INSTREAM FLOWS AND NON-CONSUMPTIVE USES OF WATER IN OKLAHOMA

Governor's Water Conference
OBA/ELS Water Law CLE
November 13, 2012
Dean Couch
General Counsel
Oklahoma Water Resources Board

DEFINITIONS

- Consumptive use
- Non-consumptive use
- Instream flow
- Environmental flow
- Lake level protection
- Sustainable

STATE LAW DEFINITIONS

- Definite stream
- Groundwater
- Domestic use

APPROPRIATION (Oklahoma law)

- Unappropriated water available in amount applied for
- Present or future need
- Beneficial use
- Proposed use does not interfere
  - Domestic uses
  - Existing appropriative uses
- Proposed use out of basin
- Proposed use out of state

APPROPRIATION
Physical Diversion Required?

82 O.S. Sec. 105.11 – Notice in newspaper in county of "point of diversion"

BENEFICIAL USE
Stream water and Groundwater

- “Use of such quantity when reasonable intelligence and reasonable diligence are exercised in its application for a lawful purpose and as economically necessary for that purpose.”
- List of uses = lawful purposes (e.g. r f & w)
- Distinguish Water Quality Standards “beneficial use” designations (e.g. fish & wildlife propagation)

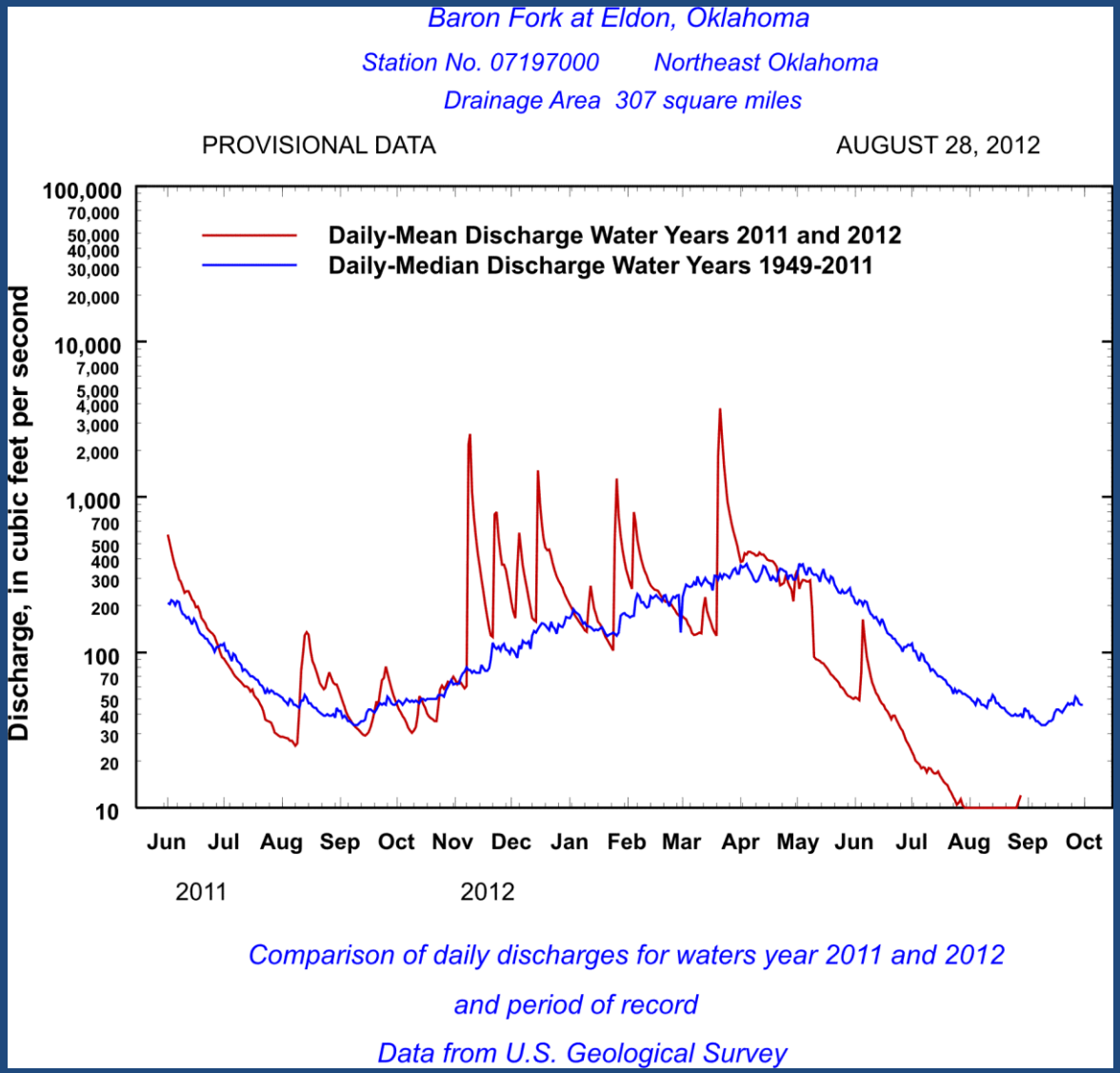
INSTREAM FLOW TECHNICAL ISSUES

- Studies
  - Identify target(s) to protect
  - Establishing scope (e.g. aquatic, recreation)
  - Measure: Flow (cfs) and Volume (AF)
- Models – to predict future conditions
  - Data for input
  - Accuracy needed (may depend on implementation)
  - Flow separation methods – WHAT and HEFR

INSTREAM FLOW POLICY ISSUES

- Implementation (SW appropriation)
  - Authorize flow volume as beneficial use
    - Appropriation permit for ISF (junior)
    - Qualified applicant (agency, non-profit)
  - Take water off table (plenary authority)
    - Water not available for appropriation
    - Flow separation methods for hydrograph analysis
    - Establish by legislation or agency rule
  - Condition new appropriations (plenary authority)
    - Monitoring requirements – USGS gage, weir, depth staff
    - Enforcement – self, water masters, field 'ditch riders'

HYDROGRAPH


Baron Fork at Eldon, Oklahoma
Station No. 07197000 Northeast Oklahoma
Drainage Area 307 square miles
PROVISIONAL DATA
AUGUST 28, 2012
Daily-Mean Discharge Water Years 2011 and 2012
Daily-Median Discharge Water Years 1949-2011
Discharge, in cubic feet per second
100,000
70,000
50,000
40,000
30,000
20,000
10,000
7,000
5,000
4,000
3,000
2,000
1,000
700
500
400
300
200
100
70
50
40
30
20
10
Jun Jul Aug Sep Oct Nov Dec Jan Feb Mar Apr May Jun Jul Aug Sep Oct
2011
2012
Comparison of daily discharges for waters year 2011 and 2012
and period of record
Data from U.S. Geological Survey

BARRON FORK

INSTREAM FLOW POLICY ISSUES

- Implementation (SW appropriation)
  - Retroactive restrictions
  - Once beneficial use, always beneficial use?
  - Release from storage
    - Kansas acquired storage, legislative flow numbers
    - Private property, takings, just compensation
  - Allow transfers - consumptive to instream
  - Recognize conservation – senior water
- Geographic considerations
  - Perennial vs. ephemeral natural flow
  - Okla. Scenic Rivers

INSTREAM FLOW POLICY ISSUES

- Domestic use (ltd. riparian) assumption
  - New appropriations cannot interfere
  - OWRB set aside – water off table to appropriate
- Riparian right to "reasonable use"
  - *Franco* footnote 40 Restatement factors
- Public Trust
  - Illinois Central
  - *National Audubon* and Mono Lake
  - *Franco* dissent

GROUNDWATER and INSTREAM FLOWS

- Ownership and Allocation – surface acres
- Conjunctive/Integrated Management
  - Pumping and effects on surface flow
  - OCWP Water Supply Reliability recommendation
- SB 288 and Sensitive Sole Source GW Basin
- Edwards Aquifer and *Day* case
  - Regulatory taking?
  - Just compensation?

INSTREAM/ENVIRONEMNTAL FLOWS OCWP Recommendation

1. Address legal and policy questions
2. Study other mechanisms
3. Develop draft methodology for studies
4. Study economic impacts
5. Perform pilot study in a Scenic Rivers
6. Preserve ISF Workgroup

- Four years ≈ $1,500,000 ($350,000 yr)

Dean Couch, General Counsel
Oklahoma Water Resources Board
3800 North Classen Boulevard
Oklahoma City, Oklahoma 73118

Phone: 405.530.8800
Fax: 405.530.8900
www.owrb.ok.gov