

EXEMPT WELLS AND AGRICULTURE

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Introduction

In western states, the principal of prior appropriation generally governs groundwater rights. Unlike the riparian approach followed by most eastern states, prior appropriation does not tie water rights to ownership of land. Thirteen states have either formally adopted or have indicated a preference for the Prior Appropriation rule. These include: Alaska, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming.

Prior appropriation begins with the the principle of “first in time, first in right.” Generally, the first landowner to divert the water to beneficial use gains priority right in the amount that is used. In times of shortage, the first user gets all of the water to which he is entitled, the second user gets all of their water, and so on, until there is no more water to appropriate. Once all the water is appropriated, those users without priority get nothing.

Exempt Wells

Most prior appropriation states require a potential appropriator to go through a permitting process before withdrawing water. This process varies by state but can be expensive and time consuming, and includes requiring the state to investigate and make specific findings with regard to availability of water for the requested use and the potential impact the proposed use would have on other water users. This application process can take many years and tens of thousands of dollars to complete.

Recognizing the burden placed on would-be appropriators and the small amount of water used by certain types of wells, many states have created exemptions for certain types of wells from at least some portion of the permitting process. These have come to be known as “exempt wells,” and are commonly applied to wells withdrawing only limited quantities of water or wells used for specific purposes, such as domestic use or livestock watering.

Sixteen states utilize exempt wells: Alaska, Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Washington and Wyoming. These states include 12 of the 13 prior appropriation states (only Utah does not provide for exempt wells). In addition, Arizona, Nebraska, Oklahoma, and Texas utilize exempt wells. Each of these states use detailed permitting schemes, some of which include priority. Arizona and Oklahoma use the reasonable use rule. The reasonable use rule allows a landowner to use the water beneath his property for uses that are reasonably related to the use of the overlying land. Texas utilizes the absolute dominion rule, which gives the landowner the right to use the ground water beneath his property without liability, unless malicious intent exists. Nebraska uses a combination of the rules of correlative rights and

reasonable use for ground water. Finally, Wyoming uses the reasonable use rule in conjunction with the prior appropriation doctrine.,

Exempt well provisions allow withdrawals with relaxed requirements based upon maximum quantities withdrawn, the use for which the water was applied, or both. Exempt wells are generally classified as domestic wells or agricultural (or stock watering) wells. This white paper focuses on exempt agricultural wells. However, since exempt domestic wells often include allowances for irrigation, and farmsteads often also use domestic wells, this paper also addresses exempt domestic wells.

EXEMPT AGRICULTURAL WELLS

This section summarizes the allowances for exempt agricultural wells in each of the 16 states, first in text, then in a table that allows comparison between the states.

Alaska

Alaska requires potential appropriators to file an application before water may be appropriated. Although Alaska does not expressly exempt livestock wells, it provides an exemption from the application requirement for uses that do not qualify as “a significant amount of water.” Regulations define a “significant amount of water” as the consumptive use of more than five thousand gallons from a single source in a single day; the daily or recurring consumptive use of more than five hundred gallons per day from a single source for more than ten days per year; the non-consumptive use of more than thirty thousand gallons per day from a single source; or any use that might adversely affect water rights of appropriators or of the public interest. Thus, Alaska exempts wells withdrawing less than the defined amounts, including those used in connection with livestock, from the application process.

Arizona

Arizona provides an exemption for all withdrawals of groundwater for non-irrigation uses from wells with a pump capacity of thirty-five gallons per minute or less. However, in 2006, Arizona imposed additional restrictions on drilling exempt wells located within one hundred feet of the service area of a municipal provider with an assured water supply designation within an active management area. Additionally, in certain areas, stock watering wells are granted additional exemptions. Currently, in active management areas, withdrawals from exempt wells drilled after April 28, 1983 are limited to ten acre-feet per year for uses other than domestic or livestock. Similarly, if subsequent active management areas are created in the future, no withdrawals would be permitted except those for domestic use or stock watering. The applicable statute defines stock watering as “the watering of livestock, range livestock, or poultry.” Within an active management area, Arizona exempts stock watering wells and releases a well owner from needing a groundwater right or withdrawal permit, complying with spacing rules, using water metering devices, paying groundwater withdrawal fees, and filing an annual groundwater use report. Exempt well owners must only file a notice of intent to drill, use a licensed well driller, and pay the required filing fee before drilling may occur.

Colorado

Colorado provides an exemption from the permitting process for wells producing less than fifteen gallons per minute that are used for “the watering of poultry, domestic animals, and livestock on farms and ranches.” Colorado generally allows exempt stock watering wells only on tracts of land of thirty-five acres or more. Different requirements, including limitations on the amount of water that may be pumped per minute, may be imposed on wells located within Designated Groundwater Basins.

Idaho

Idaho exempts domestic wells from the permitting process, the payment of an application fee, and the requirement of a measurement device. Idaho provides a two-prong definition of “domestic use.” The first prong of the test applies to stock watering, defining domestic use as including the use of water for “livestock and for any other purpose in connection therewith” if the total use does not exceed thirteen thousand gallons per day. Even if stock wells fall within this definition, they are still subject to inspection and licensing requirements.

Kansas

Kansas, too, exempts domestic wells from the state’s permit requirement. However, domestic well owners are not exempt from providing information regarding water use to the chief engineer. Kansas defines domestic uses as including water used “for the watering of livestock, poultry, farm and domestic animals used in operating a farm[.]” To fall within the domestic use definition, livestock must be (1) pastured and not confined to a feedlot; (2) cattle feedlots must have fewer than one thousand head capacity; and (3) other animals in a confined feeding operation must consume less than fifteen acre-feet per year. Under this rule, while a well serving any number of cattle on pasture and any amount of water consumed could qualify as domestic, no cattle feedlots over one thousand head capacity may fall within the exception. Other types of livestock in confined operations, such as confinement hogs or sheep feedlots are not limited as to capacity, but are limited in the total amount of water a user may withdraw each year, whereas no such water quantity limitation is imposed on a cattle feedlot of less than one thousand head capacity.

Montana

Montana provides a quantity, rather than use, exemption to the permitting process and, therefore, does not expressly address livestock watering. Specifically, wells located outside domestic management areas are exempt if they appropriate thirty-five gallons a minute or less and do not exceed ten acre-feet of withdrawal per year. Although these wells are exempt from the permitting process, a well owner must still file a notice of completion and, upon filing, the state is required to issue a certificate of water right.

Nebraska

Generally, Nebraska statutes exempt all single water wells that are only capable of pumping fifty gallons per minute or less. In addition to state statutory requirements, Nebraska also allows local natural resource districts to pass rules, including permitting requirements for certain wells, but such additional permitting is not allowed for water “used to water range livestock.” Also, although the state may issue stays on drilling in over-appropriated and fully appropriated basins, wells for the watering of range livestock are exempt from any such stay. However, all wells, including exempt livestock wells, must register with the state.

Nevada

Nevada provides a permitting exemption for domestic wells, including wells used for “the watering of livestock and any other domestic animals” so long as the withdrawal from the well does not exceed two acre-feet per year. The Nevada State Engineer does, however, retain the discretion to require registration of domestic wells and to limit the depth of such wells or even prohibit drilling altogether if water districts or municipalities in the area can furnish water in lieu of a domestic well.

New Mexico

New Mexico not only requires that a person seeking to appropriate water for livestock purposes file an application with the state engineer but also requires the state engineer to grant the permit upon its filing, leaving the state engineer no discretion to review or analyze the application. Thus, livestock wells are exempt from the typical requirement of publication, notice, investigation, and findings by the state engineer. If an applicant seeks to drill a livestock well on federal land, the applicant must submit proof to the state engineer that he or she is legally entitled to place livestock on the land where the water is to be used and he or she has received permission to access the portion of the land necessary to drill the well. The New Mexico Supreme Court recently upheld a facial constitutional challenge brought against the domestic well statute, finding that the statute did not violate the constitutional doctrine of prior appropriation.

North Dakota

Wells drilled for livestock purposes in North Dakota are exempt from the state’s permit requirements so long as the total amount of water appropriated is less than 12.5 acre-feet per year. North Dakota defines “livestock uses” as “the use of water for drinking purposes by herds, flocks, or bands of animals kept for commercial purposes.” All appropriators, including those drilling livestock wells, must notify the state engineer of the well’s location and acre-foot capacity.

Oklahoma

In Oklahoma, any person may appropriate groundwater from his or her own land for domestic use without a permit. “Domestic use” includes the use of water by a natural individual for “farm and domestic animals up to the normal grazing capacity of the land[.]” There is no express limitation on the amount of water that a domestic well may withdraw, but domestic wells are subject to sanctions against waste. The Oklahoma Water Resources Board expanded the definition of “domestic use” to include an exemption for water withdrawn by natural individuals for “agricultural purposes.” The Oklahoma Water Resource Board construes this regulation as applying a 5 acre foot per year limit on wells used for “agricultural purposes.” Certainly the Oklahoma Water Resource Board’s “agricultural purposes” definition appears broader than the more limited statutory definition and would include, for example, a feedlot or dairy that would likely not fall within the statutory “domestic use” definition as it would have more cattle than the normal capacity of the land. Importantly, both of these definitions limit the exemption to “natural individuals,” thereby excluding corporations or partner- ships from falling within the exemption.

Oregon

Oregon law exempts wells for several uses, including those for “stockwatering purposes,” from the requirements of registration and permitting. A person drilling an exempt well, however, must file the exempt well with the Water Resources Department, pay a \$300 recording fee, and provide a map showing the location of the well within thirty days of drilling completion.

South Dakota

Generally, a person seeking to appropriate water in South Dakota must obtain a permit from the Water Management Board. An exemption exists, however, for well owners seeking to make “reasonable domestic use” of water. The state limits reasonable domestic use to twenty-five gallons per minute on an average daily basis and to 25,920 gallons per day or less as necessary for domestic purposes. Additionally, South Dakota considers domestic purposes to be the highest use of water, taking precedence over all appropriative rights.

The definition of “domestic use” includes stock watering. Originally, however, the South Dakota statute did not provide a definition of “stock watering.” Courts were left to interpret the phrase, and, in doing so, strictly limited the permissible uses to the consumption of water by animals. In 2012, the South Dakota Legislature amended the statute to define the phrase more broadly than the court’s interpretation. Thus, under the current South Dakota law, stock watering is defined as “[u]se of water not exceeding eighteen gallons per minute on an average daily basis for livestock in a confinement operation, including water for drinking, sanitary and general welfare purposes, and for like purposes by those caring for the livestock[.]” Importantly, the quantity limitations for domestic use are applicable to stock watering as well.

Texas

In Texas, the preferred method of groundwater management is to place such management in the hands of various local groundwater conservation districts located throughout the state. The Texas Water Code provides that wells “used solely” for providing water for livestock or poultry on a tract of land larger than ten acres that are “incapable of producing more than twenty-five thousand gallons of groundwater per day” are exempt from the permitting requirements of local groundwater conservation districts. Thus, local groundwater conservation districts may not require a permit or restrict the production for exempt wells, even during times of drought. Importantly, even though livestock wells are exempt from the permitting process, they must still be registered in accordance with the rules of the local district, be equipped and maintained to conform with rules regarding installation, and must have a drilling log on file with the local district.

These requirements, however, are merely a baseline, and local groundwater conservation districts may broaden the exemptions. For example, the Brazos Valley Groundwater Conservation District doubles the maximum production allowed for exempt wells, allowing an exemption for domestic or livestock wells capable of producing up to fifty thousand gallons per day. Similarly, the Bluebonnet Groundwater Conservation District exempts “agricultural wells” rather than the narrower stock well definition contained in the state statute from portions of the permitting process and from production limitations.

Also of note, at least one Texas groundwater conservation district expressly excludes Confined Animal Feeding Operations (“CAFOs”) from the livestock watering exemption. Thus, while a CAFO may not qualify for exemption in certain counties, they may well be able to drill a well without completing the permitting process in other areas of the state.

Utah

Utah recognizes no exempt wells, finding instead that any impairment, even de minimus, is unacceptable. Thus, all livestock wells must go through the general permitting process with the Utah State Engineer.

Washington

Washington exempts certain wells from the permitting process, including wells used for “stock-watering purposes.” There is no limitation on the quantity of water for stock-watering purposes under this statute. Although the statute does not define the phrase “stock-watering purposes,” agency interpretation has given this phrase broad meaning beyond merely livestock consumption of water. The state, however, may require exempt users to provide information regarding the means and quantity of water withdrawal.

Wyoming

While Wyoming does not exempt stock wells from the permitting process, it does provide exemptions from certain requirements in the adjudication process. Moreover, domestic and stock wells are given a “preferred right” over all other uses, regardless of the date of priority. Thus, if a non-preferred well interferes with a preferred well, the non-preferred user must either reduce his use to eliminate the interference or provide water to the preferred user. While Wyoming does not define “stock use,” it does limit the permissible rate of withdrawal to twenty-five gallons per minute. (You Can Lead Livestock to Water...A Survey of Exempt Wells in the West, Tiffany E. Dowell).

Table 1: Agricultural/Stockwatering Wells

State	Capacity Limit
Alaska	>30,000 gallons per day
Arizona	>35 gallons per minute
Colorado	>15 gallons per minute
Idaho	>13,000 gallons per day
Kansas	>15 acre-feet per year
Montana	>35 gallons per minute; >10 acre-feet per year
Nebraska	>50 gallons per minute
Nevada	>2 acre-feet per year
New Mexico	None
North Dakota	>12.5 acre-feet per year
Oklahoma	>5 acre-feet per year; Subject to sanctions against waste
Oregon	None
South Dakota	>18 gallons per minute; >25,920 gallons per day
Texas	>25,000 gallons per day; Subject to local groundwater conservation district requirements
Washington	None
Wyoming	>25 gallons per minute

EXEMPT DOMESTIC WELLS

The same sixteen states utilize exempt wells for purposes such as bathing and cooking. Table 2 summarizes exempt domestic wells in each of these states, including irrigation limits, if any.

Table 2. Exempt Domestic Wells

State	Capacity Limit	Diversion Limit	Irrigation limits
Alaska	None	.56 AFY	None
Arizona	56.46 AFY	10 AFY in certain active management areas	2 acres in certain active management areas
Colorado	15.195 AFY (5 AFY in designated groundwater basins)	none	1 acre
Idaho	None	none	½ acre (but limit of 13,000 gallons/day)
Kansas	None	none	2 acres
Montana	56.46 AFY (but 10 AFY limit)	none	None
Nebraska	None	80.65 AFY	None
Nevada	None	2 AFY	None
New Mexico	None	1 AFY	1 acre
North Dakota	None	none	5 acres
Oklahoma	None	none	3 acres
Oregon	None	16.80 AFY	½ acre
South Dakota	None	29.03 AFY	None
Texas	None	28.00 AFY in groundwater management districts	None
Washington	None	5.6 AFY	None
Wyoming	None	42.91 AFY	1 acre

References

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