created confusing jurisdictional issues for the OWRB.

The importance of groundwater issues is on the rise in Oklahoma. With growing urban populations and the continuing needs of agriculture, the need for groundwater will only increase.\textsuperscript{212} Consequently, the ability to understand the Act’s permitting process will become increasingly important as the competition for the use of groundwater grows.

\textsuperscript{212} See Jacobs Ranch, L.L.C. v. Smith, 148 P.3d 842 (Okla. 2006) (a recent decision highlighting the importance of groundwater sales in Oklahoma).