

## CHAPTER II OKLAHOMA WATER LAW AND ITS ADMINISTRATION



## CLASSIFICATION OF WATER

Depending upon the natural state in which it is found, water in Oklahoma has been classified into five basic categories: ground water, diffused surface water, watercourses or definite streams, lakes and atmospheric water. In many instances it may be difficult to ascertain the specific class into which certain water may fall, since one often merges into another.

### Ground Water

Oklahoma statutes define "ground water" as water under the surface of the earth regardless of the geologic structure in which it is standing or moving as long as it is outside the cut bank of a definite stream (82 O.S. Supp. 1972, §1020.1A).

Ground or subsurface water is generally recognized as falling into one of two categories: percolating ground water or underground streams. Percolating ground water filtrates or percolates through the soil or interstices of the rock while an underground stream must have a well defined and known channel under the surface of the earth "outside the cut bank of any definite stream".

### Diffused Surface Water

The Oklahoma Supreme Court in 1909 (*Jefferson v. Hicks*, 23 Okl. 684, 102 P. 79) quoted with favor a definition of "surface water" originally given by a Federal Court in 1894 as:

"...that which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow. Surface water ceases to be such when it enters a watercourse in which it is accustomed to flow, for, having entered the stream, it becomes a part of it, and loses its original character."

In recent times courts and scholars alike have preferred the term "diffused surface water" as a more accurate and descriptive expression since the term "surface water" is

somewhat misleading. This is so because all waters appearing on the surface of the earth, whether they are found in definite streams or elsewhere, are technically surface waters.

The Oklahoma Supreme Court has stated that the two terms, "surface water" and "diffused surface water", are synonymous and, further, that:

"Surface waters are those which, in their natural state, occur on the surface of the earth in places other than definite streams or lakes or ponds. They may originate from any source and may be flowing vagrantly over broad lateral areas or, occasionally for brief periods, in natural depressions. The essential characteristics of such waters are that their short-lived flows are diffused over the ground and are not concentrated or confined in bodies of water conforming to the definition of lakes or ponds." (*Oklahoma Water Resources Bd. v. Central Oklahoma Master Conservancy Dist.*, 464 P. 2d 748, 1969).

"Oklahoma Water Resources Board Rules, Regulations and Modes of Procedure" (1979 Revision) give a simplified definition of "diffused surface water" as:

"water that occurs, in its natural state, in places on the surface of the ground other than in a definite stream or lake or pond."

### Stream Water

The statutes define "definite stream" as:

"a watercourse in a definite, natural channel, with defined beds and banks, originating from a definite source or sources of supply. The stream may flow intermittently or at irregular intervals if that is characteristic of the sources of supply in the area." (82 O.S. Supp. 1972, §105.1A).

Therefore, it may be said that where the natural conformation of the surrounding country necessarily collects therein so large a body of water, after heavy rains or the melting of large bodies of snow, as to require an outlet to some common reservoir,

and where such surface water is regularly discharged through a well-defined channel which the force of the water has made for itself and which is the accustomed channel through which it flows or has ever flowed, it constitutes a defined channel. It is not essential to the existence of a "definite" stream that its source of supply be spring water. It may be surface water collected within a large watershed from rain and melted snow which concentrates and cuts for itself a well-defined channel and regularly discharges through such outlet. Nor is it essential that there be a constant and continuous flow of water. The Oklahoma Supreme Court has said that the determinative question in every case is whether the water precipitated in the form of rain or snow has formed for itself a visible course or channel, and is of sufficient magnitude or volume to show frequent action of running water. (*Oklahoma Water Resources Bd. v. Central Oklahoma Master Conservancy Dist.*, 464 P. 2d 748, 1969).

With regard to natural spring water and its legal classification under Oklahoma law, the Oklahoma Supreme Court in 1977 held that while ground water was admittedly the water source for underground springs which ultimately rise to the surface of the ground, such spring water becomes Oklahoma "stream water" when the spring water forms a definite stream. In interpreting Oklahoma's statutory references and definitions of "ground water" and the waters of a "definite stream", the Court ruled that when a natural spring forms a definite stream, the water in the stream and the spring itself, "from its inception", must be classified as stream water, not as ground water, and must be appropriated as such. In this connection the Court observed that it was immaterial that such spring water may, upon reaching the surface, run across the surface for some distance in a nondefinite or diffused course as long as the spring formed or was the source of a definite stream. (*Okla. Water Resources Bd. v. City of Lawton*, 580 P.2d 510, 1977).

## Lakes

While the terms "lake" and "reservoir" are not statutorily defined, Oklahoma Water Resources Board rules and regulations define "reservoir" as any surface depression which contains or will contain the water impounded by a dam. Generally, the rules of law relating to lakes or reservoirs are analogous to those concerning watercourses. Under the terms of Title 60, §60, as well as at common law, diffused surface waters lose their original character when they reach some well-defined channel and flow with other waters to reach some permanent lake or pond.

## Atmospheric Water

Water is constantly being exchanged between the earth and the atmosphere. Water evaporates from the earth, is carried in the air as water vapor, a gas, and as it condenses changes from gas to liquid again and falls as rain.

Weather modification activities in Oklahoma are regulated by the Oklahoma Water Resources Board under the provisions of Title 2 O.S. Supp. 1972, §1401 et seq., as amended.

Other than a suit for damages against an operator for allegedly causing a flood near El Reno with the verdict being for the defendant (*Samples v. Irving Krick, Inc. Civ. Nos. 6212, 6223 and 6224, W.D. Okl, 1954*), Oklahoma courts have not had occasion to deal with the legal aspects of cloud seeding or rainmaking attempts nor the effects created by such activities.

## HISTORY OF WATER LAW ADMINISTRATION IN OKLAHOMA

Following passage of the Homestead Act in 1862, pioneers began moving westward taking up land for agricultural purposes, and the need for irrigation water was recognized.

On May 2, 1890 the Territory of Oklahoma was created out of the western part of what had been known as Indian Territory, with the eastern part of which is now Oklahoma remaining Indian Territory.

In 1902 President Theodore Roosevelt signed into law the Reclamation Act which established a special fund to be used in the examination and survey for, and the construction and maintenance of, irrigation works for storage, diversion, and development of waters for the reclamation of arid and semiarid lands. Oklahoma Territory was specifically mentioned in the Act and the following year investigations were begun to determine how water supplies could best benefit the Territory.

## Early Water Laws

The Eighth Legislative Assembly of the Territory of Oklahoma in 1905 enacted water laws outlining the procedure for acquiring water rights, regulating the use of water, and creating the office of the Territorial Engineer, as well as outlining his duties.

The drive for statehood in Oklahoma Territory began early. The Enabling Act was approved June 16, 1906, and provided for admission to the Union of the Territory of Oklahoma and the Indian Territory as the single State of Oklahoma.

The Constitution of Oklahoma, effective November 16, 1907, provided in Article XVI, §3:

"The Legislature shall have power and shall provide for a system of levees, drains, and ditches and of irrigation in this state when deemed expedient, and provide for a system of taxation on the lands affected or benefited by such levees, drains, and ditches and irrigation, or on crops produced on such land, to discharge such bonded indebtedness or expenses necessarily incurred in the establishment of such improvements; and to provide for compulsory issuance of bonds by the owners or lessees of the lands benefited or affected by such levees, drains, and ditches or irrigation."

The First Session of the Oklahoma Legislature passed House Bill 482 (S.L. 1907-08, Chapter 30). This bill was known as the Oklahoma State Drainage Act, and it authorized

county commissioners to form drainage districts to ensure an adequate amount of irrigation water was available for usage. Also, the State Engineer assumed all powers held before Statehood by the Territorial Engineer.

## Commissioners of Drainage and Irrigation

House Bill 47 (S.L. 1923-24, Chapter 139) created the Commissioners of Drainage and Irrigation for the State of Oklahoma. The Act called for five commissioners to be appointed by the Governor with the advice and consent of the Senate.

District courts were given the power to establish within their jurisdiction conservancy districts for the purposes of preventing floods, regulating stream channels, providing for irrigation, reclaiming or filling of wetlands, regulating stream flows and diverting water flows. The district judge also appointed three persons in his district to serve as a board of directors for the conservancy district.

Persons, corporations, municipalities or other parties desiring to secure the use of water in a particular district had to make application to the Board of Directors in its district for the right to use that water. Preference for water rights was given to those with the greatest need and the most reasonable use. Boards of Directors also had the power to provide financing for water projects by issuing bonds at a rate not to exceed six percent per annum.

## Commission of Drainage, Irrigation and Reclamation

House Bill 47 (S.L. 1925, Chapter 149) created the Commission of Drainage, Irrigation and Reclamation of the State of Oklahoma. This act reduced the number of commissioners from five to three. It also transferred the powers and duties conferred upon the State Engineer and upon the State Highway Engineer, pertaining to waters, drainage, irrigation and water control, to the Commission. The powers of the Commission were broadened to in-

clude supervision of lakes, canals, ponds, ditches and streams of the State which were created, improved and maintained by the aid of federal, state or county money; investigation and determination of the best methods of flood control and water conservation; authorization to negotiate contracts with the Federal Government and other states for the purpose of obtaining assistance and cooperation in the accomplishment of flood control and water conservancy; and determination and mapping of proposed conservancy and water improvement districts along with justifying the creation of the proposed districts.

#### **Conservation Commission**

House Bill 49 (S.L. 1927, Chapter 70) created the Conservation Commission. This Commission was composed of three members and assumed a major duty in addition to those in the 1925 law. This duty was the supervision, conservation and development of the water power of the State.

House Bill 85 (S.L. 1935, Chapter 70, Article 3) conferred additional duties and powers upon the Conservation Commission. Some of the duties set forth in the bill were:

1. To control, store and preserve within the boundaries of the State, all waters in the State which may be stored within the State in any manner whatsoever, for any useful purpose, under the authority and control of said Commission, and to use, dispose and sell the stored water within the boundaries of the State, except as to such waters duly appropriated to private, municipal or public use.
2. To control rivers, creeks, ponds and lakes, to prevent or aid in the prevention of, damage to person or property from such harmful waters within the State of Oklahoma.
3. To acquire by gift or gratuitous grant, any and all property, real, personal or mixed, or any estate, or interest therein situated within

the State of Oklahoma, necessary to the exercise of the powers, rights, privileges, and functions conferred upon the Commission.

#### **Oklahoma State Planning Board**

Senate Bill 64 (S.L. 1935) created the Oklahoma State Planning Board. This board consisted of seven members and was responsible for all resource development and planning in the state.

#### **Oklahoma Planning and Resources Board**

Senate Bill 108 (S.L. 1936-37, Chapter 24, Article 17) created the Oklahoma Planning and Resources Board. Section 3 of the Act consolidated the duties of the Conservation Commission, Oklahoma Forest Commission and the Oklahoma State Planning Board within the new Planning and Resources Board. The Act set up the Division of Water Resources within the Board and increased the Board's membership from seven to nine.

Senate Bill 111 (S.L. 1939, Chapter 24, Article 17) reduced the number of members to five: the Governor, the State Budget Officer, and three citizen members appointed by the Governor with the advice and consent of the Senate. This bill also gave the Board exclusive administrative control over all state parks, state lakes and land owned by the state for recreational purposes.

#### **Oklahoma Water Resources Board**

House Joint Resolution 520 (S.L. 1955) provided for a water study committee composed of State Legislators and citizen representatives of agriculture, industry, municipalities and recreation, fish and wildlife. The committee reviewed Oklahoma's water problems and recommended the establishment of a separate agency responsible for the administration of water rights, negotiation of federal contracts and development of state and local plans to assure the most effective use of the State's water resources.

Senate Bill 138 (S.L. 1957, Title 74, Chapter 23, Section 3) transferred the water related duties of the Planning and Resources Board to the Oklahoma Water Resources Board and provided for a seven-member Board.

House Bill 1073 (S.L. 1963, Chapter 336, Section 1) created the Oklahoma Water Conservation Storage Commission consisting of the same membership as the Water Resources Board. This commission had the authority, if the maximum conservation storage in a reservoir site could not be contracted for between the Federal Government and local interests, to provide funds to insure the site's optimum development. The Commission could issue investment certificates from the Water Conservation Storage Fund as provided under the Act.

A continuing study of Oklahoma's water laws, recommendations and proposals was provided for in 1957 (82 O.S. Supp. 1978, §1085.14). Beginning in 1969, the Water Law Subcommittee and the Citizens Advisory Committee under the Legislative Council's Committee on Conservation and Economic Development, began an effort to collect, simplify and recommend recodification of the existing water law. The result of this work was introduced in the 1972 legislative session in the form of three Senate bills and six House bills, with seven of the nine bills passing that year. The Irrigation District Act was held for interim study and passed in the 1973 session. The Conservancy and Master Conservancy District revision bill was not adopted and thus this Act remains more or less in its original form.

House Bill 1596 (S.L. 1972, Chapter 253) increased the membership of the Oklahoma Water Resources Board, and consequently the Water Conservation Storage Commission, to nine members, one member being appointed from each of the six Congressional Districts of the State as they existed in 1957, and three members appointed at large.

Senate Bill 138 (S.L. 1977, Chapter 9), known as the "Oklahoma Sunset Law", provided for termination of the Water Conservation Storage Commission as created by House Bill 1073 (S.L. 1963, Chapter 336, Section 1) on the 1st day of July 1978 and the powers, duties and functions to be abolished one year thereafter. However, Senate Bill 215 (S.L. 1979, Chapter 247) transferred all existing obligations of the Oklahoma Water Conservation Storage Commission to the Oklahoma Water Resources Board effective July 1, 1979. The stated purpose of this bill was to provide or assist in providing for the acquisition, development and utilization of storage and control facilities of the waters of the state for the use and benefit of the public and for the conservation and distribution of water for beneficial purposes in or from reservoirs or other storage facilities within Oklahoma by the United States or Oklahoma or any agency, department, subdivision or instrumentality thereof.

## **OKLAHOMA GROUND WATER LAW**

### **Early Ground Water Laws and Court Decisions**

The first Legislative Assembly of the Territory of Oklahoma, in 1890, enacted a statute with regard to ground water which provided:

"The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same."

This Section was amended in 1963 to include the provision that "The use of ground water shall be governed by the Oklahoma Ground Water Law". (Title 60 O.S. 1971, §60).

The Oklahoma Supreme Court, in *Canada v. Shawnee*, 179 Okl. 53, 64

P.2d 694 (1936, 1937), had occasion to decide what principle or principles of law should govern the diversion and use of percolating water. Although the 1890 statute declared that the owner of land owns the water flowing under its surface but not forming a definite stream, the Court in *Canada v. Shawnee* declared that:

"By whatever is meant when the statute says that the landowner 'owns' that elusive and unstable substance, percolating water, beneath his land, it must likewise be true that the adjacent landowner is given the same with respect to that which underlies his land. If the owner invades the natural movement, placement, and percolation of such water by creating artificial suction with powerful motor driven pumps, it is not long until he is taking that water which was but a moment before 'owned' by his neighboring landowner. We do not say that this is forbidden, so long as the taking is reasonable; but we do say that it exposes the futility of attempting to justify the complete exhaustion of a common supply of water on the ground that the landowner who has taken it all 'owned' that part thereof underlying his land when the operations commenced. His neighbor likewise had an ownership.

In a later case that involved the right of a municipality to take ground water under the law of eminent domain, the Supreme Court referred to a number of pertinent statutes, including the reenacted Territorial statute according ownership of water to the owner of the land, and stated: "In view of what we have heretofore said, we should not give these legislative acts a too limited construction." (*Bowles v. Enid*, 206 Okl. 245 P.2d 730, 1952).

As to the classification of ground waters, the Supreme Court in *Canada v. Shawnee*, *supra*, stated:

"In legal consideration subterranean waters are divided into two classes: (1) Percolating waters, and (2) underground streams. Percolating waters are those which

seep, ooze, filter, and otherwise circulate through the subsurface strata without definite channels. Underground streams are simply what their name implies; water passing through the ground beneath the surface in defined channels.

"Different rules are ordinarily prescribed for the two classes of water. The cases and authorities are generally agreed that subterranean water will be presumed to be percolating water unless it is definitely shown to be of the other class. There was not such showing here, and the parties concede that this action is governed by the rules applicable to percolating water."

In this same case, the Supreme Court discussed the right to use percolating water and adopted what it considered to be the proper version of the rule of reasonable use which was set forth in two paragraphs from the syllabus by the court as follows:

"3. The owner of land may draw from beneath its surface as much of the percolating waters therein as he needs, even though the water of his neighbor is thereby lowered, so long as the use to which he puts it bears some reasonable relationship to the natural use of his land in agricultural, mining, or industrial and other pursuits, but he may not forcibly extract and exhaust the entire water supply of the community, causing irreparable injury to his neighbors and their lands, for the purpose of transporting and selling said water at a distance from and off the premises.

"6. Section 11785, O.S. 1931, vesting ownership of percolating water in the owner of the land above it, does not thereby vest said owner with the right to such an unreasonable use as will enable him to destroy his neighbor's property by forcibly extracting and exhausting the common supply of water for sale at a distance; such use being subject to the same restrictions as are imposed upon

ownership of other classes of water.”

Portions of the opinion in *Canada v. Shawnee*, supra, have been quoted with approval in many later cases and no doubt this decision played a role in the adoption of the 1949 Oklahoma Ground Water Law.

#### **Water as a Mineral**

Webster's Seventh New Collegiate Dictionary (1971), page 539, defines "mineral" as:

"Any of various naturally occurring homogeneous substances (as stone, coal, salt, sulfur, sand, petroleum, water, or natural gas) obtained for man's use usually from the ground."

While, on page 1006, "water" is defined as:

"A noun; the liquid that descends from the clouds as rain, forms streams, lakes, seas and is a major constituent of all living matter and that is odorless, tasteless, very slightly compressible liquid oxide of hydrogen...; a natural mineral water..."

It has been argued that water is a mineral which should be included in a reservation of all minerals. The Oklahoma Supreme Court has declared that, in a technical sense, water is a mineral (*Vogel et al. v. Cobb*, 193 Okl. 64, 141 P.2d 276, 148 A.L.R. 774, 1943). However, the Oklahoma Supreme Court, in *Mack Oil Company v. Lawrence*, Okl. 389 P.2d 955 (1964), determined that a conveyance with "all mineral rights reserved" does not reserve the natural waters underlying the land and that, therefore, such waters remain legally attached to the surface of the realty involved. The Court limited this determination by stating that the "fact that the conveyance of the surface rights carried with it both the soil and underground water did not invest the surface owner with such a possessory right as to deprive holders of the mineral rights to the use of the water under the land for purposes necessary and incidental to their own operations thereon."

It is thus well established in Oklahoma that, while the holders of mineral rights are entitled to use such ground water as may be necessary to produce other minerals, the ownership of such water would normally remain in the surface owner absent an express conveyance of same.

#### **The 1949 Ground Water Law**

The 1949 Ground Water Law provided for a system of court adjudications of existing rights in and to ground water. Such adjudications were predicated upon ground water surveys and compilations of data respecting then existing ground water rights. Beyond the adjudication of existing ground water rights, which adjudications were primarily based upon priorities of claims to ground water, the appropriation of ground water by an individual required a permit from the Board.

One very significant aspect of legislative policy embodied within the 1949 Ground Water Law was the policy of total conservation and limits placed upon the amount of ground water which could be placed to beneficial use by appropriation. Section 1007 of the law required the Board to determine the safe annual yield of a ground water basin, the same to be measured by the average annual recharge of the basin. Section 1013 prohibited the issuance of any ground water appropriation permits which would authorize the extraction and use of ground water from a basin where such an appropriation and use would result in depletion above the average annual ratio of recharge. Simply stated, the 1949 law envisioned an administrative regulatory system through which the available ground water resources would never be depleted, i.e. that the authorized appropriation and use on a yearly basis would not exceed the average annual recharge to the basin and only the "safe annual yield" of the basin could be withdrawn.

#### **The 1972 Ground Water Law**

Oklahoma's statutory system of ground water use regulation under-

went major revision in 1972 (effective July 1, 1973), and the current system of regulation largely consists of the 1972 statutory framework with some minor amendments since that date.

The state policy which the 1972 ground water legislation intended to implement was stated as follows:

"It is hereby declared to be the public policy of this state, in the interest of the agricultural stability, domestic, municipal, industrial and other beneficial uses, general economy, health and welfare of the state and its citizens, to utilize the ground water resources of the state, and for that purpose to provide reasonable regulations for the allocation for reasonable use based on hydrologic surveys of fresh ground water basins or subbasins to determine a restriction on the production, based upon the acres overlying the ground water basin or subbasin."

A 1978 amendment narrowed the exemption from the Act which had previously applied to the taking, using or disposal of water trapped in producing and nonproducing mines by depleting the word "nonproducing".

The major features of Oklahoma's current Ground Water Law, codified as 82 O.S. Supp. 1979, §§1020.1-1020.22, combine aspects of individual personal property ownership in ground water and a regulatory scheme of ground water reasonable use and regulation. Under the provisions of 60 O.S. 1971, §60, it is acknowledged that one may possess individual ownership in one's ground water, that is water flowing under the surface of the land. Such ownership and use, however, is subject to the early adopted American rule of reasonable use and the regulatory conditions and restrictions imposed by statute (*Canada v. City of Shawnee*, 179, Okl. 53, 64 P. 2d 694, 1936).

Under the provisions of 82 O.S. Supp. 1978, §1020.21, a municipality has the authority to regulate or permit the drilling of domestic and industrial water wells within its corporate limits. It is further provided that a

municipality may use the water allocated to the platted land within its corporate limits provided water can be made available to the platted land, a permit is obtained from the Board, the wells are located not less than 600 feet within its limits and the wells are drilled on such platted land. The Board's rules and regulations provide that a municipality has the authority to regulate and/or permit the drilling of domestic wells within its corporate municipal limits, with the Board having jurisdiction over the drilling of wells other than those for domestic purposes. Municipalities and the Board have concurrent jurisdiction to regulate and/or permit industrial wells within corporate municipal limits.

The Board's rules and regulations provide that ground water basins or subbasins may be artificially recharged but pollution and/or waste of water as set forth in 82 O.S. Supp. 1972, §1020.15 must not occur. Other than for domestic use, the use of water for this purpose requires a permit.

#### **Hydrologic Surveys and Maximum Annual Yield Determinations**

Oklahoma Law requires the Board to make hydrologic surveys and investigations of each fresh ground water basin or subbasin and, upon their completion, to make a determination of the maximum annual yield of fresh water to be produced from each ground water basin or subbasin (82 O.S. Supp. 1972, §1020.5). These hydrologic surveys must be updated at least every ten years at which time the Board may increase the amount of water allocated but may not decrease an allocation. Once a hydrologic survey has been completed and a tentative maximum annual yield established for the basin or subbasin, the Board is required to hold hearings and make copies of the survey available to interested persons. After the hearings are completed the Board makes its final determination as to the maximum annual yield of water in the basin or subbasin to be allocated to the overlying

land, based upon a minimum basin or subbasin life of 20 years.

#### **Prior Rights to Ground Water**

In establishing the total discharges to be used in determining maximum annual yields the Board must make a determination of those persons having prior rights to ground water as of July 1, 1973, the effective date of the 1972 law. The criteria and procedure for determining prior rights are set forth in detail in Chapter VIII of the Board's rules and regulations. These prior rights, once established, have priority over any rights acquired subsequent to July 1, 1973, and are prioritized among themselves, but do not include the right to be protected by requiring junior right holders or ground water rights acquired subsequent to July 1, 1973, to curtail production of ground water unless the prior right holder asking for that relief proves that such relief is necessary to prevent material impairment of his prior right and that such relief will in fact materially benefit the exercise of his prior right.

#### **Waste of Ground Water**

Title 82 O.S. Supp. 1972, §1020.15, provides that the Board shall not permit any fresh ground water user to commit waste by:

1. Drilling a well, taking, or using fresh ground water without a permit, except for domestic use;
2. Taking more fresh ground water than is authorized by the permit;
3. Taking or using fresh ground water in any manner so that the water is lost for beneficial use;
4. Transporting fresh ground water from a well to the place of use in such a manner that there is an excessive loss in transit;
5. Using fresh ground water in such an inefficient manner that excessive losses occur;
6. Allowing any fresh ground water to reach a pervious stratum and be lost into cavernous or otherwise pervious materials encountered in a well;
7. Permitting or causing the pollution of a fresh water strata or

basin through any act which will permit fresh ground water polluted by minerals or other waste to filter or otherwise intrude into such a basin or subbasin;

8. Drilling wells and producing fresh ground water therefrom except in accordance with the well spacing previously determined by the Board;
9. Using fresh ground water for air conditioning or cooling purposes without providing facilities to aerate and reuse such water; or
10. Failure to properly plug abandoned fresh water wells in accordance with rules and regulations of the Board and file reports thereof.

Several cases involving ground water have been tried since the 1972 Ground Water Law became effective. The Supreme Court decision in *Lowrey v. Hodges*, Okl. 555 P.2d 1016, 1976, specifically involved the subject of waste. The trial court had reversed a Board Order granting a temporary permit and stated that in its judgement appellants proved, as required by 82 O.S. Supp. 1975, §1020.9, that 1) they were owners of the land; 2) the land overlies a fresh water basin; and 3) attempted to prove the third requirement that the water would be put to a beneficial use, to-wit: irrigation. There was no evidence, the court said, with respect to the fourth requirement that there would be no waste and that such finding was insufficient in the absence of evidence.

Upon appeal the Supreme Court vacated the district court judgment and reinstated the Board's order granting the temporary ground water permit in question. It was noted by the Supreme Court that the Legislature had designated agricultural stability as a beneficial use and it required little imagination to recognize that the Legislature intended to include irrigation for the purpose of growing food and fiber as a beneficial agricultural use. Regarding the question of waste and the ap-

pellees contention that the record must show that waste will not occur, the Supreme Court agreed that an applicant must show what method he intended to use for irrigating a particular area and, once that information had been furnished, the Board had the authority to determine whether or not waste would occur. If the protestants thought waste would occur they would need to present that evidence to the Board for consideration. If the protestants fail to introduce evidence to substantiate occurrence of waste, 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. The court further found that "the definitions of waste set forth in 82 O.S. Supp. 1975, §1020.15 contemplated an after-the-fact finding of waste and set out the procedure for criminal prosecution, injunction, and suspension of a permit when and if it did occur".

The Attorney General of Oklahoma has ruled that the Board has the authority to grant temporary permits for irrigation water in amounts less than two acre-feet per surface acre of land owned or leased by the applicant when to grant such amount would not be of beneficial use "or would constitute waste" (Opinion No. 74-218 dated December 17, 1974).

#### **Completing and Filing Ground Water Applications**

Under the provisions of the Ground Water Law any landowner has a right to take ground water for domestic use from land owned by him without a permit. Other than this exception any person intending to use ground water must make application to the Board for a permit prior to commencing any drilling for such purposes and before taking water from any completed well previously drilled.

#### **Notice and Hearing**

After an application has been accepted for filing, a hearing date is set and a notice is prepared setting forth all of the pertinent facts of the

application. The notice of the hearing must be published by the applicant once a week for two consecutive weeks. In addition, the applicant is required to give the same notice by certified mail to all immediately adjacent landowners. Any interested party has the right to protest the application.

#### **Issuance of Permits**

The Board may approve or deny the application based upon evidence presented at the hearing or from hydrologic surveys or other relevant data. Consideration is also given by the Board as to whether the lands owned or leased by the applicant overlie the fresh ground water basin or subbasin and whether the use to which the applicant intends to put the water is a beneficial use. If so, and if there is no indication that waste will occur, the Board must approve the application and issue a permit.

The Board is authorized to issue regular, temporary, special or provisional temporary permits under 82 O.S. Supp. 1979, §§1020.10-1020.11:

1. A regular permit allocates to the applicant his proportionate part of the maximum annual yield of the basin or subbasin which part is 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 ground water basin or subbasin which the applicant owns or leases.
2. A temporary permit authorizes ground water use and allocation under circumstances where the required hydrologic survey and determination of maximum annual yield has not yet been made. The water allocated by a temporary permit may not be less than two acre-feet annually for each acre of land owned or leased by the applicant in the basin or subbasin, all being subject to specified statutory exceptions.

3. A special permit is an authorization by the Board to put ground water to beneficial use in excess of amounts authorized pursuant to a regular or temporary permit, this being under special circumstances in which greater quantities of water are required. Such special permit may not be issued for a period to exceed six months but may be renewed three times.

4. In addition, a 1977 amendment to the Ground Water Law allows the issuance of provisional temporary permits. Such permits are granted by the Executive Director for a period not to exceed sixty days and are non-renewable. The applicant is not required to give notice by publication or by certified mail. The applicant is however required by the rules and regulations of the Board to send a copy of the application to the surface landowner notifying him of the location of the well, purpose of use, and amount of water requested. Such permit holders are required to notify the Board in writing within thirty days after the expiration of the permit as to the disposition of the well covered by the permit.

Any permit issued by the Board may be cancelled upon proper notice and hearing for willful failure of the applicant to report annual usage (82 O.S. Supp. 1972, §1020.12). The Board may accept the voluntary surrender of any ground water permit by the holder thereof (82 O.S. Supp. 1972, §1020.13).

#### **Wells and Well Drilling**

Under the provisions of 82 O.S. Supp. 1972, §1020.16, all persons drilling wells, reconditioning wells, and test drilling in fresh ground water basins or subbasins must make application for and become licensed with the Board. Drillers of domestic wells are, however, exempt from this provision.

The Board has adopted minimum standards for construction of

water wells, plugging of abandoned water wells and water well test holes, and capping of water wells not in use. The purpose of these minimum standards is to provide uniform rules and regulations to protect fresh ground waters of the state from contamination and waste, and to provide protection to the public by enforcing proper well construction, proper plugging of abandoned wells, and proper handling and capping of water wells.

The Board may grant a well location exception and permit the well to be drilled and completed at a location other than that previously established when it is shown that to require the drilling of a well at a prescribed location would be inequitable or unreasonable (82 O.S. Supp. 1972, §1020.18).

The Executive Director is authorized to approve an additional or replacement well when such well is determined to be necessary to fully exercise an existing right, provided the new well location is not within 600 feet of the applicant's property line unless the applicant furnishes a written statement from each adjacent landowner within 600 feet of the proposed well indicating no objection to the well (82 O.S. Supp. 1972, §§1020.17, 1020.18, 1085.2 and 1085.12).

#### **Metering of Wells**

Upon a request of a majority of landowners residing within a basin or subbasin, the Board is authorized to require that water wells be metered. Such meters shall be placed under seal and are subject to reading by the agents of the Board at any time. The applicant may also be required to report the reading of the meters at reasonable intervals (82 O.S. Supp. 1972, §1020.19).

#### **Well Spacing Orders**

The Board may, before issuing any permits in a ground water basin or subbasin, determine and order a spacing of wells which, in its judgment, may be necessary to an orderly withdrawal of water in relation to the allocation of water to the land over-

lying the basin or subbasin. By ruling of the Attorney General dated February 22, 1978 (Opinion No. 77-305), the Oklahoma Water Resources Board does not have authority to set mandatory well spacing prior to completion of a hydrologic survey and allocation of the ground water to the land overlying a basin or subbasin (82 O.S. Supp. 1972, §1020.17).

#### **Reports**

Water use report forms are mailed during January of each year to each water right permit holder, except holders of special and/or provisional temporary permits, who must complete same and return to the Board within 30 days. This report becomes a part of each permit record. Additionally, temporary permits will not be revalidated unless the space provided on the annual water use report form is properly completed indicating that the applicant wishes the permit revalidated.

Upon transfer of ground water rights the new owner must notify the Board and submit the required transfer fee. When the owner of a water right makes a change in his mailing address he is required to provide the change and reference his ground water application number.

### **OKLAHOMA STREAM WATER LAW**

#### **Appropriation Doctrine**

Attempts have sometimes been made to trace appropriation law from the English law, from the Massachusetts Mill Acts or from Spanish law. It is more reasonable to assume, however, that those who originated the appropriation doctrine were not versed in these laws. In 1849 the cry of "Gold!" went out and excitement rose to a frenzied peak immediately after the first nugget was picked up at Sutter's Mill. The lure of precious metal and quick riches drew thousands of prospectors to California. Lawlessness was rampant and to create order in the ungoverned public domain, the miners organized mining districts and vigilante committees

which sometimes went shockingly far in meting out "justice" to those who fell under their righteous shadows. Out of the chaos rules were adopted to resolve competing mining claims and rights to the use of the water necessary to wash the gold from the gravel. Under these rules the discoverer of a mine was protected against claim jumpers with the first user of the water being protected against later takers, thus evolved appropriation law — the law of the first taker or "Law of the West", as it is sometimes known.

This law of customs was promptly adopted by the courts with the first case being tried in 1855 (Irwin v. Phillips, 5 Cal. 140). The holders of claims that lay far from a stream diverted the water over to their diggings. The owners of later claims lower on the now-dry streambed sued to require the stream to flow down in its natural channel. The California Supreme Court rejected the common law rule of riparian rights since neither party had title to the land, and, taking notice of the existing political and social conditions, held that those customs of the miners which had become firmly fixed should be followed. Among the most important of these, it said, was that of protecting the rights of those who by prior appropriation had taken the water from its natural beds and by costly artificial works had transported it for miles over mountains and ravines to supply the needs of the gold miners. The court quoted no precedents, for there were none, and a new common law form of action was born.

The evolution of this doctrine was a fortuitous event as it proved equally useful for agriculture. As mining became more competitive and less lucrative, many miners as well as newcomers to the area began farming. The doctrine protected the first settler's use of water on his land against competing claims of later settlers.

The doctrine of prior appropriation was established with respect to watercourses in Oklahoma by virtue

of Territorial legislation enacted in 1897. These statutes declared the unappropriated waters of the ordinary flow or underflow of every stream, and storm or rain waters, in areas in which, because of insufficiency or irregularity of rainfall irrigation is beneficial to agriculture, to be the property of the public and subject to appropriation for the uses and purposes and in the manner provided. A proviso forbade the diversion of such flow or underflow to the prejudice of the rights of a riparian owner without his consent, except after condemnation. Grant of the power of eminent domain for condemnation of rights-of-way and of private lands needed for water development projects included "the water belonging to the riparian owner" (Terr. Okl. Laws 1897, Chapter XIX, Sec. 1). The sections of the 1897 law relating to appropriation of stream and storm waters, and to condemnation of water belonging to the riparian owner, were omitted from the Revised Laws of 1910, and were thereby repealed.

In 1905 a more comprehensive procedure for appropriating water under the supervision of Territorial officials was provided. The law of prior appropriation has undergone considerable development since that early legislation, but the fundamental principles of the law remain.

The Oklahoma Supreme Court in 1907 decided a case in which the parties were appropriative claimants who had not proceeded under statutory authority, but who based their claims "upon the general rule of law applicable to such cases" (*Gates v. Settlers' Mill., C. & R. Co.*, 19 Okl. 83, 91 P. 856). The court applied to the facts of the case the general Western law of priority of appropriation, without construing either of the statutes. Specific principles accepted and applied in deciding the controversy were that: To acquire an appropriative right to the use of water of a public stream, there must be construction of a ditch, diversion of water into the ditch and conveyance to the place of use, and actual application of the water to a beneficial

use. Reasonable diligence must be pursued throughout and failure to do so works a postponement of the priority as against a later appropriator whose right has attached pending completion of the first appropriator's right. Otherwise, the first in time has the better right, that is, priority over later appropriators. A subsequent appropriator, however, may obtain a right to surplus water in the stream above the quantity previously appropriated, which right will be superior to an attempted enlargement of the first appropriator's right. Thus the court accepted, among other things, the fundamental principle of priority of appropriation based upon priority in time of acquiring the right.

The Supreme Court in two subsequent cases construed and applied provisions of the 1905 statute relating to the acquirement of appropriative rights (*Gay v. Hicks*, 33 Okl. 675, 124 P. 1077, 1912; *Owens v. Snider*, 52 Okl. 722, 153 P. 833, 1915). The court's interpretation resulted in the adoption of a requirement unique in western water law, namely, that the state administrative agency had no authority to issue a permit for the appropriation of water for irrigation purposes unless and until a hydrographic survey and an adjudication of existing rights was made of the stream system on which the appropriation was sought.

Thus, Oklahoma Supreme Court decisions have recognized the appropriateness of applying the appropriation doctrine under Oklahoma conditions. They have also construed important parts of the statutory procedure relating to acquirement of appropriative rights.

#### **Riparian Doctrine**

The riparian doctrine was purportedly brought to this country by two American jurists, Story and Kent, who took it from the French civil law. That their work formed the basis for the introduction of the riparian doctrine into the English common law was concluded by a noted authority in the field of water law, Samuel C.

Wiel ("Water Rights In the Western States", Edition 3, Vol. II, San Francisco, 1911). The doctrine was first laid down in the English law in 1833. Having thus been received into the English common law, the riparian doctrine eventually became the law in several of the western states that adopted the common law of England.

The common-law doctrine of riparian rights originally accorded to the owner of land contiguous to a stream the right to have the stream flow by or through his land undiminished in quantity and unpolluted in quality — with one exception. The exception was that any riparian owner might take whatever water he needed for his so-called natural uses, that is, domestic and household purposes and the watering of animals necessary to the sustenance of the farm family. Irrigation, a consumptive and so-called artificial use, was not at first contemplated, but came to be accepted as a proper riparian use. No landowner could monopolize the water for irrigation. His use for that purpose had to be reasonable in relation to the similar needs of all other owners of land contiguous to the stream.

The conflict between riparian and appropriative water rights in the western states came about primarily because, in those western states that recognized both types of rights, the water rights of the lands that bordered streams were recognized as superior to those of noncontiguous lands. With the development of the country and the growing competition for water, it was inevitable that controversies should arise between owners of lands riparian to a stream, and persons who wished to extend the use of the waters to areas back from the channel, thereby increasing the usefulness of the overall water supply.

#### **Riparian and Appropriative Rights in Oklahoma**

Title 60 O.S. 1971, §60, provides: "The owner of the land owns water standing thereon or flowing over or under its surface but not forming a definite stream. The use of ground

water shall be governed by the Oklahoma Ground Water Law. Water running in a definite stream, formed by nature over or under the surface, may be used by him for domestic purposes as defined in Section 2(a) (82 O.S. Supp. 1979, §105.1(b) as long as it remains there, but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same, as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the State, as provided by law; provided, however, that nothing contained herein shall prevent the owner of land from damming up or otherwise using the bed of a stream on his land for the collection or storage of waters in an amount not to exceed that which he owns, by virtue of the first sentence of this Section so long as he provides for the continued natural flow of the stream in an amount equal to that which entered his land less the uses allowed in this Act; provided further, that nothing contained herein shall be construed to limit the powers of the Oklahoma Water Resources Board to grant permission to build or alter structures on a stream pursuant to Title 82 to provide for the storage of additional water the use of which the land owner has or acquires by virtue of this act."

"Domestic use" by law means the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land, and for the irrigation of land not exceeding a total of three acres in area for the growing of gardens, orchards, and lawns (82 O.S. Supp. 1972, §105.1B.).

Title 60, §60, is a modification of a statute passed in 1890 by the First Territorial Legislative Assembly of Oklahoma which declared the right of a landowner with respect to use of water naturally occurring on his land.

This statute, for comparison purposes, provided that:

"The owner of the land owns water standing thereon or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same."

In 1897 the Territorial legislature of Oklahoma enacted a statute authorizing appropriation of water which contained a recognition of riparian rights in a proviso that flow or underflow should not be diverted to the prejudice of the riparian owner, without his consent, except after condemnation proceedings. The statute granted the right to condemn private lands and "the water belonging to the riparian owner". As previously noted, these provisions were repealed by omission from the Revised Laws of 1910.

The Oklahoma Supreme Court has quoted or cited the Territorial statute of 1890 in several cases concerning the rights of landowners to use the water of a natural stream flowing across their land (*Broadly v. Furray*, 163 Okl. 204, 21 P. 2d 770, 1933; *Grand-Hydro v. Grand River Dam Authority*, 192 Okl. 693, 139 P. 2d 798, 1943; *Smith v. Stanolind Oil & Gas Co.*, 197 Okl. 499, 172 P. 2d 1002, 1946). Undoubtedly this early statute has been important in such development of the riparian doctrine as has taken place in Oklahoma.

As recently as 1968 the Supreme Court (*Oklahoma Water Resources Bd. et al. v. Central Oklahoma Master Conservancy Dist.*, 464 P. 2d 748, at 752) asserted that, under the provisions of 60 O.S. 1951, §60, the landowner cannot assert ownership in water "forming a definite stream". His rights therein are purely riparian.

Both systems, riparian and appropriative, have been recognized in Oklahoma as a result of legislative acts and decisions of the Supreme

Court and, most significantly, the two doctrines have developed independent one of the other.

### **Appropriative Rights to Stream Water**

Stream water in Oklahoma is, with few exceptions, public water subject to appropriation for beneficial use. Thus, the appropriation doctrine is in effect which contemplates acquirement of the right to the use of water by diverting it to beneficial use in accordance with the procedures and under limitations specified by law. An acquired appropriative right relates to a specific quantity of water and is good as long as the right continues to be exercised. The right may be acquired for any use of stream water that is beneficial and reasonable.

The bare essence of the appropriation doctrine is that a right is acquired by diverting water from a watercourse and applying it to a beneficial use. The water right carries a "priority". The basic principle employed is "first in time, first in right". The first person to appropriate water according to the procedures outlined in the statutes and put it to a reasonable and beneficial use has a right superior to or a priority over any later appropriators. In water-short years, junior appropriators with low priorities may be barred from using water and exercising their rights in order to satisfy the rights of earlier, senior appropriators.

Oklahoma Water Resources Board rules and regulations define "appropriation" as the process under 82 O.S. Supp. 1972, §105.1 et seq., by which an appropriative stream water right is acquired and a completed appropriation results in an appropriative right. Thus, an "appropriative right" is the right acquired under the procedure provided by law to take a specific quantity of public water, either by direct diversion from a stream, an impoundment thereon, or a playa lake, and to apply such water to a specific beneficial use or uses.

An appropriative right is appurtenant to the tract of land in connection with which the right was ac-

quired but, under procedures set forth in the statutes, may be severed and simultaneously transferred to become appurtenant to other lands. Under this same procedure provision is made for changing the place of diversion, storage or use.

An important amendment to the Stream Water Law was made in 1963. Effective June 10 of that year the Oklahoma Water Resources Board was authorized to make necessary surveys and gather data for the proper determination of all persons using water throughout the state for beneficial purposes in order to establish vested or appropriative rights to stream water without the lengthy court adjudications contemplated in the earlier law. The criteria or basis for determining appropriative priorities was set forth in the law. These determinations were made for all stream systems, with the exception of the Grand River Basin, in a seven-year period between 1963 and 1969.

#### **Purposes For Which Water May Be Appropriated**

As set forth in the Board's rules and regulations, the purposes for which the public waters of the state may be appropriated are agriculture, irrigation, mining, secondary oil recovery, milling, manufacturing, power production, industrial purposes, the construction and operation of water works for cities and towns, stock raising, public parks, game management areas, propagation and utilization of fishery resources, recreation, housing developments, pleasure resorts, artificial recharge of a ground water basin or subbasin, water quality control, or any other beneficial uses.

Except for the preference given to domestic use in 82 O.S. Supp. 1972, §§105.2 and 105.12, the statutes do not establish any system of preferential use among the different beneficial uses of water.

#### **Completing And Filing Stream Water Applications**

Oklahoma statutes provide that any person, firm, corporation, state or

federal governmental agency, or subdivision thereof, intending to acquire the right to the beneficial use of any water shall, before commencing any construction of works for such purposes or before taking same from any constructed works, make an application to the Board for a permit to appropriate such water, with the notable exception that water for domestic use is exempt from such requirement (82 O.S. Supp. 1972, §105.9). "Domestic use" 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 growing of gardens, orchards and lawns (82 O.S. Supp. 1972, §105.1).

The initial step in obtaining an appropriative right to the use of stream water consists of filing an application on forms furnished by the Board.

Every application is assigned a priority date, this being the date the water right application is received by the Board. This date is extremely important as it determines the priority between earlier or senior appropriators and later or junior ones. Again, it is first in time, first in right.

If the application is for irrigation of land not owned by the applicant, the name and address of the owner must be furnished along with either a valid lease or written consent of the owner. If the applicant does not own the land at the point of diversion, the permit is issued with the condition that the applicant must provide, within a reasonable time as determined by the Board, an easement, license, or other evidence that the water can be put to beneficial use.

The total amount of water to be appropriated per calendar year is stated in acre-feet and the rate of diversion indicated in gallons per minute. The purpose or purposes for which the water is to be diverted must be noted and if the water is to be used for more than one purpose, the specific amount to be used for each individual purpose is to be clearly set forth. The applicant must also clearly

state the name of the water supply from which it is proposed to divert water and the method of diversion.

#### **Amount of Water Allowed**

Based upon custom and practice, the Board has established and historically applied a reasonable use criteria of two acre-feet of stream water per acre to be irrigated. An exception may be made, however, if an applicant can show a reasonable need for additional water. Applicants for other beneficial uses of water are not restricted as to amount if the Board determines that water is available for the appropriation. In some instances the applicant may be asked to demonstrate or justify a need for the amount of water requested.

#### **Notice and Hearing**

After the application has been duly filed and accepted a date is set for a public hearing and a notice setting forth all the pertinent facts in the application is prepared by the Board to be published by the applicant once a week for two consecutive weeks in a newspaper of general circulation in the county of the point of diversion and within the adjacent downstream county. The last notice must be published at least ten days prior to the date of the hearing. At its discretion, the Board may require the notice to be published in additional counties to insure that adequate notice is given. The applicant is responsible for the accuracy of the published notice and must bear the cost of publication in the newspaper.

Interested persons may appear at the hearing in protest of any application. Hearings are conducted in accordance with the Administrative Procedures Act and the Board's rules and regulations.

#### **Issuance Of Permits**

The application is either approved or denied by the Oklahoma Water Resources Board based upon the following determinations found in 82 O.S. Supp. 1972, §105.12:

1. There is unappropriated water

available in the amount requested;

2. The applicant has a present or future need for the water and the use is a beneficial use; and
3. The proposed use does not interfere with domestic or existing appropriate uses.

In addition, in the granting of water rights for the transportation of water for use outside the originating stream system, applicants within the stream system have a right to all of the water required to adequately supply the beneficial needs of the water users therein and the Board is required to review such needs every five years.

Upon approval of an application, a permit is issued which sets forth the amount of water granted, any use conditions, and the time within which the water shall be utilized.

The Board is authorized to issue four types of stream water permits (82 O.S. Supp. 1972, §§105.1 and 105.13):

1. A regular permit which authorizes the holder to appropriate water on a year-round basis in an amount and from a source approved by the Board.
2. A seasonal permit which authorizes the holder to divert available water for specified time periods during the calendar year.
3. A temporary permit which authorizes the appropriation of water in an amount and from a source approved by the Board, is valid for a time period not to exceed three months, does not vest in the holder any permanent right, and may be cancelled by the Board in accordance with its terms.
4. A term permit which authorizes the appropriation of water in an amount and from a source approved by the Board for a term of years which does not vest the holder with any permanent right and which expires upon expiration of the term stated in the permit.

#### **Denial Of Permit**

If an applicant fails to meet any of the statutory requirements stated above, the Board must deny the permit and the applicant is notified. If denial is on the basis that water is not available in the amount applied for but is available in a lesser amount, and all of the other requirements have been met, the applicant is notified of the amount available and is entitled to amend the application and request the lesser amount. Such request must be returned to the Board by certified mail within 15 days following receipt of the notice of denial. Upon receipt of the amended application, the Board must approve the application for the lesser amount at its next scheduled meeting. This same rule applies when a permit is denied on the basis that the applicant has not demonstrated a present or future need for the water applied for. Request for amendment by an applicant does not waive the right to appeal the denial of the original application for a permit (82 O.S. Supp. 1972, §105.14).

#### **Construction Of Works**

Under 82 O.S. Supp. 1972, §105.15, any permit issued by the Board shall expire unless the applicant begins construction of works within two years of permit issuance. Beginning construction consists of purchasing equipment, beginning construction of dam or diversion works, or preparing land. Construction plans may be amended at any time upon written request and Board approval, but such changes do not extend the time for construction or placing the water to use beyond that authorized in the permit. The law provides for an extension of time for beginning construction for good cause shown, such as engineering difficulty or other valid reason over which the applicant has no control, but such extension cannot exceed two years unless a national emergency is found to exist.

Within 10 days following completion of the works the owner must give notice of such completion. Then

a completion inspection may be made by the Board to determine the actual capacity of the works as well as their safety and efficiency. If not properly constructed, a reasonable time is allowed to make necessary changes and the certificate of completion is withheld until such changes are made. In addition, the Board may postpone the priority under the permit until such time as the works are actually completed and approved by the Board and any applications subsequent in time shall the benefit of such postponement of priority (82 O.S. Supp. 1972, §105.25).

#### **Time For Putting Water To Beneficial Use**

The permit holder has a period of seven years to put the full amount of stream water applied for to beneficial use. However, if it appears that the proposed project, improvement or structure will promote the optimal beneficial use of water in the State and it further appears that the total amount of water cannot be put to beneficial use within seven years, then the Board is authorized, based upon a schedule of use submitted by the applicant and, where appropriate, supported by population data from the State Employment Security Commission, to provide in the permit a schedule of time within which certain percentages of the total amount shall be put to use. This extended schedule of use, however, shall not exceed the useful life of the project or, where such useful life is indeterminate, beyond 50 years from the date of the permit (82 O.S. Supp. 1972, §105.16).

#### **Loss Of Right Under Permit**

Water not put to beneficial use in whole or in part as provided by the terms of the permit is forfeited by the permit holder and becomes public water available for appropriation under the provisions of 82 O.S. Supp. 1972, §105.17. Upon such a finding the applicant is notified by certified mail that a loss of right hearing will be held at which time he may appear and show cause why the right should not be declared to have been lost

from nonuse. Failure of the Board to determine that a right to use water has been lost by nonuse, however, does not in any way revive or continue the right. (82 O.S. Supp. 1972, §105.18).

### **Reports**

Annual water use surveys are conducted by the Board. Cards to report water use are mailed in early January which are to be completed and returned by March 1. This information not only helps the applicant protect his water right but also provides valuable information for the Board's use in maintaining a record of the amount of water used in Oklahoma.

Transfer of water rights and changes in address must be reported to the Board.

### **Miscellaneous Provisions in The Stream Water Law**

Stream water statutes provide that the owner of works for the storage, diversion or carriage of water containing water in excess of his beneficial use needs is required to deliver such surplus water at reasonable rates to parties entitled to the use of water for beneficial purposes (82 O.S. Supp. 1972, §105.21).

Water turned into any natural or artificial watercourse by any party entitled to the use of such water may be reclaimed below and diverted therefrom by such party, subject to existing rights and less such allowance for losses as may be determined by the Board. Anyone wishing to reclaim such water using the bed and banks of any stream for conveyance must file an application with the Board setting forth the particulars of the diversion (82 O.S. Supp. 1972, §105.4).

### **Ownership Of Water**

Under the provisions of Title 60 O.S. 1971, §60, the owner of land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. Water running in a definite stream over or under the surface may be used for domestic purposes as long as it remains there but he may not prevent

the natural flow of the stream, or of the natural spring from which it commences its definite course "as such water becomes public water and is subject to appropriation for the benefit and welfare of the people of the State."

The Oklahoma Water Resources Board is charged with administering the laws pertaining to public waters. The policy of the state regarding such administration is stated as being to provide for water storage and utilization for the use and benefit of the public, for conservation and distribution for useful purposes, and to benefit the general welfare and future economic growth of the state (82 O.S. Supp. 1972, §1085.17).

There is a popular misconception that water stored in large federally built reservoirs belongs to the federal government. All stream water, which includes lake water, belongs to the state. All the Federal Government owns in such projects is the structure holding the water and the land upon which it rests. Municipalities or other entities contract with the Federal Government for storage in the structure, not for the water. Anyone wishing to obtain a right to the use of such public water must make proper application to the Oklahoma Water Resources Board.

### **Flood Flows**

The Supreme Court in the early 1900's (Jefferson v. Hicks, 23 Okl. 684, 102 P. 79, 1909; McLeod v. Spencer, 60 Okl. 89, 159 P. 326, 1916) made a distinction between what it termed ordinary floods and extraordinary floods, i.e. an ordinary flood being one the repetition of which might, by the exercise of ordinary diligence in investigating the character and habits of the stream, have been anticipated, even though the repetition might be at uncertain intervals, while an extraordinary flood would be unexpected, not foreseen and the magnitude and destructiveness of which could not have been anticipated and prevented.

A case decided in 1943 (Franks v. Rouse, 192 Okl. 520, 137 P. 2d 899) states in the syllabus that:

"A watercourse, in the legal sense of the term does not necessarily consist merely of the stream as it flows within the banks which form the channel in ordinary stages of water; but includes the overflow waters of such stream which extend beyond its banks in times of ordinary floods and which, at such times, are accustomed to flow down over the adjacent lower lands in a broader but still definable stream, or which flow in natural depressions, continuing in a general course, though without definable banks, back into the stream from which they came, or into another watercourse. In such case the overflow water is not, and does not become, surface water."

This rule was adopted earlier in *Jefferson v. Hicks*, supra, which is the earliest case in Oklahoma on this subject.

### **Navigable Waters**

The subject of navigation and navigable waters is one of considerable proportion. Navigable waters have been defined as those waters of the United States usable as such in interstate or foreign commerce (United States v. Utah, 283 U.S. 64, 75, 1931) "when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." Navigable waters of a stream within a state, which do not conform to the definition of navigable waters of the United States, are navigable waters of that state.

In developing currently recognized criteria of navigability for determining waters subject to the paramount authority of the United States under the commerce power, the landmark case is the New River decision rendered by the Supreme Court in 1940 (United States v. Appalachian Electric Power Co., 311 U.S. 377) the Court holding that "The navigability of the New River is...a

factual question, but to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests as to navigability." Note has been made of statements in the New River opinion that availability of a stream for navigation must be considered in addition to evidence of navigability under natural conditions; but consideration of improvements needed to make a stream suitable for commerce, even though not completed or even authorized, may control determinations of navigability. In addition, said the Court, a waterway is not barred from classification as navigable merely because artificial aids are needed before commercial navigation may be undertaken. Limits to such improvements are a matter of degree; a balance between cost and need when the improvement would be useful. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic.

The Court in New River also said that "Although navigability to fix ownership of the riverbed or riparian rights is determined...as of...the admission to statehood...navigability, for the purpose of the regulation of commerce, may later arise".

Some other points are made in the New River decision — it is not necessary for navigability that the use should be continuous. Even nonuse over long periods of years because of changed conditions, competition from railroads or improved highways, or other developments, does not affect the navigability of rivers in the constitutional sense. When once found to be navigable, a waterway remains so. And it is well recognized that the navigability of a waterway may be only of a substantial part of its course.

The navigability of streams in relation to control of their waters and ownership of their beds presents a Federal question. (*Lynch v. Clements*, Okl. 263 P. 2d 153, 1953). Upon admission of Oklahoma to the Union, according to the United States Supreme Court, title to the beds of

navigable streams within its borders passed from the United States to the state. The passing of title was thus effected by operation of law, by virtue of the constitutional rule of equality among the states whereby each new state becomes, as was each of the original states, the owner of the soil underlying the navigable waters within its borders. However, title to the beds of nonnavigable streams did not pass to the state upon its admission to the Union. If the state has a lawful claim to any part of the bed of a nonnavigable stream, it is only such as may be incident to its ownership of riparian lands and "so of the grantees and licensees of the state". (*Oklahoma v. Texas*, 258 U.S. 574, 1922).

The Supreme Court further held that where the United States owns the bed of a nonnavigable stream and the upland on one or both sides, it is free when disposing of the upland to retain all or any part of the river bed. Whether in any particular instance the Government has done so is essentially a question of what the Government intended. When there is no attempt or intent to dispose of a river bed separately from the upland, then, tested by common law, conveyances of riparian tracts extend not merely to the water line, but to the middle of the stream.

The vesting of paramount control over navigation so far as foreign and interstate commerce is concerned does not destroy the concurrent and subordinate power of the state, and the state may act in the absence of action by the Federal Government. In the words of the United States Supreme Court (*Coyle v. Oklahoma*, 221 U.S. 559, 1911):

"The power of Congress to regulate commerce among the States involves the control of the navigable waters of the United States over which such commerce is conducted is undeniable; but it is equally well settled that the control of the State over its internal commerce involves the right to control and regulate navigable streams within the State until Congress acts on the subject..."

Implications of the control of navigable waters were discussed by the Supreme Court in a case decided in 1941 (*Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508, affirming *Oklahoma v. Guy F. Atkinson Co.*, 37 Fed. Supp. 93 (D. Okla. 1941)). This case involved primarily the constitutionality of the Act of Congress of June 28, 1938 (52 Stat. L. 1215) insofar as it authorized construction of the Denison Dam and Reservoir on Red River in Texas and Oklahoma. The Court took the view that the project in question was a valid exercise of the commerce power by Congress. While commerce was at that time limited to a portion of the river within Louisiana, nevertheless it was stated that:

"The fact that portions of a river are no longer used for commerce does not dilute the power of Congress over them...and it is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions..."

Flood protection, watershed development, and recovery of the cost of improvements through utilization of power have been recognized as part of commerce control; and, said the Court:

"...we now add that the power of flood control extends to the tributaries of navigable streams. For, just as control over the non-navigable parts of a river may be essential or desirable in the interest of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries..."

and

"the fact that ends other than flood control will also be served, or that flood control may be relatively of lesser importance does not invalidate the exercise of the authority conferred on Congress."

As the construction of this dam and reservoir was a valid exercise by Congress of its commerce power, the Court held that there was no interference with the sovereignty of the state.

Tests of navigability were discussed at some length by the United States Supreme Court in *Oklahoma v. Texas*, 258 U.S. 574 (1922) in reaching the conclusion that no part of the Red River within Oklahoma was navigable.

The syllabus by the Oklahoma Supreme Court in a case relating to the Arkansas River (*Lynch v. Clements*, Okl. 263 P. 2d 153 (1953)) contains the following:

"...where the United States Supreme Court has judicially determined that an Oklahoma river is navigable below a certain point, although such decision and its findings may not be binding upon the parties to subsequent actions in the federal courts, this court will take judicial notice that such stream is navigable below that point, and that title to the river bed where navigable, and also previously conveyed by federal grant, vested in the State of Oklahoma upon its admission as a state."

It has been determined that the Arkansas River in Oklahoma is navigable roughly from the confluence with the Verdigris River (near Muskogee, Oklahoma) to the Oklahoma-Arkansas state line (Kerr-McClellan Navigation Channel).

Although navigability tests have been applied to the Red and Arkansas Rivers, such tests have not been applied to other streams in Oklahoma to determine if they would be navigable under Federal law.

Subject to the paramount authority of the Federal Government to control navigation and to protect the navigability of navigable streams, the right to appropriate such waters is generally recognized throughout the West. Many diversions under appropriative rights are made from navigable streams. The effect of acquisition of an appropriative right on a navigable stream is to establish the appropriator's right to make his diversion during the periods in which it does not impair the navigable capacity of the stream. That waters of navigable streams of the United States may be appropriated, subject to the

dominant Federal easement, has been specifically recognized by the United States Supreme Court. The Court declared the Colorado River to be a navigable stream of the United States and recognized the privilege of the states and individuals therein to appropriate and use the water by holding that this privilege is subject to the paramount navigation authority (*Arizona v. California*, 298 U.S. 558, 1936).

In a determination of riparian rights in the water of navigable streams, it is necessary to distinguish 1) rights in the flow of the stream itself from 2) rights in the bed of the stream and 3) rights in the fast land contiguous to the channel (*Curry v. Hill*, 460 P. 2d 933, (Okl. 1969)). The Supreme Court said, in this case, that:

"The question of whether such streams similar to the Kiamichi River were navigable in fact at least so far as fishing and use for pleasure purposes is concerned has been troublesome to the courts in various jurisdictions for many years. Our precise holding is that the Kiamichi River is an open stream, navigable in fact and can be fished on from boats if the fisherman gets on the stream without trespass against the will of the abutting owner, but the fisherman cannot fix or station trot lines on the bottom of that part of the stream owned by the abutting land owner without permission of such owner."

## **POLLUTION CONTROL LAWS**

### **A Need For Water Quality Control**

Oklahoma's future is highly dependent upon the quality of water it has available for use and it is imperative that the quality of the state's waters be preserved in order to assure its appropriateness for all beneficial uses.

The Oklahoma Water Resources Board is charged with knowing where water suitable for all purposes can be found, and that the quality of such water will be suitable for its intended use. The effects of municipal, in-

dustrial and agricultural growth, and the waste water associated with such growth, on the quality of each potential water supply source must be ascertained. In this regard the quality of the state's ground waters is as important, if not more so, as that of Oklahoma's surface waters.

One of Oklahoma's greatest assets is her oil and it has never been more precious than in this era of energy shortages. However, the production and storage of oil must be done with great care if the waters of the state are to be adequately protected. In earlier times the state did not insure that adequate precautions were taken, and numerous oil spills from drilling and storage areas occurred, causing extensive and long lasting pollution of the state's water resources.

As a by-product of oil and gas well drilling there is almost always salt water brought to the surface which must be disposed of. With secondary oil recovery there is an additional threat to the ground waters. By injecting water under pressure into an oil well more oil can be recovered. If salt water is used for this operation, great care must be exercised so that it will not percolate through loose, sandy soil or shale to reach a layer of fresh water. In spite of the potential problems, it should be noted that the Oklahoma Water Resources Board favors the use of salt water for this recovery, particularly in areas of the state where there is a shortage of fresh water available.

Sewage must be adequately treated before it is released into a stream. Industrial plants typically are required to have lagoons into which they can put waste water so the waste can settle out before the water can be again put into the streams.

Another way man can and sometimes does pollute the surface water is with chemicals. By using insecticides and herbicides to control objectionable insects and plants, fields are sprayed with the rain washing it into the streams. It has been found that this kind of pollution reduces and sometimes eliminates

the reproduction of fish in streams. Insecticides and herbicides have also demonstrated harmful effects on humans, animals and birds.

In addition to man-made pollution, the waters in several areas of Oklahoma are polluted by natural salt as discussed in Chapter IV.

### Early Pollution Laws

Recognizing some of these problems, the legislature early on enacted laws (S.L. 1927, Chapter 38, page 59) concerning municipal water supplies making it unlawful to:

"...pollute, or permit the pollution, by salt water or by crude oil or the bottom settlements thereof, or by sulphur water or any other mineral water or by the refuse or the products of any well or mine, of any stream, pond, spring, lake or other water reservoir fit to be used, and used as a water supply by an incorporated city or town by which said water is rendered unfit for use as a water supply for municipal purposes. In any case in which a municipal water supply has been so polluted prior to the passage of this Act and such pollution is suffered to continue after the passage of this Act the same shall be deemed as unlawful pollution as herein defined."

The Act provided a right of action for damages to incorporated cities and towns resulting from such pollution of its water supply; the amount of compensation for the detriment caused, whether it would have been anticipated or not; and further provided "where such pollution is continued for a period of six months or more, the injury shall be regarded as permanent".

The Oklahoma Supreme Court had occasion to consider three leading cases concerning this law: 1) The measure of damages for permanent pollution (*Roxana Petroleum Corporation v. City of Pawnee*, 155 Okl. 141, 7 P. 2d 663, 1932); 2) Amount of damages (*Arkansas Fuel Oil Co. v. City of Blackwell*, C.C.A. Okl., 87 P. 2d 50, 1937); and 3) Temporary dam-

ages (*Oklahoma City v. Tyetenicz*, 175 Okl. 228, 52 P. 2d 849, 1935).

### Water Pollution Control Act of 1955

As more and more people began using more and more water, pollution began to loom as a very great problem. Recognizing this problem, and recognizing the importance of maintaining the quality of Oklahoma's water, the Legislature passed the "Oklahoma Water Pollution Control Act of 1955" (82 O.S. Supp. 1955, §901 et seq.).

The declaration of policy with regard to pollution of state waters was set forth in §904 as follows:

"Whereas the pollution of the waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and whereas the problem of water pollution of this state is closely related to the problem of water pollution in adjoining states, it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses; to provide that no waste be discharged into any waters of the state without first being given the degree of treatment necessary to protect the legitimate beneficial uses of such waters; to provide for the prevention, abatement and control of new or existing water pollution; and to cooperate with other agencies of this state, agencies of other states and the federal government in carrying out these objectives."

§907 of the Act made it unlawful for any person to cause pollution of any waters of the state. It was further unlawful for any person to carry on certain activities without first

securing a permit from the Board. Such activities were specified as:

- (1) the construction, installation, modification or operation of any industrial disposal system or part thereof or any extension or addition thereto;
- (2) the increase in volume or strength of any industrial wastes in excess of the permissive discharges specified under any existing permit;
- (3) the construction, installation, or operation of any industrial or commercial establishment or any extension or modification thereof or addition thereto, the operation of which would cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical or biological properties of any waters of the state in any manner not already lawfully authorized;
- (4) the construction or use of any new outlet for the discharge of any wastes into the waters of the state.

In addition, §907 made it the responsibility of the State Department of Health to issue permits for the construction and installation of municipal sewage disposal systems and further provided that the Department of Health must report to the Oklahoma Water Resources Board any technical information relative to such systems as the Board might require.

Penalties for violations were provided in §912 and the right of appeal by persons who might be adversely affected was provided for in §913.

"Pollution" was defined as "contamination, or other alteration of the physical, chemical or biological properties of any natural waters of the state, or such discharge of any liquid, gaseous or solid substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or

to livestock, wild animals, birds, fish or other aquatic life". "Wastes" were said to mean "industrial waste and all other liquid, gaseous or solid substances which may pollute or tend to pollute any waters of the state". The Act declared "waters of the state" to mean "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion thereof. (82 O.S. 1961, §905.)

The powers and duties of the Board were enumerated in §906. §906(a) authorized the Board to develop comprehensive programs for the prevention, control and abatement of new or existing pollution of the waters of the state. §906(f) authorized the Board to "adopt, modify or repeal and promulgate standards of quality of the waters of the state and classify such waters according to their best uses in the interest of the public for the prevention, control and abatement of pollution".

In order to effectuate the comprehensive program required in §906(a), the Board was authorized in §908 to group state waters into classes according to their present and future best uses for the purpose of progressively improving the quality of such waters and upgrading them from time to time by reclassifying them to the extent practical and in the public interest. Hearing and published notice was required prior to classifying or reclassifying the waters or setting standards. Pursuant to this authority water quality standards were completed in 1968. The standards were revised and updated in 1973, again in 1976, and most recently in 1979. The standards are incorporated in the rules and regulations of the Oklahoma Water Resources Board and thereby into the laws of the State of Oklahoma. Any violation of their provisions gives rise

to the remedies set forth in the Water Pollution Control Act.

#### **Water Quality Coordinating Committee**

With the passage of the Federal Water Quality Act of 1965 (Public Law 89-234) the Governor of Oklahoma, by Executive Order dated January 13, 1966, created the Oklahoma Water Quality Coordinating Committee. This committee was composed of the heads of those agencies having water pollution control statutory authority who were given the additional responsibility of coordinating state water quality control activities with the 1965 Federal Water Quality Act. The agencies involved were the Oklahoma Water Resources Board, the Oklahoma State Department of Health, the Oklahoma State Corporation Commission, the Oklahoma State Department of Wildlife Conservation and the Oklahoma State Department of Agriculture.

#### **Pollution Control Coordinating Act of 1968**

The Pollution Control Coordinating Act was passed in 1968 creating the State Department of Pollution Control (82 O.S. 1971, §§932 through 942, as amended). The Act provides that the Department of Pollution Control be administered by the Pollution Control Coordinating Board which is composed of nine members as follows: The State Commissioner of Health; the President of the State Board of Agriculture; the Director of the Oklahoma Water Resources Board; the Director of the Department of Wildlife Conservation; the Chairman of the Oklahoma Corporation Commission; the Director of the Department of Industrial Development; the Director of the Oklahoma Conservation Commission; and two members appointed by the Governor with the advice and consent of the Senate who must be knowledgeable and experienced in environmental activities.

The Department of Pollution Control, the administrative arm of the Pollution Control Coordinating

Board, is responsible for establishing a coordinated water pollution control program utilizing the existing resources and facilities in the five state agencies having water pollution control responsibilities and authority under existing statutes.

#### **The 1972 Pollution Control Laws**

The pollution control laws were codified in 1972 without significant change from the 1955 Act (82 O.S. Supp. 1972, §§926.1 through 926.13). Additional responsibilities of the Oklahoma Water Resources Board in conjunction with other state agencies are described under 82 O.S. 1971, §§932.1 et seq., as amended (Pollution Control Coordinating Act of 1968).

In addition, the Scenic Rivers Act of 1970 gave the Board and other appropriate water pollution control agencies the authority to assist in preventing and eliminating the pollution of waters within the designated scenic river areas (82 O.S. 1971, §1457).

The Board's authority in all water quality areas, either as the primary regulatory agency or in a more general oversight role, has been recognized on numerous occasions by the Attorney General. See Opinion No. 76-215 dated July 30, 1976, and more recently Opinion No. 79-205 of August 28, 1979, wherein it stated:

"In light of the statutory provisions relative to the Water Resources Board evidencing the Legislature's intent that the jurisdiction and authority of such Board is to be auxiliary and supplemental to other pollution laws and that the Board is to provide additional and cumulative remedies to prevent, abate and control pollution of the waters of the state, it is apparent that Section 2756 (63 O.S. Supp. 1978, §2756(A)(2)) does not operate to divest the Board of its authority to act in the area of water pollution generated by oil and gas related operations..."

"Accordingly, it is the opinion of the Attorney General that...63 O.S. Supp. 1978, §2756(A)(2) does not

prevent the exercise of jurisdiction by the Water Resources Board over oil and gas related pollution pursuant to its authority found in 82 O.S. Supp. 1972, §926.1 et seq. in order to prevent, abate and control the pollution of the waters of the state."

### **Waste Discharge Permits**

Any person discharging wastes into the waters of the state, such as liquid, gasses, solids, or other waste substances or a combination thereof, resulting from any process of industry, manufacturing trade or business or from the development, processing, or recovery of any natural resource, must secure a permit from the Board before commencing such activity. A permit from the Board, however, is not required for industries discharging industrial waste directly into municipal treatment facilities nor for discharges encompassed within normal agricultural activities (82 O.S. Supp. 1972, §926.5; Rules and Regulations of the Board; 63 O.S. Supp. 1978, §2751 et seq.). In addition, under the Board's rules and regulations, any person who generates industrial waste and constructs lagoons, septic tanks, and/or total retention facilities for storage and/or disposal of industrial wastes must secure a permit from the Board before commencing such activity. Well service company terminal yards which generate waste from the washing of vehicles and/or storage of salt water, mud and other substances used in the exploration, development and production of oil and gas having a discharge or a potential for contamination of surface or ground waters of the state must also secure a permit from the Board.

Under the Board's rules and regulations, the discharge of contaminated storm water is prohibited unless it is pretreated before discharge. If contaminated storm water runoff is retained in lagoons or ponds, and is hazardous or toxic, such

lagoons and ponds must be lined and proof of same provided.

Application forms are provided by the Board and must be filed in duplicate. Plant location and complete plant operations must be described in the application. A map of the area must be attached showing the location of the facilities, location of receiving waters, discharge points, lagoons, storage facilities, etc. If deemed appropriate the Board may ask for detailed plans and specifications (82 O.S. Supp. 1972, §926.4).

### **Notice And Hearing**

When an application has been accepted for filing a date is set for a hearing and a notice is prepared setting forth all of the pertinent facts in the application. The applicant must publish the notice at his expense once each week for two consecutive weeks in the county in which the discharge is located and such other counties as the Board may designate. Hearings are conducted in accordance with the Administrative Procedures Act and the Board's rules and regulations (82 O.S. Supp. 1972, §926.3).

### **Permits**

The Board may either approve or deny the application and, if approved, the Board may require special conditions be included in the permit.

All waste disposal permits are issued for a period of five years and may be renewed upon written application to the Board. A water disposal permit may be modified by filing an amended application by the applicant or the Board may request that an amended application be filed (82 O.S. Supp. 1972, §926.4).

The Board may require the maintenance of records relating to the operation of disposal systems. Copies of such records must be submitted upon request and any authorized representative of the Board may examine records or memoranda pertaining to the operation of disposal systems (82 O.S. Supp. 1972, §926.9).

### **Violations — Notice And Hearing**

The Board or its duly authorized representatives has the power to enter at reasonable times upon any private or public property for the purpose of inspecting and investigating conditions relating to pollution or possible pollution (82 O.S. Supp. 1972, §926.9).

82 O.S. Supp. 1972, §926.7A, provides that:

"Whenever the Board determines there are reasonable grounds to believe that there has been a violation of any of the provisions of this act or any order of the Board, it shall give written notice to the alleged violator or violators specifying the cause of complaint. Such notice shall require that the matters complained of be corrected or that the alleged violator appear before the Board at a time and place within the affected area or within a mutually agreeable location specified in the notice and answer the charges. The notice shall be delivered to the alleged violator or violators in accordance with the provisions of subsection D of this section not less than twenty (20) days before the time set for the hearing."

Under the provisions of this section the violator is given the option of correcting the matters complained of or appearing at a hearing for the purpose of answering charges. Should the violator elect to comply with the Board's notice and requirements he must correct the matter in a manner acceptable to the Board and need not appear at the hearing. In the alternative, if a violation hearing is held, the Board affords the alleged violator or violators an opportunity for a fair hearing in accordance with the provisions of §926.8 regarding conduct of hearings.

On the basis of evidence produced at the hearing, the Board is required to make findings of fact and conclusions of law and enter its order thereon. The order of the Board becomes binding upon all parties unless appealed to the district court.

Under the provisions of 82 O.S. Supp. 1972, §926.10A, any person violating the provisions of, or who fails to perform the duties imposed by the Act, or violates any order or determination of the Board is guilty of a misdemeanor and in addition may be enjoined from continuing such violation. Each day upon which such violation occurs constitutes a separate violation. §926.10B provides:

"It shall be the duty of the Attorney General on the request of the Board to bring an action for an injunction against any person violating the provisions of this act or violating any order or determination of the Board. In any action for an injunction brought pursuant to this section, any findings of the Board after hearing or due notice shall be prima facie evidence of the facts found therein."

#### **Laboratory Certification**

The objectives of the laboratory certification program are to provide reasonable assurance of the accuracy of scientific data submitted to the Board and to establish the use of uniform methods of water analysis. Each laboratory must employ qualified personnel and maintain adequate equipment and facilities.

#### **CONCLUDING NOTE**

Water law and its administration in Oklahoma has a long and storied history. In many respects it is a highly complex and technical area and this Chapter is but a brief highlight of the subject. For a more in-depth study of Oklahoma Water Law, attention is directed to the following publications by Joseph F. Rarick, J.S.D., David Ross Boyd, Professor of Law, College of Law, University of Oklahoma:

*Oklahoma Water Law, Ground or Percolating, In The Pre-1971 Period,*

Reprinted from "Oklahoma Law Review", Volume 24, Number 4, November 1971.

*Oklahoma Water Law, Stream and Surface, In The Pre-1963 Period,* Volume 22, "Oklahoma Law Review", No. 1, February 1969).

*Oklahoma Water Law, Stream and Surface, Under The 1963 Amendments,* Reprinted from Volume 23, Issue No. 1 (February 1970) of the "Oklahoma Law Review".

*Oklahoma Water Law, Stream and Surface, The Water Conservation Storage Commission and The 1965 and 1967 Amendments,* Reprinted from Volume 24, Issue No. 1, (February 1971) of the "Oklahoma Law Review".

*The Right To Use Water In Oklahoma,* Copyright 1976, by Joseph F. Rarick, The University of Oklahoma Law Center.