Environmental Law: The Environmental Quality Act as a Reservoir of Legislative Intent—A New Model of Interagency Cooperation Springs Forth from the Clarification of Oklahoma's Groundwater Law

by

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COMMENTS

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I. Introduction

One autumn Wednesday, September 13, 2000, concerned people filled the chamber of the Oklahoma House of Representatives;[1] many were from Oklahoma's vast hog industry, who feared that their water might be cut off[2] as a result of the Oklahoma Supreme Court's ruling in *Messer-Bowers Co. v. State ex rel. Oklahoma Water Resources Board.*[3] Issues of groundwater access have come to a complex and heated boil in Oklahoma, involving the interests and jurisdictions of a number of state agencies and a multitude of statutes, most prominently title 82, sections 1020.1-1020.22 (Groundwater Law), title 60, section 60 (Estates in Real Property), and title 27A, sections 1-1-101 to -3-103 (Oklahoma Environmental Quality Act [EQA]).[4] Competing interests in groundwater use can give rise to major legal disputes because it is both a critical and limited resource. Indeed, 25% of the United States' total water use comes from groundwater.[5] The Oklahoma legislature most recently codified the importance of groundwater as a critical resource for the state in the 1972 Groundwater Act, which acknowledges groundwater's vital role in agriculture, industry, municipalities, the general economy, and the health and welfare of the state and its citizens.[6]

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1. *See* Mick Hinton, *Panhandle Groundwater Yields Pesticide Trace*, DAILY OKLAHOMAN, Sept. 14, 2000, at 4-A, *available at* LEXIS, News Library, News Group File. The article reported that "the 101-seat House chamber at the state capitol nearly was filled with people — many from the state's vast hog industry — who fear their water might be cut off because of a far-reaching ruling by the state Supreme Court this summer." *Id.* Duane Smith, chief of the water agency said the *Messer-Bowers* ruling will have a tremendous impact on all water users licensed by the state. *Id.* Dean Couch, the water board's attorney, said the ruling extends to other industrial users. *Id.* "Municipalities and also irrigators and possibly even the gas and oil industry could be affected." *Id.*

2. *Id.*

3. 2000 OK 54, 8 P.3d 877.

4. 82 OKLA. STAT. §§ 1020.1-1020.22 (2001); 60 OKLA. STAT. § 60 (2001); 27A OKLA. STAT. §§ 1-1-101 to -3-103 (2001).

5. DAVID A. FRANCKO & ROBERT C. WETZEL, TO QUENCH OUR THIRST: THE PRESENT AND FUTURE STATUS OF FRESHWATER RESOURCES IN THE UNITED STATES 23 (1983).

6. 82 OKLA. STAT. § 1020.2 (2001) ("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 groundwater resources of the state . . . .").

The dual interests of utilizing groundwater resources and protecting groundwater resources can sometimes pull in opposite directions.[7] In an attempt to negotiate these competing interests, the Oklahoma Supreme Court declared the issue of use and control of groundwater to be one of "*publici juris*, and of immediate local, national, and international concern."[8] Groundwater requires this heightened concern, in large part, because groundwater is especially vulnerable to contamination, even more so than surface water.[9] Because aquifers and reservoirs are underground and slow moving, they can become long-term sinks for contaminants.[10] Damage to groundwater and aquifers is mostly irreversible, and groundwater pollution can take years to reveal itself.[11]

Messer-Bowers, which addressed water runoff from a large hog farm operation in Woodward County, is the latest of a handful of cases, beginning in the 1930s, that have shaped Groundwater Law in Oklahoma. Farm runoff is a leading cause of groundwater pollution in many parts of the United States. Indeed, farm runoff is a problem that policy makers cannot address in a piecemeal fashion; instead it requires a comprehensive, coordinated solution.[12] In *Messer-Bowers*, the Oklahoma Supreme Court directed the Oklahoma Water Resources Board (Water Board) to discontinue its piecemeal approach to water management and exercise its full scope of responsibilities, which, the court determined, ran concurrently with other environmen-

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7. *See* Okla. Water Res. Bd. v. Tex. County Irrigation & Water Res. Ass'n, 1984 OK 96, ¶¶ 7-24, 711 P.2d 38, 42-47 (discussing the conflict of interests between (1) beneficial use that may cause waste by pollution and waste by depletion; and (2) reasonable use designed to curtail both waste by pollution and waste by depletion).

8. *Id.* ¶ 14, 711 P.2d at 43. "Of public right" is the direct translation of *publici juris*. *See* BLACK'S LAW DICTIONARY 1244 (7th ed. 1999). The Oklahoma Supreme Court uses the *publici juris* designation to signal and emphasize that the court must give considerable weight to the public's interest in the matter under review. *See, e.g.*, Dulaney v. Okla. State Dep't of Health, 1993 OK 113, ¶ 18, 868 P.2d 676, 684 (observing that legal issues involving groundwater become *publici juris* because "[n]o commodity affects and concerns the citizens of Oklahoma more than fresh groundwater").

9. *See* Payal Sampat, *The Hidden Threat of Groundwater Pollution*, USA TODAY, July 1, 2001, at 28; *see also* Hinton, *supra* note 1, at 4-A. The Hinton article reports that, in the Oklahoma Panhandle, traces of pesticides are showing up in water 250 feet below the ground. Hinton, *supra* note 1, at 4-A. Representative M.C. Leist, then-Chairman of the House Agriculture Committee stated, "It's frightening to know we are having some pesticide seepage. Now we need a lot more studies of percolation rates in all the aquifers in the state." *Id.* Kathy Peter, District Chief of the U.S. Geological Survey, stated that the pesticides detected, which include atrazine, simazine and metachlor, have been used over the last thirty years and "[i]t was thought that they would take much longer to show up in underground water basins such as the Ogallala Aquifer." *Id.* Newly published research links the chemical atrazine "to cancer in humans and to deformities in frogs that caused them to grow both testes and ovaries." *See* John H. Cushman, Jr., *New Study Adds to Debate on E.P.A. Rules for Pesticide*, N.Y. TIMES, June 2, 2002, at 21.

10. Sampat, *supra* note 9, at 28.

11. *Id.*

12. *Id.*; *see also* Hinton, *supra* note 1, at 4-A ("Oklahoma's hogs produce as much waste as a city of five million people, said Jon Craig, head of water quality for the state Department of Environmental Quality.").

tal agencies.[13] Notably, *Messer-Bowers* was the court's first major decision addressing the status of groundwater after passage of the EQA.

In the aftermath of the *Messer-Bowers* decision, the Oklahoma legislature amended two provisions in the Groundwater Law statutes in an effort to adjust agency jurisdiction over groundwater pollution.[14] The new legislation raises a number of questions regarding the role of the state's environmental agencies and the extent of their jurisdictions in making final permitting decisions for groundwater rights. However, if construed reasonably, the recent legislation may allow a new model of interagency cooperation to emerge that can protect the state's groundwater without overly burdening businesses and corporations that apply for groundwater permits. This interagency cooperation is especially likely if agencies will take seriously the policy mandates of the EQA and administratively interpret the new statutes in accordance with the *Messer-Bowers* decision.

This comment traces the history and issues of Oklahoma Groundwater Law from the 1930s to the most recent case of *Messer-Bowers*. Part II describes how courts and the legislature have struggled to define (1) groundwater in relation to stream water and (2) the property rights governing both. Part II also examines the importance of reasonable use in arriving at a functional definition of these concepts.

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13. *See* Messer-Bowers Co. v. State *ex rel.* Okla. Water Res. Bd., 2000 OK 54, ¶ 18, 8 P.3d 877, 882 (holding that the Water Board's understanding of the EQA was myopic and ordering it to reconsider the permit based on the court's broader interpretation).

14. *See* H.R. 1480, 48th Leg., 1st Sess. (Okla. 2001). This legislation, sponsored by Representative Leist and Senators Easley and Muegge, amended title 82, sections 1020.9 and 1020.15. *Id.* Subsection 3 of section 1020.15 emphasized the legislation's high priority. *See id.* "It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval." *Id.* See *infra* notes 164-65 for the full-text of the amendments. *See also* Mick Hinton, *Water Purity Put Atop List by Legislator*, DAILY OKLAHOMAN, Aug. 17, 2000, at 4-A, *available at* LEXIS, News Library, News Group File. The article read as follows:

> The chairman of the state House Agricultural Committee predicted . . . that water quality will be a top issue in the state legislature next year, after [the *Messer-Bowers*] ruling.
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> The court . . . told the state Water Resources Board that it must start considering how manure spreading affects the state's water quality.
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> Rep. M.C. Leist, D-Morris, said that he will head an interim legislative study this fall to address the issue. Pollution caused by animal waste "will probably be one of the two or three big issues we face next year" in the Legislature, Leist said.
>
> The Legislature needs to establish a uniform state policy governing animal waste, Leist said. He pointed to prolific poultry operations in eastern Oklahoma and the growth of hog farms in central Oklahoma and the Panhandle.
>
> The state agriculture department estimates Oklahoma had almost 2.2 million hogs on June 1, and that more than 216 million broilers were raised in the state during the past year.
>
> . . . .
>
> Legislators will train a spotlight on the July 5 decision by the Oklahoma Supreme Court. The opinion was rendered in a dispute over an application by Kronseder Farms to develop a farm in northwestern Oklahoma for 142,000 pigs.

Id.

Part III follows the evolving role of reasonable use as courts integrate it into the current policy of utilization to promote beneficial use of groundwater. It describes the criteria for permits and the impact of the EQA on the authority of governing agencies. Part IV analyzes both the holdings and the reasoning of the *Messer-Bowers* case in its broader legal and historical context. For example, it analyzes how the court resurrected legal precedent to clarify the definitions of groundwater and stream water and how the court interpreted the EQA to assign two state agencies concurrent jurisdiction over waste by pollution. Part V then analyzes Oklahoma's Groundwater Law after the *Messer-Bowers* decision. *Messer-Bowers* prompted the legislature to change the Groundwater Law, and Part VI argues that Oklahoma courts should construe the changes to promote a new model of interagency cooperation with direct benefits for both the environment and business.

II. Meandering Toward a Definition of Groundwater

A. The Definition from Title 82

Title 82, section 1020.1(1) of the Oklahoma Statutes defines groundwater as "fresh water under the surface of the earth regardless of the geologic structure in which it is standing or moving outside the cut bank of any definite stream."[15] On first impression, this definition seems both obvious and simple. It covers discrete, nonmoving underground reservoirs, as well as underground reservoirs in which the water is moving, as long as the water does not move in "a definite, natural channel, with defined beds and banks, originating from a definite source or sources of supply."[16] Yet, title 60, section 60, declares important distinctions concerning a person's right to groundwater that complicate this definition. Specifically,

> [t]he owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. The use of groundwater shall be governed by the Oklahoma Groundwater Law. Water running in a definite stream, formed by nature over or under the surface, may be used by the owner of the land riparian to the stream for domestic uses as defined in Section 105.1 of Title 82 of the Oklahoma Statutes, 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 state, as provided by law . . . .[17]

One apparent complication arising from the above statutory language is that stream water can be above or below the surface; therefore, a subterranean stream, even though underground, is not granted the status of groundwater.[18] Another major

15. 82 OKLA. STAT. § 1020.1(1) (2001).
16. *Id.* § 105.1(1).
17. 60 OKLA. STAT. § 60(A) (2001).
18. *See id.*

complication is the clash of this statute with the standard definition of groundwater, previously cited from title 82. This clash occurs at the point where stream water interfaces with groundwater, for example, where springs emerge from the ground and form definite streams. This clash has given rise to a series of Oklahoma cases that lead directly to the *Messer-Bowers* decision.

B. Canada v. City of Shawnee

The Oklahoma Supreme Court first established the distinction between groundwater and underground stream water in *Canada v. City of Shawnee*.[19] In *Canada*, the city of Shawnee purchased seventy acres of land, located roughly seven miles outside the city, to supply the city's water needs.[20] Shawnee intended to pump groundwater from this acreage and transport it into the city.[21] When Shawnee implemented its plan, the wells and springs of the adjacent landowners ceased to produce water, and the lands dried up.[22] As a result, the adjacent landowners brought an action to enjoin the city from extracting the groundwater.[23]

In reaching its decision, the *Canada* court distinguished between (1) percolating waters and (2) underground streams.[24] This same distinction is reflected and codified in contemporary statutes between (1) water under the surface outside the cut bank of any definite stream; and (2) water running in a definite stream.[25] Furthermore, the court noted that a landowner's water rights depend on water characterization.[26] The court affirmed the earliest common law rule regarding water of the percolating variety, dating back to 1843, which stated that such waters belong to the owner of the freehold, "like the rocks, soil, and minerals found there."[27] In contrast, according to the *Canada* court, a landowner may use stream waters as long as the stream flows in its natural direction.[28]

Significantly, the *Canada* court introduces the concept of reasonable use to qualify and limit the ownership of groundwater.[29] The court reasoned that "the limitations usually imposed upon the use of property of other classes" also circumscribed the ownership of groundwater.[30] The court observed that when an individual owns a vacant lot, building, or automobile, such individual may not injure his neighbor by an unreasonable use of the property.[31] Following this line of reasoning, the *Canada* court held that while the citizens of Shawnee must have water, they need not secure

19. 1936 OK 803, 64 P.2d 694.
20. *Id.* ¶ 1, 64 P.2d at 695.
21. *Id.* ¶ 2, 64 P.2d at 696.
22. *Id.*
23. *Id.*
24. *Id.*
25. *See* 82 OKLA. STAT. § 1020.1 (2001); 60 OKLA. STAT. § 60 (2001) (providing definitions that distinguish groundwater from stream water).
26. *Canada*, ¶ 6, 64 P.2d at 696.
27. *Id.* ¶ 8, 64 P.2d at 696.
28. *Id.* ¶¶ 16-18, 64 P.2d at 698.
29. *Id.* ¶ 10, 64 P.2d at 696.
30. *Id.* ¶ 18, 64 P.2d at 698.
31. *Id.* ¶ 19, 64 P.2d at 699.

it at the expense of adjacent landowners.[32] Therefore, according to the *Canada* court, when adjacent landowners (e.g., the city and surrounding farmers) have a coincidental claim of ownership to the same groundwater, a single landowner may take the groundwater, so long as the taking is *reasonable*.[33] As Oklahoma's law governing the use of groundwater evolved from *Canada* to the current law of 1972, courts integrated this initial concept of "reasonable use" into the formula of allocation designed to promote the beneficial use of groundwater resources.[34]

C. Oklahoma Water Resources Board v. City of Lawton

Forty-one years after *Canada*, the Oklahoma Supreme Court relied on a similar mode of reasoning in *Oklahoma Water Resources Board v. City of Lawton*.[35] This case focused more closely on the complex legal problems concerning the point where groundwater becomes stream water.[36] In *Lawton*, the Water Board granted a permit to the defendant, in accordance with groundwater statutes,[37] allowing him to take water from a spring.[38] This spring poured one million gallons of water per day into a creek that directly fed Lake Lawtonka, owned by the city of Lawton.[39] The city requested judicial review of the Water Board's decision on the grounds that the decision would severely diminish the available water in the lake.[40] The district court overturned the Water Board's decision, and the defendant appealed.[41]

On appeal, the court focused on whether tapping the source of the spring water before it reached the surface and formed a stream should be subject to groundwater statutes or stream water statutes.[42] The court acknowledged that the source of the spring was undisputedly groundwater.[43] The Water Board argued that it granted the permit to the defendant because it did not view the spring as a definite stream; even after the spring water arrived at the surface, it traveled "across the ground in a diffused manner for a short distance before forming a definite stream."[44] However, the court did not find this classification to be the dispositive issue.[45] After closely comparing the language governing groundwater in title 82 and title 60, the court refused to maintain a formalistic distinction

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32. *Id.* ¶ 15, 64 P.2d at 698 (citing Schenk v. City of Ann Arbor, 163 N.W. 109, 114 (1917)).

33. *See id.* ¶ 19, 64 P.2d at 699.

34. *See, e.g.*, Okla. Water Res. Bd. v. Tex. County Irrigation & Water Res. Ass'n, 1984 OK 96, ¶¶ 8-15, 711 P.2d 38, 42-44; *see also, e.g.*, Messer-Bowers Co. v. State *ex rel.* Okla. Water Res. Bd., 2000 OK 54, ¶¶ 11-18, 8 P.3d 877, 881-83.

35. 1977 OK 89, 580 P.2d 510.

36. *See Id.* ¶ 13, 580 P.2d at 513.

37. 82 OKLA. STAT. §§ 1020.1-1020.22 (2001).

38. *Lawton*, ¶ 1, 580 P.2d at 511.

39. *Id.*

40. *Id.*; *see also* 75 OKLA. STAT. § 318 (2001) (granting state courts authority to review permitting decisions made by state agencies).

41. *Lawton*, ¶ 4, 580 P.2d at 511.

42. *Id.*

43. *Id.*

44. *Id.* ¶ 5, 580 P.2d at 512.

45. *See id.* ¶ 13, 580 P.2d at 513.

between groundwater and stream water.[46] Instead, the court held that the test for classifying the source of a spring as groundwater or spring water "was not *how* immediately spring water forms a definite stream, but rather, *whether* the spring water forms a definite stream."[47] Although the spring in *Lawton* flowed across the ground in a diffuse manner, it did eventually flow into a creek to form a definite stream.[48] Consequently, the court found that the Water Board should not have used Groundwater Law to permit the spring's diversion.[49] Instead, the Water Board should have classified the spring, from its inception, as stream water, and therefore public water — a determination the court believed best reflected the intent of the Oklahoma legislature.[50]

III. Arriving at a Policy of Groundwater Usage

A. Management of Terms

The current statute defining the state's policy for the appropriate use of groundwater, from the 1972 Groundwater Act, provides the following:

> It is hereby declared to be the public policy of this state, in the interest of agricultural stability, domestic, municipal, industrial and other beneficial uses, general economy, health and welfare of the state and its citizens, *to utilize* the groundwater resources of the state, and for that purpose to provide *reasonable regulations* for the allocation of *reasonable use* based on hydrologic surveys of fresh groundwater basins or subbasins to determine a *restriction on the production*, based upon the acres overlying the groundwater basin or subbasin.[51]

Lawmakers packed the statute with a number of ambiguous concepts, such as utilization, beneficial use, reasonable regulation, reasonable use, and restriction on production. Several Oklahoma Supreme Court cases have attempted to define these terms and to interpret their interrelationship.[52]

To understand how the Oklahoma Supreme Court currently interprets Groundwater Law, one must go back to the early *Canada* decision that wrestled with the conundrum of concurrent ownership of a limited natural resource.[53] The *Canada* court determined that the ownership rights of a shared resource could not be absolute and it introduced the concept of "reasonable use" as the limiting factor in the use of

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46. *Id.*

47. *Id.* (emphasis added).

48. *Id.*

49. *Id.*

50. *Id.*; *see also* Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd., 1990 OK 44, 855 P.2d 568 (providing an overview of the public water rights associated with the classification of stream water).

51. 82 OKLA. STAT. § 1020.2 (2001) (emphasis added).

52. *See, e.g.*, Kline v. State *ex rel.* Okla. Water Res. Bd., 1988 OK 18, 759 P.2d 210; Okla. Water Res. Bd. v. Tex. County Irrigation & Water Res. Ass'n, 1984 OK 96, 711 P.2d 38; Lowery v. Hodges, 1976 OK 132, 555 P.2d 1016.

53. *See* Canada v. City of Shawnee, 1936 OK 803, ¶¶ 8-11, 64 P.2d 694, 696-97.

groundwater.[54] However, in this early understanding of reasonable use, it was difficult to ascertain the threshold point where water use turned from reasonable to unreasonable.[55] The court spoke in broad and inexact terms of harm to adjacent landowners.[56] However, early in Oklahoma history, the *Canada* court affirmed that industrial and commercial uses of groundwater, such as the promotion of agriculture, manufacturing, irrigation, and mining, were reasonable uses, as long as the benefit from such use was directly connected with the land from which the water was taken.[57] Thus, the *Canada* court prevented Shawnee from transporting water away from lands located miles from the city.[58]

Today, the general idea of what constitutes reasonable use has changed significantly. Reasonable use, no longer an end in itself, has evolved into a means — a factor in the equation for determining whether a party utilizes groundwater beneficially and without causing waste.[59] Title 82 codified an example of this change, and thus in a sense overturned *Canada*. The statute, however, allows for transportation only if waste does not occur, a limitation based on reasonable use analysis.[60]

B. From Conservation to Utilization

Although *Canada* provided several early ingredients of groundwater policy, the Oklahoma Supreme Court did not fully develop the current policy until *Oklahoma Water Resources Board v. Texas County Irrigation & Water Resources Ass'n*.[61] In *Texas County*, the Water Board granted a permit to Mobil Oil Company to use groundwater for secondary and tertiary oil extraction.[62] When the Texas County Irrigation and Water Resources Association challenged the permit in district court, the court upheld the validity of the permit but reversed the Water Board's decision to allow Mobil Oil to transport the water off of the premises from which it was withdrawn.[63] This decision, based on the issue of water transport, was consistent with the early *Canada* decision. In response, the Water Board and Mobil Oil challenged this order, asking the Oklahoma Supreme Court to affirm the Water

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54. *Id.*

55. *Id.*

56. *Id.* ¶ 18, 64 P.2d at 698 ("We do not believe, however, that the landowner's ownership of percolating water was given him as a weapon with which to unreasonably maim his neighbor.").

57. *Id.* ¶ 11, 64 P.2d at 697.

58. *Id.* ¶ 22, 64 P.2d at 700. The *Canada* court's holding that groundwater must be put to reasonable use on the land from which it was taken complies with the American Reasonable Use Rule. *See* JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 364 (3d ed. 2000).

59. *See* Okla. Water Res. Bd. v. Tex. County Irrigation & Water Res. Ass'n, 1984 OK 96, ¶ 8, 711 P.2d 38, 42 (modifying the *Canada* court's holding so that parties may transport groundwater away from the land).

60. *See* 82 OKLA. STAT. § 1020.15(4) (2001) (stating that the Water Board shall not permit any fresh groundwater user to commit waste by "[t]ransporting fresh groundwater from a well to the place of use in such a manner that there is an excessive loss in transit").

61. 1984 OK 96, 711 P.2d 38.

62. *Id.* ¶ 2, 711 P.2d at 40.

63. *Id.* ¶ 4, 711 P.2d at 41.

Board's original order.[64] The Oklahoma Supreme Court did not affirm the Water Board's original order, but instead reversed the granting of the permit.[65]

In arriving at its decision, the court noted a significant transition in Oklahoma's groundwater use policy from the 1949 Groundwater Law to the revised 1972 Groundwater Law.[66] The 1949 Act based water usage on a system of conservation, which protected water located within a designated critical groundwater area.[67] Under the 1949 Act, courts determined the amount of water a party could withdraw by looking to the safe annual yield of a groundwater basin as measured by its average annual recharge rate.[68] This policy linked a party's water usage directly to the fluctuations of total use and nonuse by parties who had rights to the basin.[69] For example, if parties increased their groundwater use from a basin, the average annual recharge rate would decrease, thereby reducing the amount each party could extract in the future.[70]

The 1972 Groundwater Act moved Oklahoma from a policy of conservation to a policy of utilization, a concept specifically defined in terms of "beneficial use."[71] Under this new policy, courts do not limit water use by the annual recharge rate, but by the "restriction on the production," which courts link to "the acres overlying the groundwater basin or subbasin."[72] Therefore, the amount of groundwater a party may use is the proportionate share of the maximum annual yield of the basin that equals the percentage of land that a party owns or leases.[73] This policy provides the party a greater degree of security in its ownership of the water rights because once the party secures ownership of a tract of land, ownership of a proportion of groundwater follows, regardless of the amount of water that adjacent landowners use.[74]

C. The Prevention of Harm and Waste

The groundwater statutes circumscribe the policy of utilization with the concept of beneficial use.[75] Groundwater can be used for the benefit of agriculture, industry, domestic purposes, general economy, and health and welfare of the state and its citizens.[76] The court in *Texas County* determined that Groundwater Law neither recognizes nor mentions preferences among beneficial uses.[77] Therefore, using

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64. *Id.*
65. *Id.* ¶ 24, 711 P.2d at 48.
66. *Id.* ¶ 6, 711 P.2d at 41.
67. *Id.*
68. *Id.*
69. *Id.* ¶ 7, 711 P.2d at 42.
70. *Id.*
71. *Id.* ¶¶ 8-13, 711 P.2d at 42-43.
72. *See* 82 OKLA. STAT. § 1020.2 (2001).
73. *Texas County*, ¶ 7, 711 P.2d at 42.
74. *See id.*
75. *See* 82 OKLA. STAT. § 1020.2 (2001); *see also id.* § 1020.9 (mandating that the Water Board determine "whether the use to which the applicant intends to put the water is beneficial use").
76. *See id.* § 1020.2.
77. *Texas County*, ¶ 7, 711 P.2d at 42.

groundwater to promote agriculture or industry is just as valid, in terms of beneficial use, as using the groundwater for recreation or to promote a community's health.[78] The law does not directly account for the issue of whether one party's beneficial use may undermine or preclude another party's beneficial use, a problem first addressed by the *Canada* court.[79]

However, current Groundwater Law provides important safeguards that evaluate and mitigate the collateral consequences of beneficial use through the concept of reasonable use.[80] Inherent in the utilization policy is the explicit mandate that the state implement "reasonable regulations for the allocation for reasonable usage based on hydrologic surveys of fresh groundwater basins or subbasins to determine a restriction on the production."[81] For example, under the 1936 holding of the *Canada* court, landowners only had legal recourse on the grounds of unreasonable use after harm was done, as was the case in *Canada* when the land went dry. However, after *Texas County*, the Water Board may determine reasonable use up front, at the time of the permit application, to avert any potential harm.[82] In *Texas County*, the Oklahoma Supreme Court held that "apportionment for reasonable use is the standard."[83] The *Texas County* court identified water allocation based on hydrologic surveys as one of the terms of reasonable use,[84] so that the amount of groundwater a party uses is always proportionate to the amount of land owned by the party. As a result, the predetermination by the Water Board of proper usage prevents unreasonable use, such as usurping the proportion of water reserved for adjacent landowners.

The *Texas County* court also identified the mandate for reasonable use in the Water Board's consideration of waste.[85] The wording of title 82, section 1020.9, even after recent amendments,[86] directs the Water Board to make several findings, based on information from hydrologic surveys and other data, *before* it can grant a

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78. *Id.*

79. *See id.*

80. *See* 82 OKLA. STAT. § 1020.2 (2001).

81. *Id.*

82. *See Texas County*, ¶¶ 7-13, 711 P.2d at 42-43 (explaining that Groundwater Law has evolved so that the Water Board determines reasonable use at the time of the permit application).

83. *Id.* ¶ 7, 711 P.2d at 41.

84. *Id.* ¶ 7, 711 P.2d at 41-42.

85. *Id.* ¶ 8, 711 P.2d at 42. The court's reasoning is logical and direct. *See id.* The court first read the mandate of the state's policy for groundwater usage in section 1020.2, which calls for "'reasonable regulations for the *allocation for reasonable use* based on hydrologic surveys of fresh ground water basins to determine a *restriction on the production*.'" *Id.* ¶ 9, 711 P.2d at 42 (quoting 82 OKLA. STAT. § 1020.2 (1981)). The court then looked at section 1020.9, which mandates that the Water Board shall determine from the evidence presented "'*whether the lands owned or leased* by the applicant *overlie the fresh groundwater basin* or subbasin and *whether the use to which applicant intends to put the water is a beneficial use*.'" *Id.* (quoting 82 OKLA. STAT. § 1020.9 (1981)). If the Water Board finds, in accordance with section 1020.9, *that waste will not occur*, the Water Board shall approve the application by issuing a regular permit. *Id.* Therefore, the *Texas County* court concluded that hydrologic determinations go hand-in-hand with determinations of waste, which are governed by the reasonable use standard. *See id.*

86. *See infra* notes 164-65.

permit allowing commercial use of groundwater.[87] These findings include: (1) whether the lands owned or leased by the applicant overlie the fresh groundwater basin; (2) whether the use to which the applicant intends to put the water is a beneficial use; and (3) that waste will not occur.[88] By statute, the Water Board must not permit waste of groundwater by depletion or by pollution.[89] The court in *Texas County* held that "[a] finding of no waste must be supported by evidence in the record."[90] Consequently, once the Water Board assigns the reasonable apportionment of groundwater to the landowner and the evidence shows that waste will not occur, the landowner has a greater degree of freedom to use the groundwater, such as transporting and using the water at another site.[91]

D. Advent of the Oklahoma Environmental Quality Act

In 1993, the Oklahoma legislature made a historical decision in passing the EQA.[92] The legislature designed the Act to "[b]etter utilize state financial resources for environmental regulatory services" and to "coordinate environmental activities of state environmental agencies."[93] To accomplish these purposes, the EQA assigns specific jurisdictional areas of responsibility to state agencies that play a significant role in the management of environmental resources.[94] Listed agencies include the Water Board, the Department of Environmental Quality (DEQ), and the Oklahoma Department of Agriculture (ODA).[95] The EQA creates a new playing field upon which state agencies and courts must referee environmental interests. The manner in which state agencies and courts interpret the relationship of the EQA to Groundwater Law will determine whether Oklahoma can build upon its established environmental jurisprudence or whether the state must abandon this precedence and proceed anew.

IV. Analysis of Recent Case Law: Messer-Bowers, Co. v. State ex rel. Oklahoma Water Resources Board

A. Facts

The facts leading to *Messer-Bowers* began in February 1996, when Kronseder Farms, Inc. (Kronseder) applied to the Water Board for a permit to withdraw 4520 acre-feet of groundwater per year from forty-five proposed wells located on 4520 acres in Woodward County, Oklahoma.[96] Kronseder later amended the application

87. *See* 82 OKLA. STAT. § 1020.9 (2001).
88. *See id.*
89. *See id.* § 1020.15; *see also Texas County*, ¶ 17, 711 P.2d at 45.
90. *Texas County*, ¶ 17, 711 P.2d at 45.
91. *Id.* ¶ 10, 711 P.2d at 42.
92. *See* 27A OKLA. STAT. §§ 1-1-101 to -3-103 (2001).
93. *See id.* § 1-1-102.
94. *See id.* § 1-3-101.
95. *Id.*
96. Messer-Bowers, Co. v. State *ex rel.* Okla. Water Res. Bd., 2000 OK 54, ¶ 2, 8 P.3d 877, 878; *see also id.* ¶ 10, 8 P.3d at 880 (noting that one acre-foot of water contains 325,830 gallons of water; therefore, the initial request for groundwater amounted to 1,472,751,600 gallons of water per year).

to 2929 acre-feet per year from twenty-seven wells, subject to reevaluation in light of the full 4520 acre-feet per year entitlement.[97] Kronseder had planned to house 142,000 pigs in its facility, and it estimated that it would use one-third of the water for livestock consumption; it would use the remaining two-thirds amount to wash pig manure from the facilities and into retention lagoons.[98] Kronseder would apply the mixture of effluent and groundwater to 1760 acres of native grass.[99] Furthermore, the Kronseder property consisted of a large tract of 4280 acres and a narrow strip of 240 acres that extended south from the large tract to within a mile of the North Canadian River.[100] This strip of land would contain no swine operations; Kronseder would only use the strip as a source for water extraction.[101]

Landowners adjacent to the proposed facility opposed Kronseder's application.[102] They argued that operation of the swine facility would diminish and contaminate their supply of groundwater.[103] The Water Board granted the permit on October 8, 1996, and the adjacent landowners challenged the decision.[104]

B. Issues

Because of the newly enacted EQA, the *Messer-Bowers* court addressed several unique issues. The most challenging issue facing the *Messer-Bowers* court, which required original interpretations of the impact of the EQA on Groundwater Law, consisted of whether the Water Board had to consider waste by pollution, specifically the potential contamination of groundwater from the nonpoint source discharge of effluent over the land, when reviewing a permit application.[105] The *Texas County* court had placed such responsibility within the Water Board; however, the Water Board argued that the EQA superseded the 1984 *Texas County* decision.[106] The Water Board insisted that the determination of this type of waste by pollution fell within the exclusive jurisdiction of the ODA.[107] The Water Board argued that it was only responsible for the very narrow question of waste by pollution at the specific point of water extraction.[108]

The two minor issues that followed traditional groundwater legal analysis, unfettered by the EQA, concerned (1) whether Groundwater Law or stream-water laws governed the water Kronseder planned to utilize;[109] and (2) whether the

97. *Id.* ¶ 2, 8 P.3d at 879.
98. *Id.* ¶ 4, 8 P.3d at 879.
99. *Id.* Under the terms of the reduced rate of water extraction (e.g., 2920 acre-feet per year), the two-thirds discharged over the ground would amount to 634,282,400 gallons per year, based on calculations that one acre-foot of water contains 325,830 gallons of water. *See id.* ¶ 10, 8 P.3d at 880.
100. *Id.* ¶ 3, 8 P.3d at 879.
101. *Id.*
102. *Id.* ¶ 2, 8 P.3d at 878-79.
103. *Id.*
104. *Id.* ¶ 5, 8 P.3d at 879.
105. *Id.* ¶ 14, 8 P.3d at 881.
106. *Id.* ¶ 16, 8 P.3d at 882.
107. *Id.* ¶ 17, 8 P.3d at 882.
108. *Id.* ¶ 16, 8 P.3d at 882.
109. *Id.* ¶ 6, 8 P.3d at 879.

extraction and transportation of water from the 240-acre strip of land constituted unreasonable use.[110] The landowners argued that the Water Board should have determined whether springs in the area would dry up as a result of depletion of groundwater from Kronseder's use.[111] The landowners believed that if it could be shown that natural springs would cease to flow, then based on *Lawton*, stream-water laws should apply.[112] Furthermore, the landowners argued that allowing Kronseder to extract over half of its water from just six wells located some distance from the operation on a small strip of land representing only 3% of Kronseder's total land, constituted unreasonable use.[113]

C. Procedural History/Holdings

The district court remanded the decision to the Water Board on issues unrelated to the final appeal.[114] On September 9, 1997, the Water Board again approved Kronseder's application.[115] On appeal, the district court upheld the permit, and the Oklahoma Court of Civil Appeals affirmed the Water Board's decision.[116] The Oklahoma Supreme Court granted certiorari review.[117]

The *Messer-Bowers* court held that the Water Board correctly applied Groundwater Law, not stream-water laws, in its review of Kronseder's application.[118] Furthermore, the court found that transporting the water from the 240-acre strip of land to the site of the swine operation was appropriate and consistent with the reasonable use analysis in *Texas County*.[119] However, the court did not allow the Water Board to sidestep the question of waste by pollution by passing the issue to the ODA.[120] The *Messer-Bowers* court held that the EQA did not supersede the *Texas County* decision regarding nonpoint source pollution of groundwater.[121] Finally, it found that nothing in the EQA granted exclusive jurisdiction to either the ODA or the Water Board to consider the effects of waste by pollution from nonpoint sources of contamination.[122] Therefore, the court held that the ODA and the Water Board had "concurrent environmental jurisdiction over livestock facilities which require water permits" and thus ordered the Water Board to reconsider the permit application under this ruling.[123]

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110. *Id.* ¶ 11, 8 P.3d at 881.
111. *Id.* ¶ 7, 8 P.3d at 880.
112. *Id.*
113. *Id.* ¶ 11, 8 P.3d at 881.
114. *Id.* ¶ 5, 8 P.3d at 879 (The district court opinions are available at the Woodward County District Court under District Court No. CJ-96-234).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* ¶ 8, 8 P.3d at 880.
119. *Id.* ¶ 12, 8 P.3d at 881.
120. *Id.* ¶ 18, 8 P.3d at 882-83.
121. *Id.*
122. *Id.*
123. *Id.*

D. Reasoning

The *Messer-Bowers* court found that the application for the permit was within the purview of the Groundwater Law for two reasons, one procedural and the other based on a clarification of law governing the interface of groundwater and stream water.[124] First, the court decided that the landowners did not present sufficient evidence to show that the natural springs in the area would dry up from Kronseder's water use.[125] Therefore, according to the court, the landowners failed to meet a procedural threshold of evidence for convincing the Water Board and the court that Kronseder's use would affect the springs to such a degree that the Water Board should review the permit under stream-water laws instead of Groundwater Law.[126] Indeed, the court distinguished the present case from *Lawton*, noting that, in *Lawton*, the appellants were able to identify a specific spring, the amount of water it produced, and that it was the source of a specific creek.[127] Instead of specifying a particular spring with historical significance, the landowners in *Messer-Bowers* argued that the Water Board had the burden to determine in general if Kronseder's use would affect springs.[128] The *Messer-Bowers* court further distinguished the present case from *Lawton* by noting that Kronseder was not extracting the water from the mouth of the springs themselves, but was drilling wells to extract water from the ground.[129] Therefore, by the court's reasoning, the Water Board correctly determined that the water in question was groundwater and subject to regulation by Groundwater Law.[130]

Secondly, the *Messer-Bowers* court based its finding of reasonableness directly on the precedent of *Texas County*.[131] The *Messer-Bowers* court noted that *Texas County* had overruled the notion, expressed in *Canada*, that the Water Board must tie beneficial use to the bulk of the land overlying the water basin.[132] The 1972 policy-shift of groundwater use toward greater utilization had broadened the scope of beneficial use.[133] Therefore, the *Messer-Bowers* court viewed transporting the water from the strip of land to the main operation as promoting beneficial use of the water.[134] As long as waste did not occur during transport, the use of water at a distance from extraction was reasonable.[135] Furthermore, the court reaffirmed the criteria, stated in *Texas County* and codified in title 82, section 1020.9, on which the Water Board must evaluate an applicant.[136] The Water Board must consider: (1)

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124. *See id.* ¶¶ 6-10, 8 P.3d at 879-80.
125. *Id.*
126. *See id.*
127. *See id.* ¶¶ 7-9, 8 P.3d at 879-80.
128. *Id.*
129. *Id.*
130. *See id.*
131. *See id.* ¶ 12, 8 P.3d at 881.
132. *Id.*; *see also* Okla. Water Res. Bd. v. Tex. County Irrigation & Water Res. Ass'n, 1984 OK 96, ¶ 10, 711 P.2d 38, 42-43.
133. *See supra* note 6 and accompanying text.
134. *See Messer-Bowers*, ¶ 12, 8 P.3d at 881.
135. *See id.*
136. *Id.* ¶ 10, 8 P.3d at 880.

whether the applicant owns or leases or has some other sufficient interest in the surface of the land dedicated to the application; (2) whether such land overlies a fresh groundwater basin or subbasin; (3) whether the use to which the applicant intends to put the water is a beneficial use; and (4) whether waste by depletion or waste by pollution will occur.[137] The court opined that the third and fourth criteria "measure the reasonable use of fresh groundwater" and upheld the reasonable use analysis as the standard for determining whether the intended use is beneficial and whether waste will occur.[138]

By holding that the Water Board must consider waste by pollution from nonpoint source runoff, the court rejected the Water Board's contention that the EQA had superseded *Texas County*, reaffirming *Texas County* as controlling precedent.[139] In addition, the *Messer-Bowers* court analyzed the language of the EQA in light of legislative intent and held that the Act does not preclude the Water Board from exercising jurisdiction over waste by pollution from nonpoint source runoff.[140] The EQA gives only the Oklahoma Corporation Commission exclusive jurisdiction, and then only in the area of oil and gas.[141] By its own terms, the EQA states that the areas of jurisdiction that the Act describes are in addition to those otherwise provided by law.[142] Based on this intent, the *Messer-Bowers* court reasoned that the Water Board and the ODA have concurrent jurisdiction over livestock facilities that require water permits.[143]

V. Status of Groundwater Law After Messer-Bowers

A. Clarification of Groundwater and Stream Water

The court's holding that Groundwater Laws should govern Kronseder's application has two effects: (1) to sharpen the division between groundwater and stream water in a more formalistic manner; and (2) to de-emphasize the hydrologic connection between these two classifications. The *Messer-Bowers* court could have justified its holding based on the landowners' evidentiary shortcomings, that is, their failure to present enough evidence to overcome the burden for reclassification. If the court

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137. *Id.*

138. *Id.*

139. *Id.* ¶ 18, 8 P.3d at 882-83.

140. *See id.*

141. *Id.*; *see also* Matador Pipelines, Inc. v. Okla. Water Res. Bd., 1987 OK 65, ¶¶ 11-12, 742 P.2d 15, 18 (holding that issues concerning oil and gas, even if they affect the quality of the state's waters, fall into the exclusive jurisdiction of the Corporation Commission); 27A OKLA. STAT. § 1-3-101(E) (2001) ("The Corporation Commission is hereby vested with exclusive jurisdiction, power and authority, and it shall be its duty to promulgate and enforce rules, and issue and enforce orders governing and regulating: . . . the exploration, drilling, development, producing or processing for oil and gas on the lease site . . . [and] groundwater protection for activities subject to the jurisdictional areas of environmental responsibility of the Commission . . . .").

142. *Messer-Bowers*, ¶¶ 17-18, 8 P.3d at 882; *see also* 27A OKLA. STAT. § 1-3-101(A) (2001) ("The jurisdictional areas of environmental responsibility specified in this section shall be in addition to those otherwise provided by law and assigned to the specific state environmental agency . . . .").

143. *Messer-Bowers*, ¶ 18, 8 P.3d at 882-83.

had based its analysis on that evidentiary point alone, it would have preserved the protections of the hydrologic connection, established in *Lawton*, between groundwater and stream water. In subsequent hearings, landowners who met the evidentiary threshold could have invoked the protections of natural springs provided by the *Lawton* decision.[144] Before *Messer-Bowers*, a plausible argument existed that a court could equate the inception of a natural spring with the source of the spring. Under this argument, a court could acknowledge that the inception of a spring is groundwater if it forms a stream. As a result, when springs are at issue, stream-water laws would protect the groundwater feeding the springs.

After *Messer-Bowers*, however, this argument is likely foreclosed.[145] The *Messer-Bowers* court has defined and clarified the meaning of inception of a spring as the exact point where the water table rises above an opening in the ground, causing the groundwater to pour forth.[146] A court cannot consider groundwater that does not pour forth the inception of a spring and cannot classify the water as stream water.[147] Furthermore, the *Messer-Bowers* court reinforced the formal classification of groundwater and stream water by suggesting that courts can protect only direct or primary interferences with spring water with the stream-water laws.[148] The court distinguished the appellee in *Lawton*, who extracted water by directly tapping the opening of the spring, a primary interference, from Kronseder in *Messer-Bowers*, who drilled wells to extract the water.[149] The *Messer-Bowers* court held that if extracting water from the wells has any impact on natural springs in the area, a court should view this impact as indirect or secondary to the use of the wells and therefore not protected by the stream-water laws.[150]

B. Questions of Jurisdiction

1. The Importance of Oklahoma Water Resources Board v. Texas County Irrigation & Water Resources Ass'n

Because the *Messer-Bowers* court entered new legal territory in grappling with the impact of the EQA, it needed the security of strong precedent. That may be why the court relied heavily on *Texas County* to hold that Kronseder could extract and transport water from the remote strip of land to its main facility. By demonstrating that *Texas County* applied to the minor issues, the *Messer-Bowers* court could approach larger jurisdictional questions more confidently. In effect, the EQA does seem to alter the nature of *Texas County*, and legitimate questions exist regarding

144. *See* Okla. Water Res. Bd. v. City of Lawton, 1977 OK 89, ¶ 13, 580 P.2d 510, 513. The *Lawton* court held that when a natural spring forms a stream, stream-water law protects both the stream and the spring itself from its inception. *See id.* The *Lawton* court further held that "the source of spring water was undisputedly groundwater" and that "the source of all springs is groundwater." *Id.* ¶ 4, 580 P.2d at 511.

145. *See Messer-Bowers*, ¶ 8, 8 P.3d at 880.

146. *Id.*

147. *See id.*

148. *Id.*

149. *See id.* ¶¶ 8-9, 8 P.3d at 880.

150. *See id.*

the extent to which *Texas County* continues to be viable precedent. For example, *Texas County* addressed the use of groundwater for secondary and tertiary oil recovery from wells in which the user re-injected water into the ground after its use.[151] However, the EQA has since conferred upon the Corporation Commission "exclusive" environmental jurisdiction in the area of oil and gas, which the *Messer-Bowers* court duly noted.[152] If a case arose today with the same facts as *Texas County*, the EQA would preclude the Water Board from addressing the groundwater issues, which the Corporation Commission would decide exclusively.[153]

An additional distinction between *Texas County* and *Messer-Bowers* resides in the nature of the geological structure holding the groundwater. *Texas County* addressed the waste of water extracted from the Ogallala aquifer, an underground aquifer that extends from South Dakota to Texas.[154] In contrast, *Messer-Bowers* addressed the groundwater of an alluvial reservoir along the banks of the North Canadian River.[155] Because the Ogallala aquifer is a multistate resource that extends across multiple state lines, the regulations for protecting its waters might be justifiably stricter than the regulation of alluvial reservoirs contained within state boundaries. However, state courts have not addressed this distinction within the environmental case law. In fact, *Messer-Bowers* itself set new precedent by extending the protection afforded the Ogallala aquifer in *Texas County* to the smaller alluvial reservoirs that supply water to many Oklahoma communities.

The *Messer-Bowers* court sustained the precedential value of *Texas County* not by looking to its fact-specific outcome, but by preserving the method of analysis the *Texas County* court outlined for the Water Board to undertake when reviewing a permit application.[156] Hence, although the Water Board would not have the authority to make permitting decisions in the area of oil and gas, it will continue to make permitting decisions in its remaining areas of jurisdiction.[157] Furthermore, the Water Board must find that an applicant meets specific criteria, as mandated by title 82, sections 1020.9 and 1020.15, before it can grant a permit.[158] Therefore, for those areas over which the Water Board maintains jurisdiction, the methodology outlined in *Texas County*, including the analysis of waste, should still be binding, and the Water Board must apply this methodology to any new set of facts that falls

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151. Okla. Water Res. Bd. v. Tex. County Irrigation & Water Res. Ass'n, 1984 OK 96, ¶¶ 1-6, 711 P.2d 38, 40-41.

152. *See Messer-Bowers*, ¶ 18, 8 P.3d at 882; *see also supra* note 141 and accompanying text.

153. *See* Matador Pipelines, Inc. v. Okla. Water Res. Bd., 1987 OK 65, ¶¶ 11-12, 742 P.2d 15, 18.

154. *See Texas County*, ¶ 13, 711 P.2d at 43.

155. *See Messer-Bowers*, ¶ 3, 8 P.3d 879 (describing Kronseder's property to be within one mile of the north bank of the North Canadian River, which would place the property above the river's alluvial reservoir).

156. *See id.* ¶ 17, 8 P.3d at 882.

157. The EQA specifically lists these areas of jurisdiction: (1) water quantity including, but not limited to, water rights, surface water, and underground water; (2) state water/wastewater loans and grants; (3) water well drillers/pump installers licensing; and (4) statewide water quality standards. *See* 27A OKLA. STAT. § 1-3-101(C) (2001). The four areas of jurisdictional responsibility cited are excerpted from a list of fifteen enumerated areas of jurisdiction that the EQA assigns to the Water Board. *See id.*

158. *See Messer-Bowers*, ¶ 18, 8 P.3d at 882-83.

within its jurisdiction.[159]

2. Concurrent Jurisdiction: Both Unpredictable and Burdensome

In construing the new lines of jurisdiction that the EQA establishes, the *Messer-Bowers* court concluded that the EQA "evidences an intent that the Water Board and the Agriculture Department have concurrent environmental jurisdiction over livestock facilities which require water permits."[160] Giving two state agencies concurrent jurisdiction over a single issue, like waste by pollution, without statutory guidance could result in unpredictable outcomes and may not well serve either the applicant seeking a permit or the landowners concerned about the groundwater's condition. Depending on how the agencies promulgate regulations under this holding, businesses seeking to acquire permits for legitimate operations may face the prospect of contending with the inconsistencies of two layers of state agency control when seeking a finding on a single issue.[161] Without the benefit of some consistency in the enforcement of regulations for the protection of groundwater, a business may feel too insecure and uncertain in its standing to make significant investments in new business ventures. Therefore, without a mechanism that ensures consistency of enforcement, Oklahoma's economy may suffer.

Additionally, concurrent jurisdiction may present a loophole through which businesses can disregard the stricter mandates of environmental protection. If a business had no interest in protecting the groundwater, it might engage in a form of forum shopping among the agencies and submit its application to the agency that would be most lenient in its finding of waste. Once the initial agency made its ruling, a court could find that the agency's ruling controls other agencies based on principles of collateral estoppel and res judicata, regardless of what another agency with concurrent jurisdiction might have found. This outcome could preclude communities and landowners from receiving the environmental protections intended by the EQA. Neither scenario — the excess burden on the economy or the excess burden on the environment — is desirable.

C. New Changes in Groundwater Law

In response to the *Messer-Bowers* decision, the Oklahoma legislature amended title 82, sections 1020.9 and 1020.15, in an emergency session.[162] Section 1020.9, which required the Water Board's approval of applications, previously read:

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159. The Water Board disagrees with this conclusion. *See* discussion *infra* note 182.

160. *See Messer-Bowers*, ¶ 17, 8 P.3d at 882.

161. *See* Mick Hinton, *Ag Group Says Pollution Control Falling on Two Agencies*, DAILY OKLAHOMAN, July 8, 2000, at 4-A, *available at* LEXIS, News Library, News Group File. As a result of the *Messer-Bowers* ruling, an agricultural group that supports the hog industry in northwestern Oklahoma protested that two state agencies are now required to regulate pollution. *See id.* Shawn Lepard, Executive Director of ProAg, argued that "it is wasteful to have the staffs of two state agencies perform the same services." *Id.* "Lepard said the agricultural department already requires producers to explain the procedures they will follow to protect the environment, so it is not necessary for the water board to do the same thing." *Id.*

162. *See* discussion of H.R. 1480 *supra* note 14.

> A. Before the Board takes final action on the application, the Board shall determine from the evidence presented, from the hydrologic surveys or reports and from other relevant data available to the Board and applicant, 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 the Board finds that waste will not occur, the Board shall approve the application by issuing a regular permit.[163]

This wording mandated that the Water Board execute its responsibilities, upheld in *Texas County* and *Messer-Bowers*, by considering all forms of waste, including waste by pollution from nonpoint sources. However, the amended statute now reads:

> A. 1. Before the Oklahoma Water Resources Board takes final action on an application, the Board shall determine from the evidence presented, from the hydrologic surveys or reports and from other relevant data available to the Board and applicant whether:
>
> a. the lands owned or leased by the applicant overlie a fresh groundwater basin or subbasin,
>
> b. the use to which the applicant intends to put the water is a beneficial use, and
>
> c. waste as specified by Section 1020.15 of this title will occur.
>
> 2. The Board shall approve the application by issuing a regular permit, if the Board finds that:
>
> a. the lands owned or leased by the applicant overlie the fresh groundwater basin or subbasin,
>
> b. the use to which the applicant intends to put the water is a beneficial use, and
>
> c. waste specified by Section 1020.15 of this title will not occur. When determining whether waste will occur pursuant to this subparagraph, if the activity for which the applicant intends to use the water is required to comply with the rules and requirements of or is within the jurisdictional areas of environmental responsibility of the Department of Environmental Quality or the State Department of Agriculture, the Board shall be precluded from making a determination whether waste by pollution pursuant to paragraph 7 of subsection A of Section 1020.15 of this title will occur as a result of such activity. Each groundwater protection agency, as such term is defined by Section 1-1-201 of Title 27A of the Oklahoma Statutes, shall be responsible for developing and enforcing groundwater protection practices to prevent groundwater contamination from activities within their respective jurisdictional areas of environmental responsibility.[164]

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163. 82 OKLA. STAT. § 1020.9 (Supp. 2000).

164. 82 OKLA. STAT. § 1020.9 (2001). The enactment of H.R. 1480, 48th Leg., 1st Sess. (Okla.

2001), amended section 1020.9 as follows:

A.1.Before the Oklahoma Water Resources Board takes final action on ~~the~~ an application, the Board shall determine from the evidence presented, from the hydrologic surveys or reports and from other relevant data available to the Board and applicant, whether:

a. the lands owned or leased by the applicant overlie ~~the~~ a fresh groundwater basin or subbasin ~~and whether~~,

b. the use to which the applicant intends to put the water is a beneficial use~~. If so, and if the Board finds that waste will not occur, the~~, and

c. waste as specified by Section 1020.15 of this title will occur.

2. The Board shall approve the application by issuing a regular permit, if the Board finds that:

a. the lands owned or leased by the applicant overlie the fresh groundwater basin or subbasin,

b. the use to which the applicant intends to put the water is a beneficial use, and

c. waste specified by Section 1020.15 of this title will not occur. When determining whether waste will occur pursuant to this subparagraph, if the activity for which the applicant intends to use the water is required to comply with rules and requirements of or is within the jurisdictional areas of environmental responsibility of the Department of Environmental Quality or the State Department of Agriculture, the Board shall be precluded from making a determination whether waste by pollution pursuant to paragraph 7 of subsection A of Section 1020.15 of this title will occur as a result of such activity. Each groundwater protection agency, as such term is defined by Section 1-1-201 of Title 27A of the Oklahoma Statutes, shall be responsible for developing and enforcing groundwater protection practices to prevent groundwater contamination from activities within their respective jurisdictional areas of environmental responsibility.

B. Except as otherwise provided in subsection C of this section, a regular permit shall allocate to the applicant the proportionate part of the maximum annual yield of the basin or subbasin. The proportionate part shall be that percentage of the total annual yield of the basin or subbasin, previously determined to be the maximum annual yield as provided in Section 1020.5 of this title, which is equal to the percentage of the land overlying the fresh groundwater basin or subbasin which the applicant owns or leases and which is dedicated to the application.

C. If the lands dedicated to the application overlie two or more groundwater basins and both basins have had maximum annual yields determined, the amount to be authorized by the regular permit shall be calculated on the basin having the greatest maximum annual yield. If the lands dedicated to the application overlie two or more groundwater basins or subbasins and the maximum annual yield has been determined for at least one but not all the basins or subbasins, a temporary permit may be issued to the applicant if the applicant demonstrates by substantial competent evidence that the water to be withdrawn by the temporary permit will not be taken from a basin or subbasin for which the maximum annual yield has been determined. If the land overlies two or more groundwater basins or subbasins and the maximum annual yield has not been determined for any of the basins or subbasins, more than one temporary permit may be issued for the land if the applicant demonstrates by substantial competent evidence from which basin the water will be withdrawn for each of the permits.

D. The permit shall specify the location of the permitted well or wells and other terms and conditions as specified by the Board, including but not limited to the rate of withdrawal, the level of perforating and the level of sealing the well. A regular permit shall not be granted for less than the remaining life of the basin or subbasin as previously

Furthermore, the legislature amended section 1020.15 by adding the following mandate:

> The [Water] Board shall be precluded from determining whether waste by pollution will occur pursuant to the provisions of this paragraph if the activity for which the applicant or water user intends to or has used the water as specified under Section 1020.9 of this title is required to comply with rules and requirements of or is within the jurisdictional areas of environmental responsibility of the Department of Environmental Quality or the State Department of Agriculture.[165]

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determined by the Board.

2001 Okla. Sess. Laws ch. 330, § 1.

165. 82 OKLA. STAT. § 1020.15(A)(7) (2001). The enactment of H.R. 1480, 48th Leg., 1st Sess. (Okla. 2001), amended section 1020.15 as follows:

A. The Oklahoma Water Resources Board shall not permit any fresh groundwater user to commit waste by:

1. Drilling a well, taking, or using fresh groundwater without a permit, except for domestic use;

2. Taking more fresh groundwater than is authorized by the permit;

3. Taking or using fresh groundwater in any manner so that the water is lost for beneficial use;

4. Transporting fresh groundwater from a well to the place of use in such a manner that there is an excessive loss in transit;

5. Using fresh groundwater in such an inefficient manner that excessive losses occur;

6. Allowing any fresh groundwater 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 groundwater polluted by minerals or other waste to filter or otherwise intrude into such a basin or subbasin. The Board shall be precluded from determining whether waste by pollution will occur pursuant to the provisions of this paragraph if the activity for which the applicant or water user intends to or has used the water as specified under Section 1020.9 of this title is required to comply with rules and requirements of or is within the jurisdictional areas of environmental responsibility of the Department of Environmental Quality or the State Department of Agriculture;

8. Drilling wells and producing fresh groundwater therefrom except in accordance with the well spacing previously determined by the Board;

9. Using fresh groundwater 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 of the Board and file reports thereof.

B. 1. Any employee of the Board having evidence that an act of waste is being committed in his or her presence, or on the filing of a complaint by another individual, shall immediately proceed to cite such violator and shall thereupon file a complaint in the district court of the county wherein such violation has occurred, and it shall be the duty of the district attorney of said county to prosecute such complaint. ~~In addition thereto~~

2. Except as otherwise provided by paragraph 7 of subsection A of this section, if any person commits waste as specified by subsection A of this section, the Board shall immediately institute action to enjoin in a court of competent jurisdiction and may suspend any permit to take water as long as such waste continues.

~~Provided, however, that in~~

The newly amended section 1020.9(A)(1) still holds the Water Board responsible for "determining" all three criteria outlined in *Texas County* when it takes final action on an application.[166] These criteria are: (1) the lands must overlie the groundwater basin; (2) the water must be for beneficial use; and (3) waste must not occur.[167] However, section 1020.9(A)(2) complicates the review process by creating a second tier in the statute in which the Water Board must approve the permit when it "finds" that an applicant has met the three criteria.[168] Within this second tier, the statute carves out the responsibility of determining "waste by pollution" and assigns it to the ODA, DEQ, or other environmental agency, depending upon jurisdiction.[169] Also, new section 1020.15, which complements section 1020.9, reflects legislative intent to carve out this responsibility by precluding the Water Board from determining waste by pollution when it falls into another agency's jurisdiction.[170] The two statutes, however, do not specifically address the relationship between the "finding" of "waste" made by the Water Board and the "determination" of "waste by pollution" made by another agency.[171] This ambiguity raises questions regarding how the agencies should interact when the Water Board reviews applications for groundwater permits.

VI. Constructing a New Model of Interagency Cooperation

A. Ambiguities in the New Statutes

The language of the two new statutes, sections 1020.9 and 1020.15, appears tediously complicated because it partitions closely related areas of responsibility. Such complexity can reduce the clarity of meaning. For example, section 1020.9(A)(2) mandates that "[t]he Board shall approve the application by issuing a regular permit, if the Board finds that . . . waste specified by Section 1020.15 of this title will not occur."[172] By reading section 1020.15, it is readily apparent that the Water Board "shall not permit any fresh groundwater user to commit waste by: . . . [p]ermitting or causing the pollution of a fresh water strata or basin through

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C. In cases of waste by pollution pursuant to paragraph 7 of subsection A of this section, any complaint or investigation, or any enforcement matter other than an individual proceeding involving the suspension of an Oklahoma Water Resources Board permit shall be referred to and subject to the jurisdiction of the Department of Environmental Quality or other appropriate state environmental agency or state agency with limited environmental responsibility.

SECTION 3. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

2001 Okla. Sess. Laws ch. 330, § 2.

166. *See* 82 OKLA. STAT. § 1020.9(A)(1) (2001).

167. *See id.*

168. *See id.* § 1020.9(A)(2).

169. *See id.* § 1020.9(A)(2)(c).

170. *See id.* § 1020.15(A)(7).

171. *See id.* §§ 1020.9, 1020.15.

172. *See id.* § 1020.9(A)(2).

any act which will permit fresh groundwater polluted by minerals or other waste to filter or otherwise intrude into such a basin or subbasin."[173] Therefore, the plain language of the statute mandates that the Water Board shall not approve a permit if it finds that a user commits waste by causing pollution of a fresh water strata through any act which will permit polluted groundwater to filter into a basin.[174]

The current definition of pollution, cited by the *Messer-Bowers* court, comes unaltered from title 82:[175]

> Pollution means 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.[176]

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173. *See id.* § 1020.15(A)(7).

174. *See id.* §§ 1020.9, 1020.15.

175. *See* Hinton, *supra* note 1, at 4-A. The article reports that "[s]tate officials are using the terms 'waste by pollution' to describe the potential contamination of groundwater as a result of spreading waste onto the land." *Id.* M.C. Leist, then-Chairman of the House Agriculture Committee, "insisted that officials come up with a 25-word definition of waste by pollution. But nobody present at the session [held at the state Capitol, September 13, 2000] could come up with such a definition." *Id.*

The inability to produce a definition of "waste by pollution" may suggest that the officials saw no need to add anything new to the current statutory definitions of "pollution" and "to commit waste." *See* 82 OKLA. STAT. §§ 1020.15, 1084.2 (2001). These two definitions may already encompass "waste by pollution." *See id.* Section 1020.15 provides ten definitions of what it means to commit waste. *Id.* § 1020.15. The seventh defines committing waste as "[p]ermitting or causing the pollution of fresh water strata or basin through any act which will permit fresh groundwater polluted by minerals or other waste to filter or otherwise intrude into such a basin or subbasin." *Id.* § 1020.15(A)(7). By combining the statutory definitions of "pollution" and "committing waste," "waste by pollution" can be directly understood to mean "permitting or causing the pollution of fresh water strata . . . through any act which will permit fresh groundwater polluted by minerals or other waste to filter . . . into . . . a basin," *id.*, causing contamination that "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," *id.* § 1084.2. Therefore, a reading of section 1020.9(2)(c), in conjunction with sections 1020.15(A)(7) and 1084.2, makes clear that the Water Board should be responsible for *finding* that "waste by pollution" will not occur. However, because section 1020.15(A)(7) precludes the Water Board from *determining* whether "waste by pollution" will occur, the Water Board must rely on another agency's (e.g., the ODA's or DEQ's) determination to make its prerequisite finding. *See id.* § 1020.15(A)(7). The attempt to devise a separate definition of "waste by pollution," which relates only to the contamination of groundwater from the land application of effluent, is an unnecessary exercise that may allow the Water Board to limit the broader evaluation of waste intended by the statutes.

176. 82 OKLA. STAT. § 1084.2 (2001); *see also* Messer-Bowers Co. v. State *ex rel.* Okla. Water Res. Bd., 2000 OK 54, ¶ 17, 8 P.3d 877, 882 (holding that the statutory definition of pollution applies because discharge encompasses both point source discharges and nonpoint source runoff from agricultural operations).

Based on this definition and the amended statutes, it is apparent that the Water Board has the responsibility to "find" whether waste will occur when a party discharges a mixture of water and effluent onto the land if such an act permits effluent, filtering into a basin, to pollute fresh groundwater. However, when making such a *finding*, the Water Board, according to new section 1020.9(A)(2)(c), "shall be precluded from making a *determination* whether waste by pollution pursuant to paragraph 7 of subsection A of Section 1020.15 of this title will occur."[177] This preclusion is triggered when the Water Board reviews an activity "required to comply with rules and requirements of or is within the jurisdictional areas of environmental responsibility of the Department of Environmental Quality or the State Department of Agriculture."[178] Therefore, section 1020.9 contains ambiguity regarding what it means to make a "finding" without the ability to make a "determination."[179] A similar ambiguity arises under section 1020.15 when one attempts to understand how the Water Board "shall not permit" waste when it is precluded from "determining whether waste by pollution will occur."[180]

B. An Invitation to Contradiction

The Water Board, relying on *Lowery v. Hodges*[181] and the supposition that the amended statutes severely limit the scope of *Texas County*, asserts that the determination of waste by pollution, when made by another agency, has no role in the Water Board's finding of waste as a precondition for approving a permit.[182] In

177. 82 OKLA. STAT. § 1020.9(2)(c) (2001) (emphasis added).

178. *Id.*

179. *See id.*

180. *See id.* § 1020.15.

181. 1976 OK 132, 555 P.2d 1016.

182. *See* Okla. Water Res. Bd. Order, In the Matter of the Application of Kronseder Farms, Inc., for a Permit to Application No. 96-513 for Use Groundwater in Woodward County, Oklahoma (Sept. 9, 1997) (on file with author). Before *Messer-Bowers*, the Water Board granted Kronseder a permit on the basis that "the applicant's wells and water distribution system will be sound enough to give reasonable assurance that the groundwater will not become contaminated as a result of faulty construction or operation." *Id.* at 11. Hence, the Water Board only considered waste at the point of extraction and refused to consider the issue of pollution caused by the wastewater after extraction. *See id.* The Water Board argued that "the applicant's primary activity (production of swine) and waste disposal therefrom (the containment, treatment and land application of wastewater), are under the jurisdiction of the [ODA]." *Id.* "The potential for pollution as a result of the use and operation of the lagoons and land application system is primarily subject to the determination of the State Department of Agriculture." *Id.* To support this position, the Water Board cited *Lowery v. Hodges*, which held that the definitions of waste set forth in title 82, sections 1075 and 1020.15, contemplate an after-the-fact finding of waste. *Id.* (citing *Lowery*, ¶ 20, 555 P.2d at 1023). However, this holding contradicted the more recent 1984 holding of *Texas County*, which required the Water Board to consider if waste by pollution occurred before issuing a permit. *See* Okla. Water Res. Bd. v. Tex. County Irrigation & Water Res. Ass'n, 1984 OK 96, ¶ 23, 711 P.2d 38, 47.

The Oklahoma Supreme Court distinguished *Lowery* from *Texas County* by noting that *Lowery* only addressed the issuing of a temporary permit, which follows a different reviewing process than the regular permit. *Id.* Kronseder applied for a regular permit, and the *Messer-Bowers* court, following *Texas County*, required the Water Board to consider waste by pollution before issuing the permit. Messer-Bowers Co. v. State *ex rel.* Okla. Water Res. Bd., 2000 OK 54, 17, 8 P.3d 877, 882-83.

support of this position, the Water Board proposes that "waste" and "waste by pollution" are separate and distinct categories.[183] "Waste," the domain of the Water Board, refers only to the waste of water at the point of extraction.[184] In contrast, "waste by pollution," which the Water Board now hands off to other environmental agencies, refers to pollution that occurs after the extraction of water (e.g., from land application of groundwater).[185]

Unfortunately, once put into practice, the Water Board's interpretation may contradict the protections intended by the state's Groundwater Law. Such an interpretation might allow the Water Board to find that "waste" would not occur and thereby grant a permit even if the ODA or DEQ determined that "waste by pollution" would occur. Regardless of how severe or harmful the waste by pollution might be, under this reading of the statutes, a polluter could obtain a groundwater permit if it showed no waste at the point of extraction, such as, demonstrating that its wells operated properly. And, under the mandate of section 1020.15, neither the ODA nor the DEQ would have the authority to revoke a groundwater permit that the Water Board approves.[186] They would only have authority to impose fines and

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After the enactment of H.R. 1480, the Water Board granted Kronseder's permit. Okla. Water Res. Bd. Order in the Matter of Remanded Proceedings on Application No. 96-513 of Kronseder Farms, Inc., for a Permit to Use Groundwater in Woodward County, at 6 (Dec. 11, 2001) [hereinafter Kronseder App. (Dec. 11, 2001)] (on file with author). In doing so, the Water Board returned to its original, pre-*Messer-Bowers* position. *See id.* It interpreted the new amendments to mean that, again, it has no responsibility to consider "waste by pollution" of groundwater after the point of extraction. *See id.* Interestingly, in its final order, the Water Board argued that it now complied with *Texas County*, representing an abrupt change of course from its argument in *Messer-Bowers* in which the Water Board asserted that *Texas County* was defunct and no longer applicable. *Id.* The Water Board now considers itself exempt from exerting its authority when agricultural activities produce waste by pollution. *Id.* Such circumstances, the Water Board stated, scale back the *Texas County* holding. *Id.* However, this argument is difficult to reconcile with the substantive holding of *Texas County*, which explicitly held the Water Board accountable for waste by pollution after the point of extraction. *See Texas County*, ¶ 23, 711 P.2d at 47.

One could argue that the reasoning of *Texas County* would still hold the Water Board accountable for the introduction into the ground of wastewater contaminated with swine effluent. *Id.* This might be especially true because the EPA recently classified swine effluent as "solid waste" as a result of tests from groundwater in Hennessey, Oklahoma, that showed the concentration of nitrate to be ten times the acceptable level. *See EPA Orders Oklahoma Hog Farm to Treat Manure as Solid Waste*, SOLID WASTE REPORT, Aug. 16, 2001. The EPA believed that hog effluent leaking from Seaboard Farms caused the high nitrate levels and that the nitrate posed "a danger to people drinking well water down grade from the sites." *Id.*

183. Kronseder App. (Dec. 11, 2001), *supra* note 182, at 6 (arguing that the Water Board cannot consider waste by pollution because title 82, section 1020.9(A)(2)(c), states that the Water Board "shall be precluded from making a determination whether waste by pollution" will occur).

184. *Id.* at 7.

185. *Id.* Applying the amended statutes, the Water Board distinguished between regulating the wells at the point of extraction, which is within the jurisdiction of the Water Board, and regulating the water's use in the swine facility, which, the Water Board argued, falls solely within the jurisdiction of the ODA. *See id.*

186. *See* 82 OKLA. STAT. § 1020.15 (2001) ("In cases of waste by pollution pursuant to paragraph 7 of subsection A of this section, any complaint or investigation, or any enforcement matter *other than an individual proceeding involving the suspension of an Oklahoma Water Resources Board permit* shall be referred to and subject to the jurisdiction of the Department of Environmental Quality or other

sanctions, which may not provide the same level of environmental protection as the prospect of denying or revoking the permit.[187]

This contradictory outcome works against the concept of "reasonable use," which is still an implicit requirement of Oklahoma's policy of groundwater utilization. Indeed, one of the stated purposes of Groundwater Law is to "provide reasonable regulations for the allocation for reasonable use."[188] Therefore, such a contradictory outcome would likely fall outside the scope of reasonable regulation.

C. Resolution Through Reasonable Construction

Section 1020.9 is phrased unusually in that it gives the Water Board the overall mandate to make a "finding" of waste, and then excepts the single task of "determining" waste by pollution, which it reserves to the ODA or DEQ.[189] Yet, the statute is silent on the relationship between making a finding, the primary mandate, and making a determination, the secondary mandate.[190] A reasonable interpretation dictates that the larger finding depends on the more specific determination, and the manner in which the statute allocates responsibility implies that the finding of "waste" by the Water Board must be informed by the separate determination of "waste by pollution" made by the ODA or DEQ. This construction would be consistent with the court's holding in *Texas County* that "[a] finding of no waste must be supported by evidence in the record."[191] Under the new statutes, the Water Board could make the finding based on the record, which itself would document the determination of waste by pollution as supplied by another agency. If courts followed this construction, it would suggest a model of interagency cooperation that is rare among state agencies, but one that may be a useful approach to address complex environmental issues and to allow agencies to share resources and expertise while still maintaining distinct responsibilities.

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appropriate state environmental agency or state agency with limited environmental responsibility.") (emphasis added).

187. *See* Mick Hinton, *Hog Farm Assessed a Record Fine*, DAILY OKLAHOMAN, Nov. 9, 2001, at 1-A, *available at* LEXIS, News Library, News Group File. The ODA assessed a record fine of more than $380,000 against Kronseder. *Id.* The ODA fined the hog farm for "overfilling its 43 lagoons 657 times . . . and for having too many hogs on site." *Id.* The state authorized Kronseder to have 180,800 hogs at one time, but records show that it exceeded that amount by 70,000 pigs over the past three years. *Id.* "'The amount of the fine will set a record in the state and perhaps the nation,'" said Attorney General Drew Edmondson. *Id.* The article reported that Kronseder promptly sent checks to the ODA, anticipating that the State Board of Agriculture would approve its agreement with the ODA. *Id.* This demonstrated how readily a major operation like Kronseder can accommodate such fines. *See id.* To Kronseder's credit, it has agreed to construct two new lagoons and replace an existing lagoon, the bottom of which reaches into the water table. *Id.* In addition, Kronseder has "agreed to build a 7-foot fence to keep the [hogs] from tearing the plastic lining of the lagoons." *Id.* It also agreed to repair twenty-seven monitoring wells that were not properly installed. *Id.*

188. *See* 82 OKLA. STAT. § 1020.2 (2001).

189. *See id.* § 1020.9.

190. *Id.*

191. *See* Okla. Water Res. Bd. v. Tex. County Irrigation & Water Res. Ass'n, 1984 OK 96, ¶ 17, 711 P.2d 38, 45.

In *Messer-Bowers*, the Oklahoma Supreme Court opened the door to statutory construction of Groundwater Law by quoting from *TXO Production Corp. v. Oklahoma Corp. Commission*:[192] "'The primary goal of statutory construction is to determine legislative intent. That intent is to be ascertained from the statute in light of its general purpose and object. It is presumed that the legislature has expressed its intent in a statute and that it intended what is so expressed.'"[193] The *Messer-Bowers* court used this premise to ascertain the meaning of a particular statute in the EQA that required little contextual analysis.[194] When the legislature amended the Groundwater Law, the Water Board, citing a separate case by the Oklahoma Supreme Court, used a broader premise of statutory construction to conclude that the legislature intended to change, rather than merely clarify, existing law.[195] Because the amendments represent a significant overhaul, including the reassignment of agency jurisdictions not previously mentioned in the original statutes, the legislature likely did intend to change the law. The question is: What specific changes did the legislature intend?

The Water Board's interpretation, described in section VI.B of this comment, gives rise to the ambiguities and contradictions described in sections VI.A and VI.B. Statutory construction should not increase ambiguity and contradiction; on the contrary, it should resolve such matters.[196] Furthermore, how does one ascertain legislative intent when it extends across a number of statutes involving more than one legislative act? In this situation, the ideal construction should encompass policies of both the EQA and Groundwater Law. Such a construction, however, would require a sound analytical framework for interpreting a statute contained in

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192. 1992 OK 39, 829 P.2d 964.

193. *See* Messer-Bowers Co. v. State *ex rel.* Okla. Water Res. Bd., 2000 OK 54, ¶ 17, 8 P.3d 877, 882 (quoting *TXO Prod. Corp.*, ¶ 7, 829 P.2d at 968-69).

194. *See id.*

195. *See* Kronseder App. (Dec. 11, 2001), *supra* note 182, at 6. The Water Board quoted the following passage from *Texas County*:

> By amending a statue the legislature may have intended one of two things — to change the existing law or to clarify a law that had been ambiguous. Legislative intent is ascertained by looking to the circumstances surrounding the change. Where the earlier statute definitely expressed an intent or had been judicially interpreted, the legislature is presumed to have changed an existing law . . . .

Id. (quoting *Texas County*, ¶ 6, n.14, 803 P.2d at 1122).

196. *See* Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539, 572 (2001). Healy argues that employing a canon of statutory interpretation to resolve any statutory ambiguity would appear to be a well-accepted and long-standing use of a rule of construction. *Id.* "To the extent that the canon is well-known, a court may defend this application of the canon because the legislature could have avoided its application by providing a statute that was not ambiguous." *Id.* at 573. Furthermore, the U.S. Supreme Court has established that a fundamental canon of statutory interpretation is to read the words of the statute "'in the context and with a view to their place in the overall statutory scheme.'" FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (quoting Davis v. Mich. Dept. of Treasury, 489 *U.S. 803, 809 (1989)). The Williamson Tobacco Court further stated, "A court must therefore interpret* the statue 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a harmonious whole.'" *Id.* (citations omitted) (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995); FTC v. Mandel Bros., Inc., 359 U.S. 385, 389 (1959)).

the Groundwater Law, which is directly informed by the EQA. Therefore, Oklahoma courts should consider a model of statutory interpretation employed by the U.S. Supreme Court as it addressed very similar issues in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*[197] In *Williamson Tobacco*, the Court determined whether Congress had given an administrative agency, the FDA, the authority to regulate tobacco products.[198] The Court stated,

> Because [the inquiry] involves an administrative agency's construction of a statute that it administers, . . . [the] reviewing court must first ask "whether [the legislature] has directly spoken to the precise question at issue." If [the legislature] has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of [the legislature]." But if [the legislature] has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible.[199]

Title 82, sections 1020.9 and 1020.15, do not directly mandate that the Water Board consider the determination of waste by pollution for its finding of waste. However, this does not mean that the legislature neglected to address the question of whether the Water Board must consider waste by pollution. According to the *Williamson Tobacco* Court, when determining whether the legislature has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation.[200] The meaning — or ambiguity — may only become evident when placed in context.[201]

> It is a "fundamental cannon of statutory construction that the words of the statute must be read in their context and with a view to their place in the overall scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into a harmonious whole."[202]

Likewise, other acts may affect the meaning of one statute, particularly where the legislature has spoken subsequently, and more specifically, to the topic at hand.[203]

Thus, the EQA has the greatest bearing on the appropriate relationship among the Water Board, the ODA, the DEQ, and other environmental agencies. The EQA is the only act in the body of state statutes that explains, elaborates, and specifies

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197. 529 U.S. 120 (2000).

198. *Id.* at 132.

199. *Id.* (citations omitted) (quoting Chevron U.S.A. Inc. v. Nat'l Res. Defense Council, Inc., 467 U.S. 837, 842-43 (1984)); *see also* United States v. Haggar Apparel Co., 526 U.S. 380, 392 (1999); Holly Farms Corp. v. NLRB, 517 U.S. 392, 398 (1996).

200. *See Williamson Tobacco*, 529 U.S. at 132.

201. *Id.*

202. *Id.* at 133 (citations omitted) (quoting Davis v. Mich. Dept. of Treasury, 489 U.S. 803, 809 (1989); Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995); FTC v. Mandel Bros., Inc., 359 U.S. 385, 389 (1959)).

203. *Id.*

general environmental policies, the roles of each environmental agency, areas of responsibility, and the duties of one agency to another. Therefore, the EQA should directly inform the construction of statutes, such as title 82, sections 1020.9 and 1020.15, which specifically refer to a number of environmental agencies, such as the Water Board, the ODA, and the DEQ.

The purpose of the EQA is to provide for the administration of environmental functions which will:

> 1. Provide that environmental regulatory concerns of industry and the public shall be addressed in an expedient manner;
> 2. Improve the manner in which citizen complaints are tracked and resolved;
> 3. Better utilize state financial resources for environmental regulatory services; and
> 4. Coordinate environmental activities of the state environmental agencies.[204]

These statements of purpose offer general parameters for statutory construction. Indeed, the best construction should address concerns of both industry and the public in an expedient manner; should allow for resolution of citizen complaints; should provide for efficient utilization of resources; and should coordinate agency activity. The construction based on agency cooperation certainly satisfies these four criteria, but these statements by themselves may be too general to require a specific statutory construction. However, the policies of title 27A, section 1-1-202, do provide specific guidance for statutory interpretation by mandating that each state agency shall:

> 3. Seek to strengthen relationships between state, regional, local and federal environmental planning, development and management programs;
> 4. Specifically facilitate cooperation across jurisdictional lines of authority with other state environmental agencies regarding programs to resolve environmental problems;
> 5. Cooperate with all state environmental agencies, other state agencies and local or federal governmental entities to protect, foster, and promote the general welfare, and the environment and natural resources of this state.[205]

Therefore, the EQA specifies the manner in which agencies should execute their powers, duties, and responsibilities in relation to one another. Particularly relevant

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204. 27A OKLA. STAT. ANN. § 1-1-102 (West 2001). Interestingly, and perhaps significantly, the statute's historical and statutory notes state that the legislature intentionally deleted a paragraph that read, "Eliminate agency jurisdictional overlap and duplication of effort." *Id.* This deletion further evidences that the legislature intended for the environmental agencies to have some overlap of jurisdiction so that their efforts might reinforce one another. *See id.*

205. *Id.*

is the directive for agencies to cooperate across jurisdictional lines of authority to resolve environmental problems.[206] Furthermore, the legislature did not amend or alter the EQA as a result of *Messer-Bowers*, but only amended two statutes of the Groundwater Law, section 1020.9 and 1020.15.[207] Therefore, state courts and agencies should give the policies and directives of the EQA considerable weight when interpreting statutes that directly impact the environment, especially if the specific statute involves more than one agency. It would be disruptive and inefficient if agencies, such as the Water Board, ODA and DEQ, differently construed the same statute, creating the possibility of working at odds with one another. Looking to the EQA will enable the Water Board and other agencies to devise constructions that follow a symmetrical and coherent regulatory scheme in line with legislative intent.

D. A Practical Model with Legal Precedent

Finally, a statutory construction that promotes interagency cooperation would provide the best balance to serve the interests of both industry and the public. Businesses would not have to confront two redundant layers of agency control in which they must repeat their entire application for access to groundwater. They would approach only one agency, the Water Board, to apply for a groundwater permit. This would initiate a process requiring the ODA or DEQ, depending on the jurisdiction, to make a determination of waste by pollution. The Water Board would consider the other agency's determination of waste by pollution as a fact in the record while undergoing its own reasonable use analysis to find if waste will occur. Therefore, the application process would be streamlined for business and industry. For example, if a business met all of the criteria for the Water Board except for waste by pollution, it would have administrative notice that it need only rectify this one factual finding with the ODA or DEQ, and the Water Board could then proceed with the permit.

Two court decisions, one by the U.S. Supreme Court, *United States v. Utah Construction & Mining Co.*,[208] and the other at the state level, *Bostwick v. Atlas Iron Masters, Inc.*,[209] provide precedent and support for this model of agency interaction, both holding that a determination of fact by one administrative agency is final and conclusive for subsequent adjudications.[210] Under this model of review, the application process would function properly when the ODA or DEQ made its initial determination of waste by pollution prior to action by the Water Board. The principles of collateral estoppel and res judicata, discussed in *Utah Construction* and *Bostwick*, would establish this determination as a conclusive

206. *See id.*

207. *See supra* notes 164-65.

208. 384 U.S. 394 (1966).

209. 1988 OK CIV APP 20, 780 P.2d 1184.

210. *See Utah Constr.*, 384 U.S. at 420 (holding that when an administrative agency has made a relevant factual finding, finality of findings, if sufficiently supported, cannot be avoided in adjudication of same issue); *Bostwick*, ¶ 8, 780 P.2d at 1187 (holding that a disputed fact, properly resolved before a state agency, should be allowed the same effect as a finding during judicial review).

record fact for the Water Board's subsequent adjudication.[211] Significantly, this model would resolve the ambiguities found in the 2001 statutes by providing a working relationship between what it means to make a determination of waste by pollution and to find that waste will not occur. In addition, under this model, the coordinated actions of the ODA, DEQ, and the Water Board would not lead to contradictory outcomes because the Water Board would base its findings on determinations made by another agency. Lastly, by including the determination of waste by pollution as an integral part of the permitting process, this aspect of groundwater use, vital to the public's interest and welfare, would receive reasonable consideration by the Water Board before it grants a permit.

VII. Conclusion

The *Messer-Bowers* case and the legislature's subsequent response have created the opportunity to implement a working foundation of environmental law that begins with the EQA and extends through Groundwater Law. Statutory construction based on the policies of the EQA, buttressed by the precedent of state and federal case law, provides the opportunity to move the environmental agencies toward a model of interagency cooperation and coordination; a model articulated in the law, but rarely acted upon by the agencies themselves. Considered in context of the EQA, the amendments to title 82, sections 1020.9 and 1020.15, should not allow the Water Board to regress to an insular stance on waste by pollution that undermines the substantive holdings of the 1984 *Texas County* decision.[212] The *Messer-Bowers* court has opened the door for the policies of the EQA, as crafted by the legislature, to play a guiding role in the future interpretation of environmental statutes. When a state agency decides to act on a specific statute, it must do so in relation to the overriding intent of the larger statutory scheme.[213] *Messer-Bowers* is a reminder

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211. *See Utah Constr.*, 384 U.S. at 421. The *Utah Construction* Court determined that the findings of a state board in a proceeding on a claim within its jurisdiction are final and conclusive with respect to a claim based on the same facts but which is not within the board's jurisdiction. *See id.* This holding is harmonious with general principles of res judicata and collateral estoppel. *See id.*; *see also Bostwick*, ¶ 8, 780 P.2d at 1187. The *Bostwick* court gave preclusive effect to administrative fact finding, thereby serving the value underlying general principles of collateral estoppel. *See Bostwick*, ¶ 8, 780 P.2d at 1187. The court's holding encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation, and the public's interest in conserving judicial resources. *See id.*

212. *See* discussion of Water Board's final order *supra* note 182.

213. On December 11, 2001, the Water Board approved Kronseder's groundwater permit. *See* Kronseder App. (Dec. 11, 2001), *supra* note 182. However, the Water Board based its approval on an interpretation of *Texas County* and *Messer-Bowers* that severely limits these cases' holdings. *See id.* at 6; *see also* discussion of *Texas County supra* note 182. The statutory interpretation urged by this comment would have resulted in Kronseder's approval as well. The ODA fined Kronseder for waste by pollution and reached a satisfactory agreement that the company would not commit such waste in the future. *See supra* note 187. Under the proposed interpretation, the Water Board would document the ODA's initial determination of waste by pollution for the Water Board's review and substantial finding whether waste would occur. The difference between the two interpretations would arise if a company persisted in committing waste by pollution. Under the Water Board's current interpretation, if a company committed waste by pollution beyond the extraction point, the Water Board could still approve and

that Oklahoma deserves a legal framework that best reflects the full orchestration of representative democracy.

Darin C. Savage

maintain the permit. However, the construction proposed in the comment would prevent such an outcome and achieve five important objectives: (1) resolve ambiguities in the statutes that can create loopholes in enforcement; (2) fulfill the substantial holdings of *Texas County*; (3) promote the policies of interagency cooperation mandated by title 27A; (4) respect statutory lines of jurisdiction; and (5) better safeguard the state's groundwater.