

A Roadmap for Water Law

Oklahoma Water Law Seminar

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Prof. Emily Meazell, OU College of Law

Goals:

- Basic Structure of Legal Institutions
- How Law is Made in Each Institution
- Law is Fluid: A Groundwater Example

Vertical Structure



U.S. Constitution



Federal law



State law

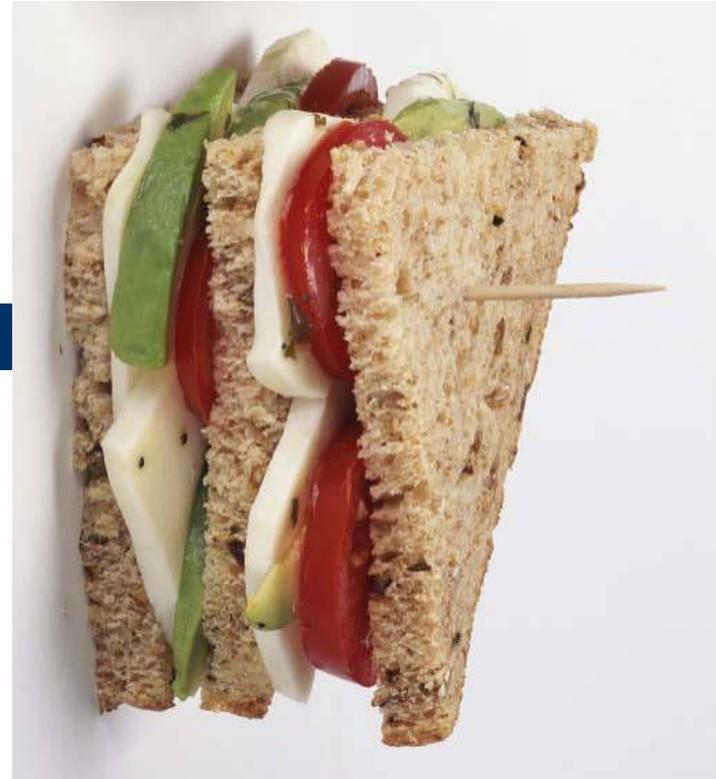


Local law

Horizontal Structure

Constitution

Executive ---- Legislative --- Judicial





U.S. Government & Legal Rules



Constitution of the United States



Congress:
Federal
Statutes



President and
Executive Branch:
Federal Regulations
& Administrative
Decisions



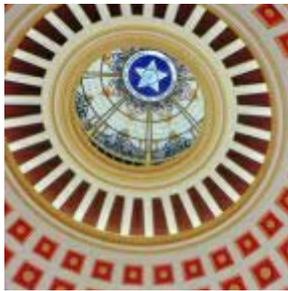
Federal Courts:
Cases (interpretations of
U.S. Constitution, statutes,
and regulations)



Oklahoma Government & Legal Rules



Oklahoma Constitution



State
Legislature:

State
Statutes



Governor and
Executive Branch:

State Regulations &
Administrative
Decisions



State Courts:

Cases (interpretations of
state constitution, statutes,
common law; state courts
also interpret federal law
subject to review by federal
courts)

Goals:

- Basic Structure of Legal Institutions
- How Law is Made in Each Institution

Legislatures & Lawmaking

- Introduce bills
- Editing process (amendments)
- Voting
- Send to executive to sign into law
- Statutes take effect and are binding

Courts & Lawmaking

- Decide legal issues raised by parties
- Interpret constitutions and statutes (includes review of agency actions)
- Common law
- Bound by *stare decisis*
- Legal product: Opinion (“case law”)

Agencies & Lawmaking

- What are they?
- Why do we have them?
- What do they do?
- How are they constrained?

What are they?



AGENCY: Each authority of the Government of the United States—but not the courts or legislature (U.S.)

AGENCY: Any constitutionally or statutorily created state board, bureau, commission, office, authority, public trust . . . or interstate commission—but not the courts or legislature (Oklahoma)

Why do we have them?

- Expertise
- Get Things Done



What do they do?

- Rulemaking
 - Notice-and-comment most frequent: regulations
- Adjudication
 - Similar to trial: administrative decisions
- Investigation
 - For example, monitor compliance with regs

How are they constrained?

- Constraint by legislature: APA
 - Gives rules agencies must follow; for example, procedure to follow when making rules
- Constraint by courts: APA permits many agency actions to be challenged
 - BUT unless violate Constitution or APA, courts review deferentially



So What Law Applies?

Legislative

- Norman Municipal Code
 - Oklahoma Statutes
- Oklahoma Constitution
 - Federal Statutes
- Federal Constitution

Judicial

- Oklahoma Criminal and Civil Courts of Appeals
 - Oklahoma Supreme Court
 - Federal District Court
- 10th Circuit Court of Appeals
 - U.S. Supreme Court

Norman norman, OK

Executive

- Oklahoma Regulations
- Oklahoma Admin Decisions
 - Federal Regulations
- Federal Admin Decisions

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Goals:

- Basic Structure of Legal Institutions
- How Law is Made in Each Institution
- Law is Fluid: A Groundwater Example

Courts & Groundwater—England, 1843

Acton (Cotton Spinning)

v.

Blundell (Coal Mining)

“Absolute Ownership” -- the “English Rule”

Legislatures Adopt—1890

- Cited by New York legislature (not adopted)
- Adopted in Dakota Territory
- Adopted in Oklahoma's First Session of Territorial Legislature in 1890:

“The owner of land owns water standing . . . or flowing under its surface”

Court Interprets Statute—1936

Canada v. City of Shawnee (Okla. 1936)

Issue: What does the statute's language, "the owner of land owns water standing . . . or flowing under its surface" actually mean?

"We do not believe, however, that the landowner's ownership of percolating water was given to him as a weapon with which to unreasonably maim his neighbor."

Meanwhile, Back at the Legislature— 1949

- Oklahoma Ground Water Law enacted:
 - Policy to conserve and protect groundwater resources, and to provide reasonable regulations for taking and using groundwater
 - Priority system, plus grandfather clause for beneficial use prior to statute
 - Apply to Oklahoma Planning and Resources Board for permits (1961 amendments changed to OWRB)
 - Envisioned development of system whereby only safe annual yield (based on yearly recharge) could be withdrawn

Agency Executes

- Board began practice of limiting applicants to two acre feet per year, per acre of land overlying the basin
- Didn't really use a priority system
- Noncompliance and enforcement difficulties

Legislative Changes—1973 & Beyond

- Policy change to mining—meant to comport with property concept of groundwater
- Does away with priority system and provides for allocation amongst water users
- Specifies how OWRB will allocate
- Directs OWRB to prepare comprehensive water plan (1974)

1973 Act Challenged in Court—1988

- Began with Agency executing
- *Kline v. State ex rel. Oklahoma Water Resources Bd.*, 759 P.2d 210 (Okla. 1988)
 - Upheld constitutionality of 1973 Act; Legislature may regulate and restrict landowners' use of groundwater
 - Upheld Board's actions; supported by substantial evidence and not clearly erroneous (deferential)

Fast Forward to Today

- Intervening case law, amendments, regulations
- Legislature continues to direct OWRB to periodically conduct water planning process and deliver water plan to Governor and Legislature
- YOU

QUESTIONS?

- Contact info:

emeazell@ou.edu

www.law.ou.edu