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NOTES

MINERAL LESSEE'S RIGHT TO FRESH GROUNDWATER: *RICKS EXPLORATION CO.* v. *OKLAHOMA WATER RESOURCES BOARD*

I. INTRODUCTION

As the diverse economy and population of Oklahoma have expanded over the years, the demand for water has spiraled and a once seemingly plentiful natural resource has become very scarce.¹ In the southwestern states, industry, agriculture, and energy development are especially dependent upon an adequate supply of water.² During the first half of the twentieth century, fresh water was available and inexpensive in central and eastern Oklahoma; only recently has water conservation, regulation, and management been emphasized. Water has now become seriously depleted and disputes over water rights are prevalent in the West.

This Note examines the conflicts of property rights between surface landowners and mineral lessees with regard to their respective ground-

1. See 1 U.S. WATER RESOURCES COUNCIL, *THE NATION'S WATER RESOURCES 1975-2000, SECOND NATIONAL WATER ASSESSMENT* (1978) [hereinafter cited as *SECOND ASSESSMENT*]; Sheets, *Water, Will We Have Enough to Go Around?*, U.S. NEWS & WORLD REP., June 29, 1981, at 34; *State's Future Hinges on Cool, Clear Water*, The Sunday Oklahoman, Dec. 16, 1984, at 1, col. 1.

2. See Note, *Interstate Transfer of Water: The Western Challenge to the Commerce Clause*, 59 TEX. L. REV. 1249 (1981). The commentator describes the important value of water:

Today a second war between the states is raging—this time over the control and exploitation of the nation's natural resources. At the frontlines of this natural resources conflict is water—water to develop new energy sources . . . water to generate electricity; water to meet the demands of the industries and people migrating to the arid Sunbelt; and water to irrigate the expansive farming operations of the Southwest. The increase in water consumption throughout the United States has led to both local and regional shortages.

Id. (footnotes omitted). "[I]ncreased demand for western water from higher consumptive uses in agriculture, industry, and energy production has outstripped local surface and groundwater supplies, causing shortages." Recent Development, *Interstate Transfers of Water: South Dakota's Decision to Market Water for Coal Slurry Operations*, 18 TULSA L.J. 515, 515-16 (1983) (footnote omitted). The U.S. Water Resources Council estimates and has identified 17 subregions that have or will have inadequate surface water supply by the year 2000. All 17 subregions are in the arid Midwest and Southwest. Excessive groundwater overdraft (when water is withdrawn from an aquifer at a rate higher than annual recharge) is presently occurring in the High Plains from Nebraska to Texas, Southcentral Arizona, and parts of California. See *SECOND ASSESSMENT*, *supra* note 1, at 56-58.

water rights.³ The Oklahoma Water Resources Board's (OWRB)⁴ regulation and allocation procedures⁵ concerning fresh groundwater⁶ will

3. See *infra* notes 84-113 and accompanying text.

4. See OKLAHOMA WATER RESOURCES BD., RULES, REGULATIONS AND MODES OF PROCEDURE, § 105.1 (1982) (amended 1983) [hereinafter cited as OWRB RULES]. This section states:

The Oklahoma Water Resources Board was created as a seven-member Board by an Act of the Twenty-Sixth Oklahoma Legislature in 1957. By an Act of the Second Session [sic] of the Thirty-Third Legislature in 1972, a nine-member Board was created, one member being appointed from each of the six Congressional Districts of the State as they existed in 1957, and three members appointed at large.

Id. "It is the purpose of the Board to determine and administer rights to the use of waters of the State; develop long-range plans to encourage the conservation, development and utilization of the water resources of the State . . ." *Id.* § 105.2.

Equally important, the OWRB is also governed by the mandates of the Oklahoma Administrative Procedures Act (APA) and the relevant statute provides:

In the exercise of all powers and performance of all duties provided in this act, the Oklahoma Water Resources Board shall comply with the procedures provided in the *Administrative Procedures Act*. Appeals shall be taken as provided in said act. The Oklahoma Water Resources Board may designate a hearing examiner or examiners who shall have the power and authority to conduct such hearings in the name of the Oklahoma Water Resources Board at any time and place subject to the provisions of this section and any applicable rules, regulations or orders of the Oklahoma Water Resources Board.

OKLA. STAT. tit. 82, § 1085.10 (1981) (emphasis added). The authority of the OWRB is very broad as evidenced by the procedures available to the agency. See OKLA. STAT. tit. 82, § 1085.2(1)-(14) (1981). In particular, one provision delegates to the OWRB the ability, "[t]o make such rules, regulations and orders as it may deem necessary or convenient to the exercise of any of the powers or the performance of any of the duties conferred or imposed upon it by this or any other law." *Id.* § 1085.2(7). See, e.g., OWRB RULES, *supra*, at §§ 100 to 1245. Furthermore, the OWRB is integrally connected with the enforcement of the Oklahoma Groundwater Law of 1972. See OKLA. STAT. tit. 82, §§ 1020.1 to 1020.22 (1981 & Supp. 1984).

5. See *infra* notes 12-16 and accompanying text.

6. In this Note "groundwater" will be defined as "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." OKLA. STAT. tit. 82, § 1020.1(A) (1981). "'[F]resh water' shall mean water which has less than five thousand (5,000) parts per million total dissolved solids. For the purpose of this act all other water is salt water." *Id.* § 1020.1(G). "The provisions of this act shall not apply to the taking, using or disposal of salt water associated with the exploration, production or recovery of oil and gas . . ." *Id.* § 1020.2 (emphasis added). This Note focuses specifically on "fresh" groundwater.

Oklahoma's 12 major groundwater basins produce 61% of the total water reported used in Oklahoma and 81% of the state's irrigation. This valuable natural resource is estimated at 320 million acre-feet. OKLAHOMA WATER RESOURCES BD., REPORT OF 1983 ACTIVITIES 22 (1984) [hereinafter cited as OWRB 1983 ACTIVITIES]. "1 [one] acre-foot expresses a definite volume of water which will cover one acre to a depth of one foot. It is equivalent to the following: . . . 325,851 U.S. gallons." OWRB RULES, *supra* note 4, at iv. The per diem water use figures are extraordinary:

On the average, over 1.5 billion gallons of fresh water per day was withdrawn for use in Oklahoma in 1980—an increase of more than 250 million gallons per day since 1975 according to annual water use reports filed with the Oklahoma Water Resources Board. Water withdrawals were nearly evenly divided between ground water and surface water sources . . .

. . . .

From 1970 to 1980 the average amount of freshwater available for use in Oklahoma remained relatively unchanged while the State's population increased by almost 466,000 persons.

OKLAHOMA WATER RESOURCES BD., 1980 REPORTED USE 1 (1983) [hereinafter cited as OWRB 1980 USE].

also be examined in this respect. Finally, the Oklahoma Supreme Court's construction, interpretation, and analysis of the statutory effects on the mineral lessee's common law rights in *Ricks Exploration Co. v. Oklahoma Water Resources Board*⁷ will be reviewed.

II. STATEMENT OF THE CASE

Ricks Exploration Company (Ricks) is the lessee of a severed mineral estateholder⁸ underlying land in Grady County, Oklahoma. Initially, it entered onto the surface, subject to the mineral lease, and drilled a well as a source of fresh groundwater for use in its drilling and exploration for oil and gas. Since Ricks had failed to obtain a groundwater use permit from the OWRB, the surface landowners were granted a temporary injunction⁹ preventing Ricks from withdrawing any groundwater. Subsequently, Ricks applied to the OWRB on two separate occasions seeking nondomestic¹⁰ fresh groundwater use permits. Both permits were denied by the OWRB, and both denials were affirmed by the seventh district court in Oklahoma County on appeal.¹¹

Groundwater rights administration is a major responsibility of the OWRB, which, through use of a groundwater application process, enforces and maintains existing rights. Initially, an application must be filed with the OWRB, and provided the OWRB's rules, regulations,¹² and relevant statutory requirements¹³ are satisfied, then a public hearing for the applicant is scheduled.¹⁴ On the basis of information obtained at the hearing, the hearing examiner¹⁵ and the OWRB executive director make certain recommendations and accordingly approve or deny the permit.¹⁶

7. 695 P.2d 498 (Okla. 1984).

8. See *infra* notes 94-113 and accompanying text.

9. OKLA. STAT. tit. 12, § 1382 (1981).

10. See *infra* note 93.

11. *Ricks Exploration Co. v. Oklahoma Water Resources Bd.*, No. CJ-82-535 (7th Dist. Okla. County 1982); *Ricks Exploration Co. v. Oklahoma Water Resources Bd.*, No. CJ-82-3551 (7th Dist. Okla. County 1982).

12. See generally OWRB RULES, *supra* note 4.

13. The statutory requirements an applicant must meet are: (a) a showing that "the lands owned or leased by the applicant" overlie a fresh groundwater basin or subbasin from which the groundwater is to be withdrawn; (b) a showing that the applicant's intended use is a "beneficial use"; and (c) a showing that "waste will not occur" by virtue of the applicant's intended use. (d) The fourth requirement, under § 1020.11(D), is that the applicant "own the land on which the well is to be located, or hold a valid lease from the owner of such land permitting withdrawal of water from such basin or subbasin." OKLA. STAT. tit. 82, §§ 1020.9 & 1020.11(D) (1981).

14. See OWRB 1983 ACTIVITIES, *supra* note 6, at 22. But see *infra* note 17.

15. See *supra* note 4.

16. See OWRB 1983 ACTIVITIES, *supra* note 6, at 22. The OWRB is constantly processing

In this case, Ricks first sought a provisional temporary permit¹⁷ for nondomestic fresh groundwater use.¹⁸ Although the OWRB may issue a permit of this type without a hearing absent a protest,¹⁹ with regard to Ricks' permit application, the *ex parte* discretionary proceeding was prevented by the protesting surface landowners.²⁰ As a consequence, OWRB counsel informed Ricks by letter²¹ of the protest. In addition, the OWRB advised Ricks that in order to satisfy the necessary due process requirements, a hearing was mandated on the permit issue and:

[C]ounsel further noted that Ricks, in effect, did not have [common law] *standing* to apply for a permit because § 1020.11(D) of the groundwater law—as interpreted by the Board's rules—limited the class of applicants to *surface owners or those having a valid permit or consent from the surface owner* to withdraw groundwater from the underlying basin or subbasin.²²

permit applications and issuing permits. *See, e.g.*, during 1983, OWRB approved 530 temporary, special, provisional temporary and regular permits allocating 99,802 acre-feet of groundwater, OWRB 1983 ACTIVITIES, *supra* note 6, at 23; during 1981, OWRB processed 391 regular and temporary permits allocating 200,107 acre-feet of groundwater, OKLAHOMA WATER RESOURCES BD., 1981 REPORTED WATER USE 8 (1984); during 1978, a total of 507 temporary, special, provisional temporary and regular permits were approved allocating 69,391.694 acre-feet of groundwater, OKLAHOMA WATER RESOURCES BD., 1979 ANNUAL REPORT 14 (1979); during 1977, 431 temporary, special and provisional temporary permits were approved allocating 131,580.49 acre-feet of groundwater, OKLAHOMA WATER RESOURCES BD., 1978 ANNUAL REPORT 15 (1978); and during 1976, 377 new applications were approved by the OWRB allocating 113,025.724 acre-feet of groundwater, OKLAHOMA WATER RESOURCES BD., 1977 ANNUAL REPORT 15 (1977).

17. The Oklahoma Groundwater Law of 1972 provides:

The procedures provided herein for the granting of regular permits shall be applicable to the granting of temporary or special permits except that the completion of the hydrologic survey shall not be a condition precedent. Provided a *provisional temporary permit* for water may immediately be granted upon *administrative approval* by the Oklahoma Water Resources Board. This permit will not be effective for . . . more than sixty (60) days.

OKLA. STAT. tit. 82, § 1020.10 (1981) (emphasis added). *See also* OWRB RULES, *supra* note 4, at § 840.7 (provisional temporary permits). A hearing procedure is required on all permit applications *except* the provisional temporary permit which is granted at the executive director's discretion. This permit is often sought by oil companies for short-term water use at drilling locations. *See* OWRB 1983 ACTIVITIES, *supra* note 6, at 22-23.

18. *Ricks*, 695 P.2d at 500-01.

19. *Id.* *See also supra* note 17.

20. *Ricks*, 695 P.2d at 501.

21. Letter from the OWRB's General Counsel Lay to Ricks Exploration Co. (Jan. 28, 1982) (informing Ricks of the surface landowners' protest and the necessary hearing required to satisfy due process).

22. *Ricks*, 695 P.2d at 501 (emphasis added) (footnotes omitted). The application was denied because (1) Ricks did not own the surface estate, (2) it did not have a valid lease from the surface landowner, and (3) it did not have the surface landowner's written consent to withdraw groundwater. Brief for Appellant at 4-5, *Ricks Exploration Co. v. Oklahoma Water Resources Bd.*, No. 58,350 (Okla. filed Apr. 7, 1982) (parties' stipulation of fact number 9). The author would like to note the curious use by the Oklahoma Supreme Court and the OWRB of the term "standing." Normally, in administrative law, it is used as a term of art which requires those appealing from an adverse agency decision to meet certain requirements before the court will review the merits of the case. The term does not connote this meaning as used by the two aforementioned authorities. Both

After receiving the letter from the OWRB, Ricks appealed to the seventh district court in Oklahoma County,²³ but that court affirmed the OWRB's decision with a similar construction of section 1020.11(D).²⁴ Ricks brought its first appeal from the district court to the Oklahoma Supreme Court.²⁵

In the interim, Ricks applied for a special permit²⁶ from the OWRB. After a hearing concerned with the permit issue, the OWRB again denied the permit application.²⁷ The OWRB reasoned that "Ricks did not have [common law] standing *qua* landowner to seek a groundwater permit and found that Ricks had not obtained permission of the surface owners to withdraw and use fresh groundwater."²⁸ Ricks appealed²⁹ the final order³⁰ of the OWRB to the seventh district court in Oklahoma County.³¹ The district court readopted the reasoning used in Ricks' first appeal³² and dismissed. Accordingly, Ricks brought a second appeal to the Oklahoma Supreme Court,³³ which then consolidated the appeals³⁴ for a

authorities use the term as a prerequisite for application to the OWRB for fresh groundwater use permits. One is not required to have "standing" to apply for hearings before an agency. Thus, in order to prevent confusion the author will refer to this anomaly as "common law standing" which is to be differentiated from "statutory standing" required by the Oklahoma APA and the courts when reviewing agency actions on appeal.

23. Ricks Exploration Co. v. Oklahoma Water Resources Bd., CJ-82-535 (7th Dist. Okla. County 1982) [*Ricks I*].

24. The statute states, "no permits shall be issued to an applicant who *does not own the land* on which the well is to be located, or *hold a valid lease from the owner of such land* permitting withdrawal of water from such basin or subbasin." OKLA. STAT. tit. 82, § 1020.11(D) (1981) (emphasis added). See also OWRB RULES, *supra* note 4, at § 815.6 (written permission of owner required if applicant does not own land).

25. *Ricks*, 695 P.2d at 501.

26. The 1972 Groundwater Law provides:

The *special permit* is granted to put groundwater to a *beneficial use* which shall require quantities of water in excess of that allocated under a regular or temporary permit. The water so authorized may be used only for the purpose designated in the permit. The permit shall be granted for a period not to exceed six (6) months and may be renewed three times.

Successive special permits shall not be granted for the same purpose.

OKLA. STAT. tit. 82, § 1020.11(C) (1981) (emphasis added). See also OWRB RULES, *supra* note 4, at § 840.5 (special permits). Applicants are often oil and gas companies seeking a water supply for the temporary duration of their drilling activities. See OWRB 1983 ACTIVITIES, *supra* note 6, at 23.

27. *Ricks*, 695 P.2d at 502.

28. *Id.*

29. The Oklahoma APA provides that, "proceedings for review shall be instituted by filing a petition, in the district court of the county in which the party seeking review resides . . . within thirty (30) days after the appellant is notified of the order . . ." OKLA. STAT. tit. 75, § 318(2) (1981).

30. See *infra* notes 60-65 and accompanying text.

31. Ricks Exploration Co. v. Oklahoma Water Resources Bd., No. CJ-82-3551 (7th Dist. Okla. County 1982) [*Ricks II*].

32. See *supra* notes 23-24 and accompanying text.

33. In pertinent part the Oklahoma APA states that, "[a]n aggrieved party . . . may secure a review of any final judgment of a district court or superior court under this act by appeal to the

single disposition.

The dispositive first impression question presented is whether Ricks Exploration Company, a mineral lessee, has common law standing before the Oklahoma Water Resources Board to seek a nondomestic fresh groundwater use permit under the existing Oklahoma Groundwater Law.³⁵ Moreover, in answering this issue, the court specifically addressed the following three sub-issues:

- 1) Whether Ricks, a mineral lessee, has a private common law right to use fresh groundwater;
- 2) assuming the first sub-issue to be answered in the affirmative, whether a mineral lessee's private common law right to use fresh groundwater may have been affected or abrogated by the Groundwater Law of 1972; and
- 3) whether Ricks, a mineral lessee, meets the "ownership" requirement of title 82, section 1020.11(D) of the Oklahoma Statutes.³⁶

III. LAW PRIOR TO *RICKS*

A. *Administrative Law*

The Oklahoma Administrative Procedures Act (APA),³⁷ patterned after the Federal Administrative Procedures Act,³⁸ was adopted in 1963 and has received little development or change since its adoption. The Oklahoma statute, which is specific in nature, provides for the delegation of authority and necessary requirements for agency establishment.³⁹ In other words, an agency like the OWRB could not have been created absent the delegation by the Oklahoma Legislature to perform administra-

Supreme Court. Such appeal shall be taken in the manner and time provided by law for appeal to the Supreme Court from the district court in civil actions." OKLA. STAT. tit. 75, § 323 (1981).

34. OKLA. STAT. tit. 12, § 990 (1981).

35. *Ricks*, 695 P.2d at 500.

36. *Id.* at 503.

37. Oklahoma Administrative Procedures Act, OKLA. STAT. tit. 75, §§ 301 to 326 (1981 & Supp. 1984).

38. Administrative Procedures Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551 to 559 (1982)).

39. The Oklahoma APA provides in pertinent part:

(a) In addition to other rulemaking requirements imposed by law each agency shall: (1) adopt as a rule or description of its organization, stating the general course and method of its operations . . . (2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available . . . (3) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions; (4) make available for public inspection all final orders, decisions and opinions.

OKLA. STAT. tit. 75, § 302(a)(1)-(4) (1981).

tive functions.⁴⁰ Finally, the APA goals were to provide a uniform system of regulating administrative procedure and establishing the scope of judicial review pertaining to the respective adjudicative and rulemaking functions within any given agency.⁴¹

The most important control mechanism over administrative action and procedure is the availability of judicial review. Judicial review⁴² operates to provide a mode of relief for an individual who is allegedly harmed by a particular agency decision or action. Before one can secure judicial review, a number of technical procedural hurdles must be overcome or a prospective litigant will be denied access to the courts without obtaining a hearing on the merits of the case.

1. Standing to Secure Judicial Review

At the outset, the person seeking review must show that he has the requisite standing⁴³ to bring the appeal before the court. A two-prong standing test was developed,⁴⁴ but two recent United States Supreme Court cases have altered this test.⁴⁵ First, the personal injury of the plaintiff or appellant must be sufficiently demonstrated.⁴⁶ Second, the injury must be fairly traceable to the alleged unlawful conduct.⁴⁷ Third, the injury must be likely to be redressed by the requested relief⁴⁸ if the

40. See *supra* notes 4 & 39.

41. *Trask v. Johnson*, 452 P.2d 575, 578 (Okla. 1969).

42. See OKLA. STAT. tit. 75, § 318 (1981) (judicial review).

43. "Standing" is a term of art in the field of administrative law. It is unfortunate that the Oklahoma Supreme Court used the term as it did in the *Ricks* opinion. Standing is grounded in the U.S. CONST. art. III, § 2 which states in pertinent part, "[t]he judicial Power shall extend to all Cases . . . and . . . to Controversies . . ." In Oklahoma, judicial review is limited by a similar concept of *justiciable* matters. OKLA. CONST. art. VII, § 7. The "case and controversy doctrine" imposes fundamental limits on judicial power. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

44. See *Barlow v. Collins*, 397 U.S. 159, 164 (1970); *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 152-53 (1970). The test is: (1) the challenged action must result in injury-in-fact to the plaintiffs; and (2) the interest invaded must be arguably within the zone of interest to be protected by the statute.

45. See *Allen v. Wright*, 104 S. Ct. 3315, 3325 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The test is: "[1] personal injury; [(2)] fairly traceable to the defendant's allegedly unlawful conduct; and [(3)] likely to be redressed by the requested relief." *Allen*, 104 S. Ct. at 3325 (citing *Valley Forge*, 454 U.S. at 472).

46. *Allen*, 104 S. Ct. at 3325-29; *Valley Forge*, 454 U.S. at 476-81; *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72-74 (1978); *Louis v. Nelson*, 544 F. Supp. 973, 988 (S.D. Fla. 1982).

47. *Allen*, 104 S. Ct. at 3325; *Valley Forge*, 454 U.S. at 472.

48. *Allen*, 104 S. Ct. at 3325; *Valley Forge*, 454 U.S. at 472.

plaintiffs or appellants prevail on the merits.⁴⁹

In Oklahoma, *Roussel v. State ex rel. Grimes*⁵⁰ is the leading case on standing. The issues in that case were whether Roussel was a person or party⁵¹ aggrieved or adversely affected within the meaning of the Oklahoma APA⁵² and thus, whether Roussel could properly appeal⁵³ the Insurance Commission's decision. Likewise, in Ricks' standing proceeding all the elements⁵⁴ must be satisfied along with the respective APA requirements and procedures.

2. Timeliness of Judicial Review

Equally important is the question of whether the timing is appropriate to secure judicial review. Three important procedures relating to timing must be discussed.⁵⁵ These include: (1) exhaustion of administrative remedies and procedures; (2) the presence of ripeness *and* finality; and (3) primary jurisdiction. Nevertheless, until the administrative remedies and procedures which are available have been exhausted, judicial review normally will be unavailable. The advancement of several policies represents the purpose for the exhaustion requirement.⁵⁶ The Oklahoma APA

49. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 262 (1977); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

50. 614 P.2d 53 (Okla. 1980).

51. *Id.* at 57. The Oklahoma APA definitions are: "[P]arty' means a person or agency named and participating, or properly seeking and entitled by law to participate, in an individual proceeding . . . [and] 'person' means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency." OKLA. STAT. tit. 75, § 301(8)-(9) (1981).

52. The standard for standing in Oklahoma is, "[a]ny person or party aggrieved or adversely affected by a final order in an individual proceeding . . . is entitled to certain, speedy, adequate and complete judicial review thereof under this act . . ." OKLA. STAT. tit. 75, § 318(1) (1981) (emphasis added).

53. "[P]roceedings for review shall be instituted by filing a petition, in the district court of the county in which the party seeking review resides or . . . where the property interest affected is situated, within thirty (30) days after the appellant is notified of the order as provided in Section 312 of this title." OKLA. STAT. tit. 75, § 318(2) (1981).

54. See *supra* notes 46-49 and accompanying text.

55. The author will provide a summary illustration of these aspects of timeliness since full development is beyond the scope of this Note. The supreme court in *Ricks*, however, applied these administrative prerequisites in a cursory fashion and failed to use the appropriate terms of art. For a full development of the analysis, these concepts must be both distinguished and discussed.

56. The underlying purposes of the exhaustion requirement are: (1) to allow the agency to employ the *discretion* and *expertise* expected by the legislature; (2) to permit *full development* of the facts *prior to judicial review*; (3) to prevent weakening of the agency by constant resort to the judiciary; (4) to promote the efficiency of administrative remedies without premature interruptions; (5) to allow the agency to correct its own errors within its internal structure; and (6) to prevent issues from becoming moot. See *McKart v. United States*, 395 U.S. 185, 193-94 (1969); *Federal Power Comm'n v. Metropolitan Edison Co.*, 304 U.S. 375 (1938); *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Louis*, 544 F. Supp. at 985; *Mattoon v. City of Norman*, 617 P.2d 1347 (Okla. 1980).

provides, "[n]either a motion for a new trial nor an application for rehearing shall be [a] prerequisite to secure judicial review."⁵⁷ Furthermore, statutory remedies cannot merely be initiated but must be pursued to their final outcome—a jurisdictional prerequisite to the courts.⁵⁸ As noted earlier, participation in a hearing before the respective agency, the OWRB, would satisfy the exhaustion requirements in Oklahoma.⁵⁹

In order for the litigants to gain the review of the judiciary, the interlocking concepts of finality and ripeness are equally important. In *Abbott Laboratories v. Gardner*,⁶⁰ the Supreme Court developed a two-pronged test for dealing with these two concepts.⁶¹ The *Abbott* Court's ripeness prong requires an examination of "impact," consisting of an immediate and significant change, and whether serious penalties are attached to noncompliance.⁶² The finality or fitness prong required for judicial review is provided in the Oklahoma APA.⁶³ Until final agency action is taken in an administrative proceeding, courts generally will not grant judicial review.⁶⁴ Also, there are three combinations of finality and ripeness possible in any given set of facts where timeliness is at issue.⁶⁵

The last requirement of timeliness that must be met is the principle of primary jurisdiction. Even though the case may meet exhaustion requirements and be final *and* ripe, judicial review could still be denied where *the agency*, rather than the court, *has jurisdiction to conduct the initial trial*. The basic proposition is that in certain instances the court decides it will not review the matter just yet and that the agency would deal with the issue more expertly and should do so prior to judicial review. If the subject matter could affect uniformity and reasonableness of

57. OKLA. STAT. tit. 75, § 318(1) (1981). The positive implication to be drawn from the language of the exhaustion statute is that *one hearing* must be held before the relevant agency, the OWRB in this case.

58. See *Martin v. Harrah Indep. School Dist.*, 543 P.2d 1370, 1374 (Okla. 1975); *Hughes v. City of Woodward*, 457 P.2d 787, 789 (Okla. 1969); *Speaker v. Bd. of County Comm'rs*, 312 P.2d 438, 441 (Okla. 1957); *Sanders v. Okla. Employment Sec. Comm'n*, 200 Okla. 366, 370, 195 P.2d 272, 276 (1948).

59. See *supra* note 57.

60. 387 U.S. 136 (1967).

61. *Id.* at 149-56.

62. *Id.* at 152-56. Is conformity expected by the agency? Conformity would not be expected in a hypothetical situation, but real facts carry the presumption of expected conformity.

63. OKLA. STAT. tit. 75, § 312 (1981). "A *final order* adverse to a party in an individual proceeding shall be in writing or stated in the record. A *final order* shall include findings of fact and conclusions of law, separately stated . . . Parties shall be notified either personally or by mail of any order." *Id.* (emphasis added).

64. See *Oklahoma ex rel. Blankenship v. Smith*, 312 F. Supp. 770, 771 (W.D. Okla. 1970).

65. 1. Final *and* ripe, when both prongs of the test are met; 2. final *and not* ripe, where there is no "impact" i.e. no compliance penalties nor hardship to the parties by withholding judicial review; and 3. if *not* final, then *not* ripe, final orders are a prerequisite to ripeness.

application, then the courts allow the agency to make the decision.⁶⁶ Moreover, primary jurisdiction is not applicable *unless* the statutory wording or agency action permits the process; *only* in these situations will the so-called Prudential Doctrine apply.⁶⁷

In *Great Northern Railway v. Merchants Elevator Co.*⁶⁸ an important distinction was made by the Supreme Court:

Preliminary resort to the Commission is required . . . [where] the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts . . . is indispensable; and such acquaintance is commonly to be found only in a body of experts.⁶⁹

Furthermore, primary jurisdiction is not waived when neglected to be raised by the litigants; the courts can raise the issue *sua sponte*.⁷⁰

3. Declaratory Judgment

The declaratory judgment section of the Oklahoma APA applies to the determination of validity or applicability of a "rule," not of an "order."⁷¹ The impact or effect of a rule must be examined to determine whether the rule falls within the ambit of the Oklahoma APA.⁷² An aggrieved party,⁷³ on appeal, cannot seek to challenge a final agency order with a declaratory judgment action.⁷⁴ One final limitation on the use

66. See *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 443-45 (1907) (deference to the agency by the Supreme Court).

67. See *Louisiana & Ark. Ry. v. Export Drum Co.*, 359 F.2d 311, 314 (5th Cir. 1966).

68. 259 U.S. 285 (1922).

69. *Id.* at 291.

70. *Export Drum Co.*, 359 F.2d at 314. "Where the statute clearly requires that an administrative determination precede judicial action, the administrative process may not be short-circuited." *Cimarron Indus. v. Okla. Tax Comm'n*, 621 P.2d 539, 541 (Okla. 1980). See also *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 687 P.2d 1049, 1056 n.1 (Okla. 1984) (Opala, J., dissenting); *Martin v. Harrah Indep. School Dist.*, 543 P.2d 1370, 1375 (Okla. 1975) (primary jurisdiction discussions).

71. OKLA. STAT. tit. 75, § 306 (1981). "The *validity or applicability of a rule* may be determined in an action for declaratory judgment in the district court . . . if it is alleged the *rule*, or its threatened *application*, interferes with or impairs . . . the legal rights or privileges of the plaintiff." *Id.* (emphasis added). "'Rule' means any agency statement of general applicability and future effect that implements, interprets or prescribes substantive law or policy, or prescribes the procedure . . . of the agency." *Id.* § 301(2). Cf. "'Order' means all or part of the final or intermediate decision . . . by an agency in *any matter other than rule making* . . ." *Id.* § 301(6) (emphasis added).

72. *Grand River Dam Auth. v. State*, 645 P.2d 1011, 1016 (Okla. 1982).

73. See *supra* note 52.

74. *Conoco, Inc. v. State Dept. of Health*, 651 P.2d 125, 129-31 (Okla. 1982). Accord *Oklahoma Tax Comm'n v. Smith*, 610 P.2d 794 (Okla. 1980) (constitutional attack on statute *prior* to agency order, judgment or decree).

of declaratory judgments is that this remedial relief cannot extend the jurisdiction of a court where it would otherwise be nonexistent. In short, the relief may only be granted where a court already has jurisdiction.⁷⁵

4. Scope of Judicial Review

The district court, on an appeal from an agency order in the exercise of its judicial function, is acting in an appellate capacity. Thus the scope of review is limited to the examination of the transcript, ascertainment of errors of law, and determinations of whether or not the findings of fact are supported by the evidence.⁷⁶ The district court may overturn the agency if the judicial actions were contrary to the law or the clear weight of the evidence contained in the record.⁷⁷ The respective agency, using a reasonableness standard, determines the relevant facts during a hearing.

In contrast, an increasing amount of review is applied when questions of law are disputed. The scope of review pertaining to questions of law is divided into two major categories which, in turn, are comprised of various independent parts. Questions of law initially raised before the court comprise the first major category of judicial review. This category contains two parts: (1) when the law is a statute; and (2) where it is common law and either part is disputed. The first part, when law is a statute, receives independent review by the court with appropriate weight given to the agency's argument and expertise.⁷⁸ On the other hand, the second part, common law, receives independent review *only* and the court provides no deference to the agency's argument *unless* aligned with the court's interpretation.⁷⁹

The second major category of judicial review occurs when the question of law is first interpreted and applied before the agency. This category also contains two parts with either a conflict present or absent in each part. The first part occurs when the law is a statute which is either disputed or undisputed as to the correct interpretation. The second part occurs when the common law is either disputed or undisputed as to the proper interpretation. When the statutory part is disputed the test used is a "reasonable basis in the law test."⁸⁰ Conversely, when the statutory

75. *Conoco*, 651 P.2d at 131-32.

76. *In re White*, 355 P.2d 404, 406 (Okla. 1960).

77. *Id.*

78. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944). This Note examines agency adjudication, not rule making, therefore only the former will be discussed concerning the scope of judicial review as the latter is beyond the scope of this Note.

79. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION*, 549-50 (1965).

80. *Hearst*, 322 U.S. at 131. The test is comprised of two components: (1) "reasonableness"—

part is undisputed, the court would accept the agency's conclusion, because it is presumptively within the agency's discretion and expertise.⁸¹ When the common law part is disputed, the court also applies the "reasonable basis in the law test." In contrast, this will differ from the disputed statutory part because the independent review of the court will *only* decide if the agency applied the same interpretation that the court used.⁸² Finally, if the common law part is undisputed, then the court will review using the "reasonable basis in the law test."⁸³ On the whole, the scope of review, as well as the entire administrative process, can become very complicated and is best understood when broken into small manageable concepts.

B. *Property Rights in Groundwater at Common Law*

1. Surface Landowner's Property Rights

At common law, the respective property interests of the surface landowner and mineral lessee were distinguished. Moreover, the use of water and the established interests are incidental to the enjoyment of both estates.⁸⁴ Traditionally, the surface landowner has been held to own the groundwater beneath the land⁸⁵ often supported by the maxim, "*cujus est solum, ejus est usque ad coelum et ad inferos*."⁸⁶ The landowner's common law interest in the water became absolute in England, spawning the English doctrine of absolute ownership.⁸⁷ This doctrine

limited review with a reasonable conclusion reached from application of law to facts; and (2) "basis in the law"—an *independent review* by the court to determine the purposes and objectives of the statute. *Id.* In other words, discern the appropriate legislative intent. However, if several interpretations can effectuate the congressional objectives, and the agency's interpretation is one, the court will allow the agency's to stand *unless convinced only one is correct*. See L. JAFFE, *supra* note 79, at 554. See also NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1951).

81. See L. JAFFE, *supra* note 79, at 549-50. But see NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961) (Judge Friendly would accept the agency's conclusion because he believes it is a finding of fact).

82. *Highland Park*, 341 U.S. at 324-25.

83. See L. JAFFE, *supra* note 79, at 549-50.

84. The court failed to address this principle in *Mack Oil Co. v. Laurence*, 389 P.2d 955 (Okla. 1964).

85. See *Acton v. Blundell*, 12 M.&W. 324, 152 Eng. Rep. 1223 (Ex. 1843).

86. "To whomever the soil belongs, he owns also to the sky and to the depths."

87. *Acton*, 12 M.&W. at 354, 152 Eng. Rep. at 1235.

[T]he person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriā*, which cannot become the ground of an action.

Id. at 354, 152 Eng. Rep. at 1235 (emphasis added). The Latin translation is "damage without legal injury."

became the foundation for the first Oklahoma Groundwater Law⁸⁸ and today, under the Oklahoma property statute, similar language is also codified.⁸⁹ The English rule of absolute ownership leveled too harsh an impact and as a result has been tempered in the United States.⁹⁰ The statutory definition of a surface landowner's property right in groundwater, in order to have any significant meaning, must necessarily include the implication to withdraw and use the groundwater.⁹¹ In fact, the Oklahoma Groundwater Law of 1972⁹² grants the surface landowner such a right for domestic use.⁹³

2. Nature and Incidents of Mineral Lessee's Rights

At early common law, an owner of land could convey a mineral estate so as to accomplish a separation of the surface estate from the mineral estate.⁹⁴ The same principle also applies to oil and gas; the owner of the land has exclusive rights to the oil and gas, prior to any severance.⁹⁵ Moreover, the respective titles can be severed so as to create a separate interest in the oil and gas rights on the one hand and the interest of the surface landowner on the other.⁹⁶

As the law has developed, severed mineral estates include more than just the right to explore and develop the oil and gas owned by the mineral owner or lessee. A mineral estate conveys with it by implication "such incidental rights as are essential to the full enjoyment of the property conveyed."⁹⁷ Accordingly, this principle also applied to oil and gas

88. See TERR. OKLA. STAT. § 4162 (1890). "The owner of land owns the water standing thereon, or flowing over or under its surface, but not forming a definite stream." *Id.*

89. "The owner of the land owns water standing thereon, or *flowing over or under its surface* but not forming a definite stream." OKLA. STAT. tit. 60, § 60 (1981) (emphasis added).

90. See *infra* notes 201-204 and accompanying text.

91. Jensen, *The Allocation of Percolating Water Under the Oklahoma Ground Water Law of 1972*, 14 TULSA L.J. 437, 448 & n.72 (1979).

92. OKLA. STAT. tit. 82, §§ 1020.1 to 1020.22 (1981 & Supp. 1984).

93. OKLA. STAT. tit. 82, § 1020.3 (1981). The statute states that, "[a]ny landowner has a right to take groundwater from land owned by him for domestic use without a permit. . . . [S]ubject to sanctions against waste." *Id.* (emphasis added). "As used in this act . . . 'domestic use' means the use of water by a natural individual . . . for household purposes, for farm and domestic animals . . . and for the irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards and lawns." *Id.* § 1020.1(B).

94. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55 (1898).

95. See 1 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 3.1, at 76 (1962).

96. See *Cuff v. Koslosky*, 165 Okla. 135, 25 P.2d 290 (1933); *Stephens County v. Mid-Kansas Oil Co.*, 113 Tex. 160, 254 S.W. 290 (1923). "When the mineral interest is severed from the surface interest, two distinct estates or interests are created, both of which are treated as real property." 1 E. KUNTZ, *supra* note 95, § 3.1, at 76-77 (footnotes omitted).

97. *Melton v. Sneed*, 188 Okla. 388, 390, 109 P.2d 509, 512 (1940).

leases.⁹⁸ The mineral estate is characterized as dominant since the owner has an implied access right to use as much of the surface and substances as may be reasonably necessary for the enjoyment of the mineral estate.⁹⁹ In Oklahoma, the limited right to use the surface has been classified as either an easement¹⁰⁰ or a *profit à prendre*.¹⁰¹

Oil and gas rights by implication carry the means of enjoying the mineral estate. The owner of the mineral estate has been determined to have, as an incident, the right to use fresh groundwater reasonably necessary for the development of the mineral estate.¹⁰² One of the earliest court decisions, *Guffey v. Stroud*,¹⁰³ which involved oil and gas conveyances, used sweeping language that clearly evidenced the right to reasonable use of groundwater.¹⁰⁴

Apparently, the first case dealing specifically with fresh groundwater was *Stradley v. Magnolia Petroleum Co.*¹⁰⁵ The surface landowner in that case initiated a conversion suit against the mineral owner, charging the unlawful taking of fresh groundwater.¹⁰⁶ The mineral owner had drilled a water well on the same premises as the oil well to obtain fresh groundwater for use in its drilling operations.¹⁰⁷ The *Stradley* court did not determine whether groundwater was conveyed with the minerals,¹⁰⁸ but held that an implied right granted the mineral owner the reasonable

98. *Pulaski Oil Co. v. Conner*, 62 Okla. 211, 162 P. 464 (1916). "[A]n oil and gas lease carries within its implications, if not within its expression, such rights as to the surface as may be necessarily incident to performance of the objects of the contract . . ." *Id.* at 214, 162 P. at 466.

99. See *Davon Drilling Co. v. Ginder*, 467 P.2d 470 (Okla. 1970); *Melton*, 188 Okla. at 388, 109 P.2d at 509; *Mary Oil & Gas Co. v. Raines*, 108 Okla. 222, 235 P. 1085 (1925); *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260 (Tex. Civ. App. 1958); *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302 (1944).

100. *Hinds v. Phillips Petroleum Co.*, 591 P.2d 697 (Okla. 1979).

101. *Rich v. Doneghey*, 71 Okla. 204, 177 P. 86 (1918). "A right to take a part of the soil [minerals] or produce of the land." BLACK'S LAW DICTIONARY 1376 (4th ed. 1968).

102. See 4 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 50.2(b), at 263 (1962). Naturally, the mineral owner or lessee does not own the groundwater, but does have the right to reasonable use thereof in the production of oil and gas. *Id.* See also *Russel v. Tex. Co.*, 238 F.2d 636 (9th Cir. 1956); *Vogel v. Cobb*, 193 Okla. 64, 141 P.2d 276 (1943); *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649 (Tex. Civ. App. 1941).

103. 16 S.W.2d 527 (Tex. Civ. App. 1929).

104. "The grant of the oil carried with it a grant of the way, surface, soil, water, gas, and the like essential to the enjoyment of the actual grant of the oil." *Id.* at 528 (emphasis added). See also *Magnolia Petroleum Co. v. Howard*, 182 Okla. 101, 77 P.2d 18 (1938) (mineral lessee in development of oil and gas is entitled to all that is reasonably necessary in the production thereof).

105. 155 S.W.2d 649 (Tex. Civ. App. 1941).

106. *Id.* at 650.

107. *Id.* A distinct similarity exists in the facts of *Stradley*, a Texas case, compared with those facts in *Ricks*, an Oklahoma case. The cases are distinguishable, however, as *Stradley* was concerned with the use of groundwater while *Ricks* dealt with the right to use and regulation of such right.

108. See generally Recent Development, *Texas Reexamines the Meaning of "Minerals"*: Moser v. United States Steel Corp., 19 TULSA L.J. 448 (1984).

use of fresh groundwater.¹⁰⁹

Oklahoma subsequently adopted the *Stradley* holding in *Mack Oil Co. v. Laurence*.¹¹⁰

[T]he conveyance . . . which recited "all mineral rights reserved" was not intended, and did not reserve the natural waters underlying the land and thereby sever the [ground]water from the surface . . . [and] the fact that conveyance of the surface carried with it both the soil and underground water did not . . . deprive holders of the mineral rights herein conveyed to use of [ground]water found under the land for purposes necessary and incidental to its own operations thereon.¹¹¹

Upon severance of the mineral estate, an easement¹¹² in the surface estate exists and the mineral estate is held to be dominant.¹¹³ Therefore, the mineral owner or lessee has an incorporeal property interest in the fresh groundwater beneath the surface estate.

C. Groundwater Law in Oklahoma

The initial attempt by the Oklahoma Legislature to regulate the use of fresh groundwater in the state with a comprehensive groundwater statute occurred in 1949.¹¹⁴ Ownership of the land was a condition precedent to the withdrawal of underground water beneath the surface.¹¹⁵ The underground water was owned by the surface landowner¹¹⁶ and "beneficial use" expressly limited the right to use such groundwater.¹¹⁷ The use of water could also be prevented if the groundwater use was in

109. *Stradley*, 155 S.W.2d at 652. Lease clauses were widely used after the *Stradley* decision to insure the right to groundwater use. A typical clause of this nature states: "Lessee shall have the right to use, free of cost . . . water produced on said land for its operation thereon, except water from wells of lessor." *Arnold v. Adams*, 147 Okla. 57, 61, 294 P. 142, 146 (1930) (construing this language in a lease).

110. 389 P.2d 955 (Okla. 1964).

111. *Id.* at 961-62. The Oklahoma Supreme Court delineated the methods by which a mineral lessee can acquire water necessary for the development of the leasehold: (1) purchase water off the lease; (2) buy water from lessor to be taken from existing sources; or (3) drill a well for water to be used on the lease. *Id.* at 962. See also *Holt v. Southwest Antioch Sand Unit, Fifth Enlarged*, 292 P.2d 998 (Okla. 1955) (The mineral owner has the right to use *salt water* produced from the premises which is reasonably necessary for the production and development of the mineral estate.).

112. See RESTATEMENT OF PROPERTY § 450 (1936) (easements defined). See also *supra* note 100 and accompanying text.

113. See *Cities Serv. Oil Co. v. Dacus*, 325 P.2d 1035 (Okla. 1958); *Wilcox Oil Co. v. Lawson*, 301 P.2d 686 (Okla. 1956). The holder of a valid oil and gas lease has the right and privilege to go on the surface and do all things necessary and incidental to the drilling of wells, including the right to use the surface. *Id.* at 688.

114. Act of June 6, 1949, ch. 11, §§ 1 to 19, 1949 Okla. Sess. Laws 641 (codified as amended at OKLA. STAT. tit. 82, §§ 1001 to 1019 (1971) (repealed 1972)).

115. See OKLA. STAT. tit. 82, § 1013 (1971) (repealed 1972).

116. *Id.*

117. See OKLA. STAT. tit. 82, § 1002 (1971) (repealed 1972).

excess of the annual natural recharge of the basin or subbasin.¹¹⁸ In essence, a conservation technique was developed to prevent overconsumption and depletion of fresh groundwater.

The 1972 Act,¹¹⁹ the present groundwater law, replaced the 1949 legislation *in toto*. Under the 1972 revisions, the legislature adopted a policy of water utilization contrasted with the conservation policy in the 1949 statutes. The basic schemes of the 1972 Act are: (1) the groundwater basins must be identified; (2) the maximum annual yield from each basin must be determined through hydrological studies; (3) the amount and location of land overlying each basin must be calculated; and (4) the maximum annual yield from the basin must be divided between or among the surface landowners above the basin in direct proportion to the surface area owned.¹²⁰

A declaration of policy was expressed as a foundation for the 1972 Groundwater Law:

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, and for that purpose to provide reasonable regulations for the *allocation for 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.¹²¹

"The Oklahoma Water Resources Board shall make hydrologic surveys and investigations of each fresh groundwater basin or subbasin."¹²² A maximum annual yield is determined and allocated accordingly to insure that the present groundwater basins shall have a minimum life of twenty years.¹²³

IV. ANALYSIS OF *RICKS*

A. *First Appeal*: *Ricks I*

As discussed earlier in this Note, the OWRB is a state agency and therefore falls within the scope of the Oklahoma APA.¹²⁴ As a result,

118. See *supra* note 115.

119. An Act Relating to Ground Water, 1972, ch. 248, 1972 Okla. Sess. Laws 529 (codified as amended at OKLA. STAT. tit. 82, §§ 1020.1 to 1020.22 (1981 & Supp. 1984)).

120. See Jensen, *supra* note 91, at 459-60.

121. OKLA. STAT. tit. 82, § 1020.2 (1981) (emphasis added).

122. OKLA. STAT. tit. 82, § 1020.4 (1981).

123. See OKLA. STAT. tit. 82, § 1020.5 (1981).

124. See *supra* note 4.

the scope of review over the OWRB's actions is often very limited when administrative prerequisites are neglected.¹²⁵ *Ricks I* was burdened with several procedural infirmities. Particularly, the jurisdictional problems were a controlling factor that the reviewing courts examined. Deductive logic demonstrates that when a state district court lacks general jurisdiction on appeal over an agency's action, then the state supreme court would also lack general jurisdiction on appeal. In short, both reviewing courts lacked general jurisdiction over the appeal in *Ricks I*.¹²⁶

1. Due Process

The substantive due process considerations that concerned the OWRB¹²⁷ with regard to the required permit hearing related to the surface landowners—the owners of the groundwater. *Ricks* could not deprive them, nor could the OWRB, of their groundwater without satisfying due process of law.¹²⁸ The hearing procedure,¹²⁹ had it been held,¹³⁰ would have satisfied the notice and hearing mandates of procedural due process.¹³¹ As Justice Opala implied, the need “for an adversary hearing on [the] application for a groundwater permit and for a consideration of the issues in conformity with the minimum standards of due process”¹³² must be satisfied.

2. Exhaustion

After *Ricks* received the letter from the OWRB,¹³³ it initiated an

125. See *supra* notes 42-83 and accompanying text.

126. *Ricks*, 695 P.2d at 502.

127. See *supra* note 21 and accompanying text.

128. U.S. CONST., amends. V, XIV; OKLA. CONST. art. II, § 7. “No person shall be deprived of life, liberty, or property, without due process of law.” OKLA. CONST. art. II, § 7.

129. The minimum standards of due process must be clearly satisfied by the procedures implemented within the agency. The Oklahoma APA provides:

(a) In an individual proceeding, all parties shall be afforded an opportunity for hearing after reasonable notice. (b) The notice shall include: (1) a statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and rules involved; (4) a short and plain statement of the matters asserted (c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

OKLA. STAT. tit. 75, § 309(a)-(c) (1981).

130. *Ricks*, 695 P.2d at 501.

131. “It has been held repeatedly that administrative procedure is within the power of the state to provide, and that when an opportunity to be heard is given, it satisfies the requirements of due process” *Martin v. Harrah Indep. School Dist.*, 543 P.2d 1370, 1374-75 (Okla. 1975). Indeed, agencies as well as the judiciary and the legislature must perform their respective functions within the confines of the Constitution.

132. *Ricks*, 695 P.2d at 501.

133. See *supra* notes 21-22 and accompanying text.

appeal to the seventh district court in Oklahoma County.¹³⁴ As the Oklahoma Supreme Court noted, "[t]he action of the [OWRB] director did not preclude the applicant [Ricks] from proceeding further before the Board."¹³⁵ In the present case, the administrative remedy that Ricks failed to exhaust was a hearing before the OWRB¹³⁶ involving the surface landowners. Ricks "remained entirely free to press the Board for an adversary hearing on its application for a groundwater permit."¹³⁷ The Oklahoma APA mandates¹³⁸ were not satisfied because of Ricks' failure to implement the proper hearing procedures before the OWRB. Consequently, the exhaustion requirement was not fulfilled and therefore prevented judicial review in the district court.

3. 'Finality and Ripeness

Likewise the timeliness aspects of finality and ripeness were not met. These two concepts interlock with ripeness being dependent upon the finality or legal question¹³⁹ and Ricks did not have an adjudicative hearing before the OWRB. In the adjudicative context of a hearing, final orders¹⁴⁰ are issued, the former necessarily leading to the latter. As Justice Opala stated, "nor did the director's letter amount to a *final* disposition of an individual proceeding"¹⁴¹ within the meaning of the Oklahoma APA section 318(1).¹⁴² No final agency action was taken in relation to Ricks' permit application; since there was no final order, then ripeness becomes a moot issue¹⁴³ and judicial review cannot be granted in the district court on appeal.

4. Primary Jurisdiction

The final aspect of a timeliness analysis is the concept of primary jurisdiction. The subject matter in *Ricks I*, the allocation of groundwater,¹⁴⁴ is a factual matter¹⁴⁵ that would affect the reasonableness and

134. *Ricks*, 695 P.2d at 501. See *supra* note 23.

135. *Ricks*, 695 P.2d at 501.

136. See OWRB RULES, *supra* note 4, at §§ 200.1 to 200.3. See also *supra* note 57 ("one hearing" required by the Oklahoma APA).

137. *Ricks*, 695 P.2d at 501.

138. See OKLA. STAT. tit. 75, § 318(1) (1981).

139. See *supra* note 63 and accompanying text.

140. See OKLA. STAT. tit. 75, § 312 (1981).

141. *Ricks*, 695 P.2d at 501 (emphasis in original).

142. OKLA. STAT. tit. 75, § 318(1) (1981).

143. See *supra* note 65.

144. See OKLA. STAT. tit. 82, § 1020.2 (1981). See also *supra* note 4.

145. See *supra* note 69 and accompanying text.

uniformity of the OWRB's application.¹⁴⁶ Thus, for these reasons it falls within the realm of primary jurisdiction.¹⁴⁷ "Because by law the *Board's* authority to regulate groundwater use and to issue permits allowing its withdrawal *is exclusive*, the district court is without original cognizance over these matters."¹⁴⁸ Furthermore, "the district court's action operates to invade the forbidden arena of the Board's original cognizance."¹⁴⁹ Therefore, since the Prudential Doctrine applies, the OWRB rather than the district court had jurisdiction to conduct the initial trial or hearing. As the district court could not usurp the original subject matter jurisdiction¹⁵⁰ of the OWRB, Ricks was denied a judicial remedy.

5. Civil Procedure

Justice Opala noted that the district court judge in *Ricks I* decided questions that were broader than the original issues raised.¹⁵¹ The district court opinion was not published, and Justice Opala's analysis should be considered *a fortiori* correct. Ricks did not challenge the OWRB rules¹⁵² and the letter from the general counsel also failed to raise the issue.¹⁵³ Notice pleading in Oklahoma¹⁵⁴ frames the issues in conjunction with the evidence admitted at trial and the trial judge cannot enlarge the scope of the issues pled through judicial fiat. The supreme court cited *Bryan v. Seiffert*¹⁵⁵ as controlling law on this procedural issue. The case is tenuous at best and deals with administration proceedings in probate.¹⁵⁶ *Bryan* does support the court's opinion concerning the prohibition on jurisdictional expansion,¹⁵⁷ but is distinguishable and probably not controlling in the administrative law context.

6. Declaratory Judgment

Apparently, reflected by Justice Opala's implication, Ricks also attempted to challenge the validity of the OWRB rules concerning permit allocation. However, Justice Opala does not make this point entirely

146. See *supra* note 66 and accompanying text.

147. See *supra* note 67 and accompanying text.

148. *Ricks*, 695 P.2d at 501 (emphasis added).

149. *Id.* at 502.

150. *Id.* at 501-02.

151. See *id.* at 502.

152. *Id.*

153. *Id.*

154. See OKLAHOMA PLEADING CODE, OKLA. STAT. tit. 12, §§ 2001 to 2027 (Supp. 1984).

155. 185 Okla. 406, 94 P.2d 526 (1939).

156. *Id.*, 94 P.2d at 526.

157. *Id.*, 94 P.2d at 526.

clear. "[T]he cause was not brought before the district court as an original declaratory suit to review the validity of the Board's rules"¹⁵⁸ in accordance with the Oklahoma APA provisions.¹⁵⁹ "Declaratory relief may not be invoked as a substitute for an appeal by one who has been aggrieved by an adverse agency ruling."¹⁶⁰ Even assuming that Ricks had participated in the requisite hearing and through an adjudication decision the OWRB issued an "order," declaratory judgment would still be inappropriate.¹⁶¹ Justice Opala, *sua sponte*,¹⁶² noted the cumulative jurisdictional defects and remanded to the district court with directions to modify its dismissal decision, in particular, with directions to dismiss for lack of subject matter jurisdiction.¹⁶³

B. *Second Appeal: Ricks II*

1. Administrative Law

Due process was satisfied since Ricks obtained a hearing on the application of the special permit,¹⁶⁴ and the surface landowners' property rights were afforded the appropriate protection. All procedural requirements of notice and hearing were satisfied. Also, exhaustion did not present a problem as Ricks exhausted the administrative remedies available; namely, a hearing before the OWRB. The OWRB issued a "final order"¹⁶⁵ denying Ricks the permit sought. Thus, with the requisite finality present, ripeness was also considered and passed muster.¹⁶⁶ Likewise, primary jurisdiction posed no problem as the OWRB performed the function required by statute, specifically the allocation of permits and a factual determination of groundwater recipients during a hearing. Neither civil procedure nor declaratory judgment problems were raised on appeal in *Ricks II*.

Even when all the aforementioned hurdles are satisfied, Ricks must also show that it has the requisite "standing"¹⁶⁷ needed to secure judicial review. Here the three-pronged standing test must be satisfied.¹⁶⁸ Exam-

158. *Ricks*, 695 P.2d at 502.

159. See OKLA. STAT. tit. 75, § 306 (1981).

160. *Ricks*, 695 P.2d at 502.

161. See *supra* note 71 and accompanying text.

162. *Ricks*, 695 P.2d at 502. See *supra* note 70 and accompanying text.

163. *Id.*

164. *Id.*

165. *Id.*

166. See *supra* note 62 and accompanying text.

167. See *supra* notes 43-54 and accompanying text.

168. See *supra* notes 46-49 and accompanying text.

ining the first factor, was there a personal injury to Ricks? Ricks was prevented from using fresh groundwater in its drilling operations and was thereby harmed. Moreover, the injury can be sufficiently demonstrated and affected Ricks directly. Examining the second factor, was the injury fairly traceable to the alleged unlawful conduct? Ricks claimed that the OWRB, through its construction of the statutes, had caused it direct injury by preventing the production of oil and gas from its mineral lease. Finally, was this injury likely to be redressed by the requested relief if Ricks prevailed on the merits? The requested relief was an adjudication decision that Ricks had a private common law right to use fresh groundwater despite the OWRB's ruling and, thus, would redress the injury, as well as prevail on the merits. In conclusion, the Oklahoma APA requirements for judicial review were met and Ricks had the quintessential "standing" needed to obtain an adjudication on the merits.

2. Scope of Judicial Review

The Oklahoma Supreme Court in its appellate review of the OWRB's construction and implementation of the groundwater law decided two distinct questions, one statutory and the other common law. The first category examined was a question of common law which was initially raised before the Oklahoma Supreme Court.¹⁶⁹ The common law question discussed both the nature and incidents of a mineral lessee's rights to fresh groundwater and the correlative rights of use.¹⁷⁰ The second category dealt with a question of law first being interpreted and applied before the agency¹⁷¹ and subsequently reviewed by the judiciary. The statutory law that was disputed as to the correct application and construction concerned Oklahoma Statutes title 82, section 1020.11(D)¹⁷² and title 60, section 60.¹⁷³

3. Ricks' Private Common Law Right to Use Fresh Groundwater

Justice Opala progressively and logically used Oklahoma precedent to answer the first sub-issue. Justice Opala began his inquiry by asking whether Ricks, a mineral lessee, had a common law right to use fresh groundwater. Because oil and gas leases, by implication, also carry the

169. See *supra* note 79 and accompanying text.

170. *Ricks*, 695 P.2d at 503. See also *supra* notes 94-113 and accompanying text.

171. See *supra* note 80 and accompanying text.

172. OKLA. STAT. tit. 82, § 1020.11(D) (1981) (ownership requirement for permit).

173. OKLA. STAT. tit. 60, § 60 (1981) (ownership of water).

means to enjoy the respective mineral estate,¹⁷⁴ mineral lessees have the right to enter and make reasonable use of the surface estate in exploration and drilling for oil and gas.¹⁷⁵ "Any limitation upon the right of entry or the right to extract minerals is in derogation of this common-law interest."¹⁷⁶ The surface landowners own the fresh groundwater below their land,¹⁷⁷ but their interest does not preclude mineral owners or lessees from using reasonable amounts of water for the production of oil and gas.¹⁷⁸ Included within and created by Ricks' mineral leasehold estate is a cluster of common law property rights.¹⁷⁹ In sum, Ricks had a private common law right to use fresh groundwater for drilling operations connected with its severed mineral leasehold estate.

4. Groundwater Law Effect on Private Common Law Right

The OWRB excluded owners or lessees of interests other than surface landowners from the permitted class of applicants for water use permits. In construing the statute, the OWRB took the position that "land" means surface estate.¹⁸⁰ In effect, Ricks was required to bargain with the surface landowners for a recognizable common law right of free access to reasonable groundwater use for oil and gas purposes.¹⁸¹ For this reason the Oklahoma Supreme Court expressly rejected the construction of the groundwater law by the OWRB.¹⁸² "A mineral owner's claim to *groundwater use* is a 'vested right' created by common law."¹⁸³ A vested inter-

174. See 1 E. KUNTZ, *supra* note 95, § 3.2, at 80. See also *Hinds v. Phillips Petroleum Co.*, 591 P.2d 697, 698 (Okla. 1979) (an oil and gas lease carries many common law property interests in the land subject to the lease); *Wilcox Oil Co. v. Lawson*, 341 P.2d 591, 594 (Okla. 1959) (holder of valid oil and gas lease has rights and privileges necessary and incidental to drilling wells); *Melton v. Sneed*, 188 Okla. 388, 390, 109 P.2d 509, 512 (1940) (all rights essential to the full beneficial use and enjoyment of the lease passes to oil and gas lessees).

175. See 1 E. KUNTZ, *supra* note 95, § 3.2, at 80. See also *Wilcox Oil*, 341 P.2d at 594 (mineral lessee has right to use the surface); *Cities Serv. Oil Co. v. Dacus*, 325 P.2d 1035, 1036 (Okla. 1958) (holder of valid oil and gas lease has right and privilege to use the surface); *Melton*, 188 Okla. at 390, 109 P.2d at 512 (the right of ingress and egress for the exploration of oil and gas is implied).

176. *Ricks*, 695 P.2d at 503.

177. OKLA. STAT. tit. 60, § 60 (1981).

178. See *Mack Oil Co. v. Laurence*, 389 P.2d 955 (Okla. 1964). See also *supra* notes 110-11.

179. See *Hinds v. Phillips Petroleum Co.*, 591 P.2d 697, 698 (Okla. 1979).

180. See OWRB RULES, *supra* note 4, at § 815.6. "[N]o permit shall be issued to an applicant who is not the surface owner of the land on which the well is to be located, or hold a valid right from such surface owner permitting withdrawal of water." *Id.* See also OKLA. STAT. tit. 82, § 1020.11(D) (1981) (contains similar wording).

181. *Ricks*, 695 P.2d at 504.

182. *Id.*

183. *Id.* (emphasis added). The supreme court cites *Oklahoma Water Resources Bd. v. Cent. Okla. Master Conservancy Dist.*, 464 P.2d 748, 755 (Okla. 1969) for support. Admittedly, the case stands for the proposition that "vested rights" are absolute and protected from legislative invasion by OKLA. CONST. art. V., §§ 52 & 54. The supreme court, however, has failed to recognize the three

est will not be deemed abrogated or impaired except by express prospective legislative nullification; a public law deprivation of private rights in such a case would also be strictly construed.¹⁸⁴ Absent an express legislative mandate, the court has no authority to strike down a valuable common law right upon an inference attempted to be drawn from a statute.¹⁸⁵ Moreover, if more than one construction is possible, then the statute must be construed within constitutional limits.¹⁸⁶

5. "Ownership" Requirement of the Groundwater Law

"Section 1020.11(D) does not manifest legislative intent to alter a mineral owner's [or lessee's] private interest in groundwater use."¹⁸⁷ In construing the "ownership test," the OWRB cannot ignore recognized common law interests which remain *unaltered* by statute.¹⁸⁸ If the Oklahoma Legislature had intended to alter these common law rights, the legislators could have done so explicitly. Furthermore, no implicit intent was evident in the statute. Vested rights cannot be deprived without due process of law.¹⁸⁹ The OWRB in its administrative adjudicative capacity constitutes state action,¹⁹⁰ and the OWRB places the surface landowners in the position where they can use the state to regulate and/or destroy private common law rights¹⁹¹ by prohibiting a mineral owner or lessee from obtaining a fresh groundwater use permit. "The state's power cannot be used to extinguish existing private rights which remain unabolished by the legislature."¹⁹² "Fundamental rights cannot be abolished by contrary judicial practices no matter how long they have

distinct water classifications that have been developed in water law. The emphasized language from the *Ricks*' text is "groundwater use," but in *Cent. Okla. Master Conservancy Dist.* the water category discussed is exclusively "diffused surface water." For an excellent summary of the three separate water classifications, see generally J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 372-79 (2d ed. 1975) (1. groundwater; 2. stream water; and 3. diffused surface water). If the supreme court had made an analogy to groundwater, then the argument would have been strong, legal and powerful, but by misstating the holding, the case cited by the supreme court is not directly on point. At this point in the analysis, the author would argue this point by analogy since it is crucial to the overall argument for a mineral owner or lessee's right.

184. *Ricks*, 695 P.2d at 504.

185. *Id.*

186. *Id.*

187. *Id.*

188. *See id.*

189. *Id.* at 505. *See also supra* note 128.

190. *See Shelley v. Kraemer*, 334 U.S. 1, 14 (1948); *Wolfenbarger v. Hennessee*, 520 P.2d 809, 811-12 (Okla. 1974).

191. *Ricks*, 695 P.2d at 505. *See OKLA. CONST.* art. II, §§ 23 & 24. *See also Shelley*, 334 U.S. at 19-20.

192. *Ricks*, 695 P.2d at 505.

continued.”¹⁹³

The OWRB's construction of section 1020.11(D) operates as a vehicle of “taking” by destroying rights that the legislature could only have done prospectively.¹⁹⁴ “Mineral lessees [Ricks] have a quantum of recognizable proprietary interest in the reasonable nondomestic use of groundwater[; t]hat interest is sufficient to place them in the category of ‘owners’ within the meaning of § 1020.11(D).”¹⁹⁵ Consequently, Ricks cannot be barred for lack of common law standing from access to the OWRB for the purpose of seeking a fresh groundwater use permit.¹⁹⁶

6. Alternate Construction

A reasonable alternative construction of the statute is possible in *Ricks II*. Frequently, there exists more than one available and correct method of proof in a geometric analysis. This proof analysis can also be applied in the present context to achieve an identical final solution. The relevant statutory language that will be discussed is contained in section 1020.11(D) and specifically, the terms “land” and “valid lease” will be construed. The inquiry considers whether a mineral estate can arguably be included within either one, the other, or both terms. As noted earlier, the OWRB construed the term “land” in the groundwater law to mean only surface estate.¹⁹⁷ Oklahoma statutes, however, define land as “the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance.”¹⁹⁸ Clearly, this language is broad enough to include a mineral estate as land within the meaning of the statute.¹⁹⁹

Likewise, Ricks can also be included within the term “valid lease” in the statute. To recapitulate, mineral owners and lessees were permit-

193. *Id.* See also *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969).

194. *Ricks*, 695 P.2d at 505.

195. *Id.*

196. *Id.*

197. See OWRB RULES, *supra* note 4, at § 815.6. See also *supra* note 180.

198. OKLA. STAT. tit. 60, § 6 (1981).

199. Furthermore, Oklahoma case law substantiates that a mineral estate is an interest in land. *E.g.*, *Meriwether v. Gulf Oil Corp.*, 298 P.2d 758 (Okla. 1956) (statute authorizing state to condemn land also included the mineral estate); *Mitchell v. Schmelzer*, 191 Okla. 646, 132 P.2d 332 (1942) (a contract for the sale of a mineral estate is real property under the statute of frauds); *Hudson v. Smith*, 171 Okla. 79, 41 P.2d 861 (1935) (quiet title action which held oil and gas in place is an “interest in land”); *Cuff v. Koslosky*, 165 Okla. 135, 25 P.2d 290 (1933) (court held a mineral interest was within the statute of “lands and tenements” when it considered appraisal before sale in execution proceeding); *Myers v. Hines*, 149 Okla. 232, 300 P. 309 (1931) (equitable proceeding concerning reservation of oil and gas rights in a property conveyance). See generally *Note, Oil and Gas: Water and Watercourses: Effect of the Oklahoma Groundwater Law on the Common Law Right to Use Water*, 37 OKLA. L. REV. 157 (1984) (a similar argument with respect to land).

ted to withdraw groundwater from the surface owner-lessor at common law. Thus, the holder of a valid oil and gas lease is clearly within the purview of the statute whether leased from the surface landowner or the mineral owner. To allow the lessee of a surface landowner to obtain a permit while on the other hand to deny a permit for the lessee of a mineral owner would be difficult to justify.²⁰⁰ No reasonable explanation has been presented by the OWRB for distinguishing between the lessee of a mineral owner and the lessee of the surface landowner of a fee simple absolute. The right to use fresh groundwater pursuant to the statute should benefit and inure to those who hold a valid property interest in the groundwater, not to the applicant's lessor. Ricks certainly falls within one if not both terms expressed in the statute. Therefore, under the appropriate construction of the groundwater law, mineral lessees and owners are also included within the class of applicants allowed to seek fresh groundwater use permits before the OWRB.

C. *Future Implications: Reasonable Use*

Reasonable use is the basic foundational concept of the current Oklahoma Groundwater Law. The leading case in Oklahoma discussing property rights in groundwater and the American rule of reasonable use is *Canada v. City of Shawnee*.²⁰¹ The Oklahoma Supreme Court examined groundwater law evolution starting with its genesis in England and traced the development through common law and ended the analysis with today's rule of reasonable use. In short, the City of Shawnee argued that the 1890 groundwater statute had adopted the English "absolute ownership rule."²⁰² The court rejected this argument, however, holding that the rights of an owner of water are forms of property subject to "qualifications . . . in the ownership and enjoyment of their own property and lives."²⁰³ The court concluded that the English rule of absolute

200. See *McKee v. Thornton*, 79 Okla. 138, 192 P. 212 (1920). The author would admit that this argument pertaining to the term "valid lease" is a weaker argument than with respect to the "land" term because the "valid lease" argument must necessarily be supported by the "land" argument to have any merit. Equitable principles, however, would strengthen the "valid lease" argument. See also Note, *supra* note 199, at 165.

201. 179 Okla. 53, 64 P.2d 694 (1936). Two excellent articles discuss this case and the evolution of the reasonable use doctrine. See generally *Rarick, Oklahoma Water Law, Ground or Percolating in the Pre-1971 Period*, 24 OKLA. L. REV. 403 (1971); see also *Jensen, supra* note 91.

202. See TERR. OKLA. STAT. § 4162 (1890). Today a similar statute is codified at OKLA. STAT. tit. 60, § 60 (1981). See generally *Rarick, Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19 (1970); *Rarick, Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1 (1969) (an excellent discussion of these two statutes).

203. *Canada*, 179 Okla. at 56, 64 P.2d at 699.

ownership did not apply and that Oklahoma follows the rule of "reasonable use." As a result, the court decided that Shawnee's use of water was unreasonable and therefore, should be enjoined.²⁰⁴

The determination, however, of what constitutes reasonable use is often extremely difficult. The solution involves an analysis examining the amount of water used combined with the mandatory stipulation that the water is taken only for a beneficial use. In order for an applicant to obtain a permit, the OWRB must find that the lands owned or leased overlie the particular basin, that the use intended is beneficial, and that waste will not occur.²⁰⁵ The Oklahoma Groundwater Law of 1972 does not define the term "beneficial use," but the term is used in the Act's declaration of policy.²⁰⁶ In contrast, the OWRB defines "beneficial use" as follows:

[T]he use of such quantity of stream or ground water when *reasonable intelligence and reasonable diligence* are exercised in its application for a lawful purpose and as is *economically necessary* for that purpose. *Beneficial uses* include but are not limited to municipal, industrial, agricultural, irrigation, recreation, fish and wildlife²⁰⁷

This definition, taken in conjunction with the declaration of policy, gives the OWRB flexibility and a wide latitude in determining beneficial uses of fresh groundwater.

Most importantly, however, the legislature must determine the best way to use fresh groundwater in Oklahoma. In 1957, a House Joint Resolution²⁰⁸ established a priority of beneficial uses for fresh groundwater.

204. *Id.* at 58, 64 P.2d at 701 (on rehearing). The American rule of reasonable use applies to groundwater. The *Canada* court stated: "[E]ach landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property, in view of the similar rights of others." *Id.* at 54, 64 P.2d at 696.

205. OKLA. STAT. tit. 82, § 1020.9 (1981). See also *infra* notes 216-24 and accompanying text.

206. See *supra* note 121 and accompanying text.

207. See OWRB RULES, *supra* note 4, at § 125.2. Other acceptable activities by the OWRB include mining, drilling oil and gas wells, and recovering oil and gas as beneficial uses. *Id.* § 605.1. Groundwater is regulated separately from stream water; the cited section deals with the latter. The general definition of beneficial use, see *supra* § 125.2, does not distinguish groundwater from stream water. Since the groundwater section of the OWRB RULES lacks a beneficial use definition, arguably the definition applied to stream water could also be applied to groundwater. A possible counter-argument might be that the stream water was not "fresh" or was unacceptable for domestic purposes and therefore was suitable for industrial uses such as oil and gas exploration.

208. H.R.J. 502, 26th Leg., 1957 Okla. Sess. Law 670, published as a footnote to OKLA. STAT. tit. 82, § 1078 (1971) (repealed 1972).

The beneficial uses of water shall be defined in this order of importance and priority:

- (1) Sustaining life (Domestic uses);
- (2) Maintaining health;
- (3) Providing food and fiber;
- (4) Increasing wealth; [and]
- (5) Augmenting recreation.

In *Texas County Irrigation & Water Resources Association v. Cities Service Oil Co.*²⁰⁹ the Oklahoma Supreme Court considered whether fresh groundwater could be used in oil and gas waterflooding operations. Naturally, the Oklahoma Supreme Court determined that the legislature had placed priorities on the beneficial uses of groundwater.²¹⁰

Nine months later, however, the supreme court did not consider the House Joint Resolution in *Hodges v. Oklahoma Water Resources Board*²¹¹ and decided that beneficial uses are all of equal priority.²¹² The *Hodges* court reasoned that if the legislature had established such priorities for various beneficial use categories, it would have so designated in a specific statutory section²¹³ dealing with water use permits.²¹⁴ Consequently, no priorities or adequate definitions of beneficial use concerning fresh groundwater have been established in Oklahoma.

Oklahoma does not have an unlimited supply of fresh groundwater, and the OWRB predicts that fresh groundwater supplies will be exhausted in certain parts of the state in the very near future.²¹⁵ Because certain uses of water are obviously more beneficial than others, a hierarchy of uses must be established to promote the utilization and planning modes of the Oklahoma Groundwater Law of 1972.

Furthermore, the concept of "waste" integrally relates to the inadequate formulations of beneficial use. As noted earlier, an approval of a permit application is contingent on the OWRB finding "that waste will not occur."²¹⁶ Frequently, legislation and particular statutes use language whereby one term defines and mutually includes the other. The OWRB Rules and Groundwater Law of 1972 are prime examples.²¹⁷

Id. This order of priority is to be used only as a guide in settling future applications for water.

209. 570 P.2d 49 (Okla. 1977).

210. *Id.* at 51. The court stated: "Present mechanical farming coupled with energy problems forces consideration of oil production, as well as irrigation, to be in both the third and fourth priorities of beneficial uses." *Id.*

211. 580 P.2d 980 (Okla. 1978).

212. *Id.* at 983.

213. See OKLA. STAT. tit. 82, §§ 1020.7 to 1020.11 (1981).

214. *Hodges*, 580 P.2d at 983.

215. "The Ogalla aquifer, underlying eight counties is the most productive and most utilized of the groundwater resources. However in recent years local water tables have dropped and overdrafting threatens the continued usage of this important aquifer. It has become apparent that groundwater resources cannot be relied upon as a long term water supply." OKLAHOMA WATER RESOURCES BD., OKLAHOMA COMPREHENSIVE WATER PLAN 155 (1980).

216. OKLA. STAT. tit. 82, § 1020.9 (1981).

217. "WASTE OR WASTE OF WATER means any act permitting or causing the pollution of fresh water or the use of such water in an inefficient manner or any manner that is not beneficial and is further defined in 82 O.S. 1981, § 1020.25 [sic]." OWRB RULES, *supra* note 4, at § 125.2 (emphasis added). The proper statutory section number is § 1020.15 which deals with waste prosecutions.

The separate terms of beneficial use and waste are not clearly defined, which renders the statutory construction mere guesswork. Obviously, the OWRB may not permit any fresh groundwater user to commit waste.²¹⁸

The OWRB solicited an opinion from the Oklahoma Attorney General in 1967. The issue presented was whether fresh water use, either underground or surface, would constitute waste for waterflood projects.²¹⁹ The Attorney General concluded in his opinion that such a use was not waste per se.²²⁰ Moreover, in *Texas County Irrigation* the Oklahoma Supreme Court decided that the OWRB had promulgated rules under the Oklahoma APA that had the effect of recognizing such a beneficial use without per se waste occurring.²²¹ Since the legislature failed to express disapproval of these particular administrative rules,²²² the Oklahoma Supreme Court held that it reflected a legislative intent to accept the OWRB regulation.²²³ The opinion indicated that under some circumstances in waterflood operations, waste may occur, but that this was an administrative decision for the OWRB to make.²²⁴

Thus, all things considered, the American rule of reasonable use applies to groundwater in Oklahoma. Reasonable use can be divided into

218. Waste is identified in the statute as follows:

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

OKLA. STAT. tit. 82, § 1020.15 (1981) (emphasis added). S.B. 288 and H.B. 1332 were introduced during Oklahoma's 38th Legislature (1981-82). The bills were intended to amend Oklahoma statute, title 82, § 1020.15 — the section defining waste. The section would have been amended to include, "the injection or discharge of fresh groundwater into a geologic formation where it will be lost for reuse or resulting in contamination by petroleum hydrocarbons or alteration of the physical, chemical or biological properties of such water by gaseous substances encountered in such formation." S.B. 288 & H.B. 1332. Each bill failed to pass.

219. Okla. Op. Att'y Gen. No. 67-159, at 1 (1967).

220. *Id.* at 4-5.

221. *Texas County Irrigation*, 570 P.2d at 51.

222. See OKLA. STAT. tit. 75, § 308(c) (1981) which states: "Failure of the Legislature to disapprove any rule transmitted under the provisions of other subsections of this section within thirty (30) legislative days after such rule has been transmitted shall result in the approval of such rule by the Legislature."

223. *Texas County Irrigation*, 570 P.2d at 51.

224. *Id.*

two categories: (1) beneficial use, and (2) waste. However, unless the Oklahoma Legislature, together with the OWRB, establish precise working definitions of these two terms, the water utilization and regulation in Oklahoma will remain haphazard. In addition, since the Oklahoma Supreme Court and the OWRB are interpreting and construing a 1967 Attorney General's opinion and a 1957 House Joint Resolution which have become outdated, the time is ripe for self-initiated legislative action to establish beneficial use priorities for fresh groundwater in Oklahoma. An undue delay will have serious future consequences—perhaps even a complete depletion of fresh groundwater in certain parts of Oklahoma. It goes without saying that industrial uses should not have the same priority or importance as water for drinking and sustaining life. In comparison, the economic effect of water must also be considered,²²⁵ because as fresh groundwater resources become depleted, the price associated along with water resources will undoubtedly rise, especially in the industrial context.²²⁶

V. CONCLUSION

The Oklahoma Supreme Court used a well-reasoned analysis in reaching a correct decision in the *Ricks* case. The private common law rights of mineral lessees to use fresh groundwater must be protected by the judiciary that recognized the rights. In the administrative context, the court's opinion in *Ricks* is an exemplar of both the proper and incorrect procedure for appeal. *Ricks I* illustrates exactly what technical hurdles an appellant must satisfy and the negative consequences that result from an implementation of improper procedures. Generally speaking, the OWRB, the agency involved in this case, must hold a hearing in its adjudicative capacity and issue a final order. In contrast, *Ricks II* is a paradigm of the proper procedure and Justice Opala's holding is indicative of the judicial protection and relief available to administrative appellants.

225. Modern economists use a micro economic concept of utility, a theory that explains value according to the degree to which a thing valued contributes to mankind's most urgent necessities. The total relative marginal utility and cost of the last little bit of water determines its price. Since an abundant supply of water exists, the price is low and as water resources become scarce, its price will rise dramatically. P. SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* 426 (7th ed. 1967).

226. Diminishing supplies of groundwater pose a severe threat to Oklahoma's future growth. Using 1977 constant dollars as a base, a projected water shortage in central Oklahoma may reduce industrial output by \$293 million by 1990 and reduce personal income by \$79.7 million. The reductions will accelerate rapidly and are projected to result in loss of \$2,508 million in industry output and \$771 million in personal income by the year 2040. *Oklahoma's Fast Depleting Water Reserves*, The Okla. Dig., Aug. 27, 1984, at 6, col. 1.

A statutory construction differing from that of the supreme court is both plausible and reasonable, and the resulting solution parallels the court's holding in *Ricks*. The Oklahoma Supreme Court clearly appeared to have the end (decision) in focus while fashioning the means (reasoning) of the case. While this is not necessarily improper, the procedure often results in forcing the reasoning and precedent to fit the desired end. Terms of art are specifically designated to command clarity and exactness; confusion is eliminated, but only when the terms are used properly, for chaos results otherwise. Along these lines, when precedent is implemented care must be maximized to avoid incorrect interpretations and to provide the proper *stare decisis* effect. Analogies are both proper and powerful in formulating legal arguments when identified as such, but are of limited value when used as precedent.

The members of the Oklahoma Legislature are to be commended for their foresight in establishing the OWRB and a groundwater law for Oklahoma. Eventually, as time passes and civilizations advance, the Legislature must keep in step and stay attuned to both judicial and administrative decisions. The implementation of amendments adds express legislative intent to already existing statutes. Let the members of the Oklahoma Legislature take up their pens to establish fresh groundwater use priorities and explicit statutory definitions of beneficial use and waste to aid the courts in construction and the OWRB in regulation of our most precious natural resource for future generations.

Richard B. Webber II