

WATER WARS

Earlier this year, a new law was passed protecting the Arbuckle-Simpson Aquifer. Since then a new trust has been formed to pump water from Southern to Central Oklahoma and a civil suit filed claiming the law is unconstitutional. What is going on here? What does it all mean? Is our water safe or not?

By Ray Lokey
Publisher

APPPEARING BEFORE the Central Oklahoma Municipal Water Trust (COMWT) in Piedmont last Thursday night, Brian DePonte walks into the room looking like a million bucks.

Dressed smartly in a pinstriped suit, white dress shirt and wearing a power tie, the black-haired, mustached vice president of sales for Municipal Services Group Inc. from Littleton, Colorado, is prepped to make a \$100 million plus presentation.

His audience is a group of community leaders tasked with finding new water sources for the cities of Yukon, Mustang, Chickasha and Piedmont.

Following a lasagna dinner at the Piedmont Civic Center and armed with power point slides and a booklet entitled "Arbuckle-Simpson Pipeline Project Financing," DePonte springs into action. He explains how a pipeline from central to southern Oklahoma could be financed through installment sales in the private sector by his company at an attractive interest rate.

The presentation goes smoothly, with the exception of one minor oversight—the pages inside the pamphlet explaining the project's financing in detail are blank.

No one in the room seems to mind.

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EARLIER THE SAME week, 100 miles south at Sulphur, board members of Citizens for the Protection of the Arbuckle-Simpson Aquifer (CPASA) discussed plans to make their organization stronger in between munching on ham sandwiches and potato chips.

President Gary Greene reviewed a recent letter and newspaper advertising campaign directed at citizens in central Oklahoma to create a greater public awareness about the aquifer issue. The board addressed a number of agenda items, ranging from creating new standing committees to mounting a letter-writing campaign protesting upcoming groundwater permit renewals.

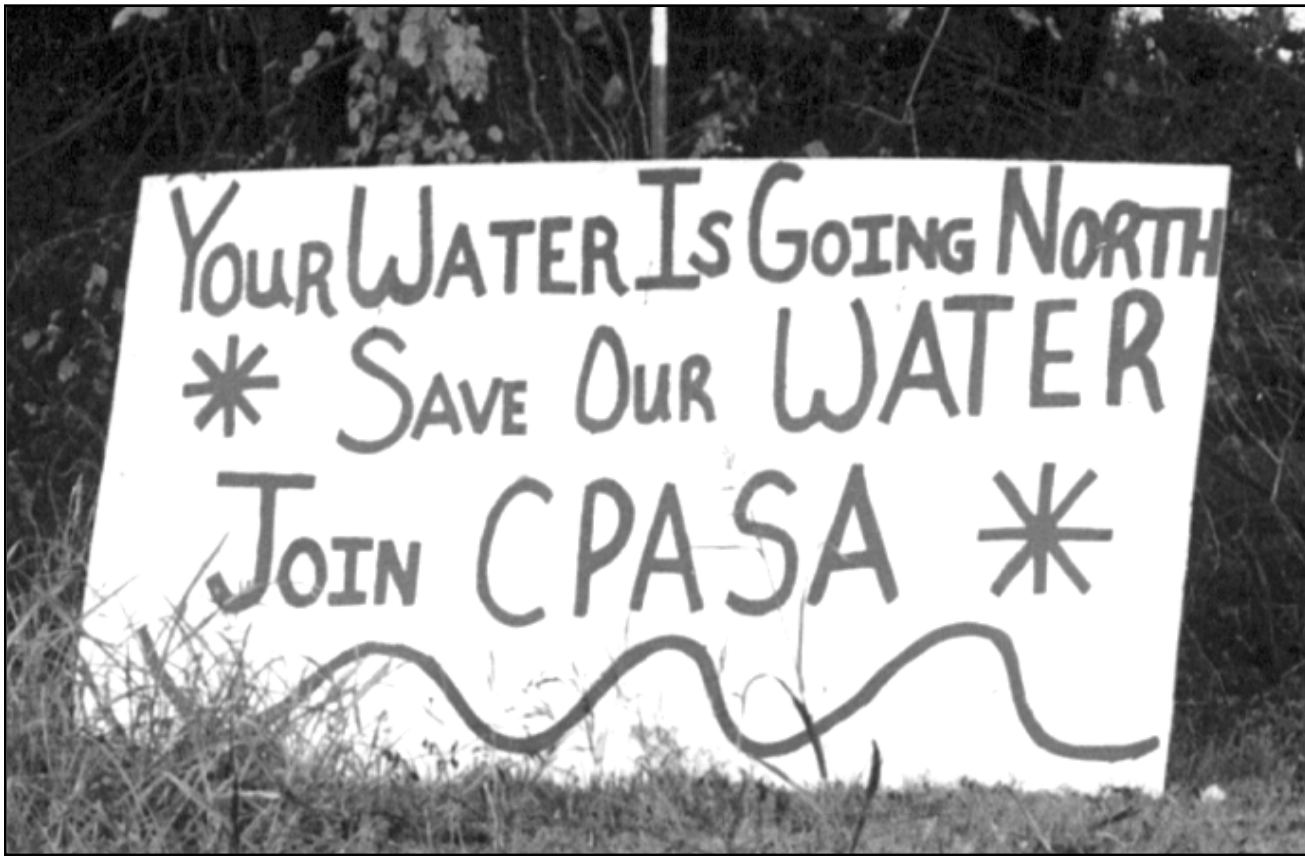
At the board meeting's conclusion, a general meeting to attract new members followed in the Murray County Expo Center. Attendance was light but the program informative as two staff members of the Oklahoma Water Resources Board made a power point presentation on the new comprehensive study of the aquifer now underway.

Locked in a desperate ongoing water battle pitting rural against urban Oklahoma, some CPASA board members wondered why more people were not present.

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THE TRUST KNOWN as COMWT was formed at a meeting in Yukon August 26. Earline Smaistrila, Yukon mayor and a vice president at Yukon National Bank, was elected chairperson. Board members include city managers, councilmen and other community leaders from Yukon, Mustang, Chickasha and Piedmont.

Their purpose—to find water to meet the future needs of their communities. Facing rapid growth projections and new federal arsenic levels effective in 2006, there is a sense of urgency and desperation in the air—some towns more desperate than others.

Serving in an advisory capacity,



WARNING SIGN—A hand-painted sign sits alongside State Highway 1 in Mill Creek alerting motorists about the threat posed by a group in Central Oklahoma pursuing a project to pump large volumes of water from the Arbuckle-Simpson Aquifer and encouraging them to join CPASA.

Yukon City Manager Jim Crosby wields tremendous influence over the trustees. It is Crosby they turn to for advice and Crosby who directs their course, albeit unofficially.

Like a riverboat gambler holding four aces, COMWT is betting on groundwater permits from the Arbuckle-Simpson—signed, sealed and delivered by four Southern Oklahoma landowners—to be their pot of gold at the end of the rainbow.

Signed the day before Senate Bill 288 went into effect prohibiting such agreements, trustees believe the next step is a judge declaring the new groundwater law unconstitutional, clearing the way for the pipeline and a water source that will quench their thirst for the next several decades.

They seem fairly confident that the judge will rule in their favor.

There are others who would disagree.

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WHEN THE LEGISLATIVE session began last year, Jay Paul Gumm of Durant had his work cut out for him as a freshman senator. The issue was fairly well-defined, at least so far as Johnston County was concerned.

The Central Oklahoma Water Resource Authority (COWRA) had been formed to pursue the construction of an 88-mile pipeline from Canadian County to south central Oklahoma to suck billions of gallons of water a year from the Arbuckle-Simpson Aquifer.

Lying beneath Pontotoc, Johnston, Murray and a fraction of Coal Counties, the aquifer is a 500 square-mile rock formation, that not unlike a sponge, soaks up and holds water underground—some estimates claiming three times the volume of water found in Lake Texoma.

If the water stayed put underground, there would be much less to squabble about. However, the aquifer also supplies water to an estimated 100 springs across its basin, creating streams such as Pennington Creek and Blue River that supply water for residents of Tishomingo and Durant.

As more and more groundwater permit applications were filed with the Oklahoma Water Resources Board, the question became how much ground-

water could be pumped without drying up the springs, which, in turn, would dry up the streams?

In a carefully crafted bill, Sen. Gumm introduced legislation co-authored by State Rep. Paul Roan of Tishomingo in the House designed to answer that very question.

Of course it required a type of comprehensive study that had never been done before, plus wording that would tie groundwater and surface water together for the first time in the history of Oklahoma.

Meanwhile, the new legislation also had to stop COWRA from proceeding with their project, estimated at a cost of close to \$200 million, as well as address temporary permits already held by landowners willing to make the sale.

The task seemed insurmountable; the opposition was formidable. Despite those challenges and through the support of local citizens led by then CPASA President Earl Brewer and the tenacity of Gumm and Roan, Senate Bill 288, as it became known, eventually passed.

The finger had been stuck in the dike.

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AFTER THE BILL was signed into law by Gov. Brad Henry, COWRA abandoned the Arbuckle-Simpson project to pursue other alternatives. For a time, it looked as if the aquifer—and the streams it supplies—were safe.

Three months later COMWT was formed with the expressed intent to do what COWRA decided it could not—build a pipeline and pump billions of gallons of water north to communities outlying Oklahoma City.

"They can get their senators and representatives to pass whatever law they want," Yukon City Manager Jim Crosby told an Oklahoma City reporter recently. "We're proceeding forward."

Despite the passage of SB 288, the war over water was far from over.

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WHEN SEN. GUMM learned a new trust had been formed to pursue taking water from the aquifer, he called it, "An inelegant attempt to circumvent the law."

The new law establishes a moratorium prohibiting any municipality or other political subdivision located outside of any county overlying the aquifer basin from entering into a contract to use groundwater from the aquifer. The moratorium will remain in effect until a new comprehensive study of the aquifer can be completed, expected to take five years.

Also mandated by the new law is that any permit for the removal of water will not reduce the natural flow of water from springs or streams in the Arbuckle-Simpson.

But remember the agreements with four landowners to sell their water to COMWT were signed the day before the law went into effect.

The trump card of Senate Bill 288 is that those permits are temporary and must be renewed annually at the beginning of each year.

The bill addresses the renewal of those permits as follows: "Any revalidation of a temporary permit, in effect upon the effective date of this act, that allows for any municipal or public water supply use of groundwater from a sensitive sole source groundwater basin outside of any county that overlays in whole or in part said basin shall be considered a new permit application and subject to the provisions of this act."

So what's the problem?

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THE ENFORCEMENT OF the new law falls under the jurisdiction of the OWRB. During a symposium about the aquifer November 4 in Oklahoma City, the question was posed to OWRB Executive Director Duane Smith whether or not the permits held by the landowners who have entered into contractual agreements with COMWT would come under the law or, since they were signed the day before the law went into effect, be grandfather-claused out.

"There's been a lawsuit about 288 that's going through the courts," Smith told an audience of about 300 people attending the symposium. "There's probably a number of things that could happen. It's unfair for me to say exactly what will happen."

"Senate Bill 288 does address the revalidation of permits," Smith continued. "Assuming that's the rule of law the day when it all comes up, my answer is 'yes,' we would put those under Senate Bill 288."

"We all know there is a legal process that is going to happen probably between now and then, but assuming things stay the way they are, Senate Bill 288 does address how the water board will address those tem-

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porary permits," Smith said.

Later during the symposium, when talking about the comprehensive study mandated by Senate Bill 288, Smith again emphasized the OWRB would follow the law.

"The goal of the study is to see how much water we can pump and still protect the springs," Smith said. "This isn't a philosophical statement by Duane Smith, the water board or the water board members. This is something that is in the law now. And we are going to do our level best to implement the law."

"We all have our philosophical differences, but the bottom line at the end of the day is we're going to implement the law."

But what's all this about the new law being unconstitutional?

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JUST DAYS AFTER Gov. Henry signed SB 288 into law, two landowners wanting to sell their water to central Oklahoma filed a civil suit in the District Court of Judge Carolyn Ricks in Oklahoma County. The case is being defended by the OWRB, State Attorney General Drew Edmondson, plus parties representing southern Oklahoma, including the city of Tishomingo.

In their brief, the landowners argue the new law is unconstitutional because it does not affect all persons similarly in similar circumstances, as it only applies to temporary permits from a sole-source aquifer. The Arbuckle-Simpson is the only aquifer in the state with that designation.

They also claim the new law violates their due process rights, and over time, "may effectively constitute a taking of private property rights from plaintiffs and other similarly situated parties without just compensation...."

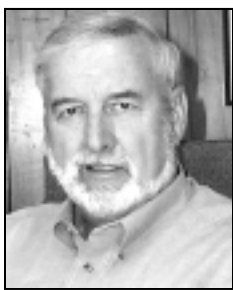
In a recent newspaper article appearing in the *Yukon Progress*, Yukon City Manager Jim Crosby added his thoughts about the legal question.

"Landowners contend they should not be restricted from selling underground mineral rights from land they own," Crosby said. "People have oil on their land and it's their oil. People have natural gas on their land, and it's their gas. It's your property," said Crosby. "But all of a sudden, the state decides water doesn't belong to the landowner."

"Oklahoma City has been through this fight and won. Now, we're in this fight and I think we'll win."

Had Crosby attended the full symposium on the Arbuckle-Simpson Aquifer in Oklahoma City instead of just part of it, he might not be as sure of himself.

Read on.
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DREW KERSHEN is a professor at the University of Oklahoma law school in Norman. While ultimately his opinion makes no difference in whether Senate Bill 288 is upheld or
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overturned, it does provide legal insight into whether or not the new law is constitutional.

Kershen was a guest speaker at the symposium hosted by the OWRB earlier this month entitled, "All Things Water." He spoke on Senate Bill 288 and House Bill 1410—calling for a moratorium on selling water to Texas.

In the esteemed professor's eyes, SB 288 comes closer to being constitutional than HB 1410, stating the latter "facially discriminates" against the dormant commerce clause.

"However, the fact that it (SB 288) does make a distinction between letting the cities and political entities over the basin utilize this without having to wait on this hydrological study does raise some significant legal issues," the professor said.

The more dominant issue, according to Kershen, is whether or not the moratorium is an "acceptable" rather than "excessive" burden by the state.

Kershen said if the moratorium became a permanent prohibition on the sale, then the state would face a real issue of whether or not it has taken the groundwater rights of private property owners.

However, since the purpose of the moratorium is only temporary, creating "a pause or delay" to allow the state to gather the kind of data necessary to better manage water resources,

Kershen said he believed it does not result in a taking of property.

He added that Oklahoma has for a long time had "reasonableness" as a standard to resolve well interference claims between groundwater claimants, and that the Supreme Court has upheld reasonable regulation of groundwater.

Sen. Gumm echoed Kershen's comments later in the program when he said, "What we're talking about is reasonable regulation of the use of private property. The bottom line is we're trying to move to reasonable management of this resource of the Arbuckle-Simpson Aquifer."

Sounds reasonable.

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WHETHER OR NOT Senate Bill 288 will be upheld or overturned is in the hands of the courts. Either way, the case will be appealed to the Oklahoma State Supreme Court for a final ruling.

Some estimate the decision to be only a matter of months away. Others, perhaps more realistically, claim it could be years.

Meanwhile, as Jim Crosby says, COMWT is moving forward. Estimating the pipeline construction will take up to five years, Crosby says their plan is to purchase water from Oklahoma City and blend it with their existing groundwater to meet the new arsenic standards until given the green light



AT RISK—One of the main concerns of residents in Southern Oklahoma is overpumping from the Arbuckle-Simpson Aquifer. The aquifer supplies much of the water in Pennington Creek (shown above), Blue River and other streams in this part of the state. If too much groundwater is pumped, the springs could shut down, drying up the streams.

to pump water from the Arbuckle-Simpson.

And while the members of COMWT continue to meet and push forward to pump large volumes of water from the aquifer some day in the future—despite what it might do to Blue River, Pennington Creek, Byrd's Mill Spring, and Turner Falls, among others—what, may you ask, can the average citizen do?

One way to help is, if you're not a member of CPASA, join today. CPASA has shrunk in membership from a high of around 450 members at its peak one year ago, to about 340 today, even though the threat is just as great, if not greater.

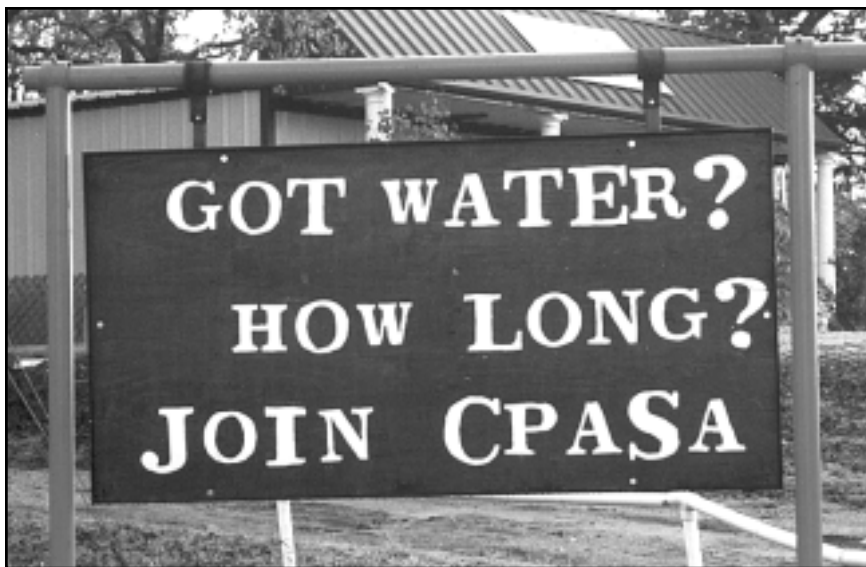
To join send a \$10 membership fee (or more if you desire) to CPASA, P.O. Box 891, Tishomingo, OK 73460.

Secondly, CPASA is working on putting together packets of letters to protest the renewal of permits con-

tracted with Southern Oklahoma landowners to sell their water to COMWT. The more people who protest, the more the OWRB is going to sit up and take notice of what people have to say. Any protests have to be filed between now and Dec. 31, so the clock is ticking.

At the time of this writing, protest letters are being finalized and should be available within days at various business locations for your endorsement. Watch future issues of this newspaper to learn where you can pick up your packet.

This war is far from being over.



ANOTHER CPASA SIGN located in front of a Tishomingo business poses the question of how long city residents can depend on their present water supply if the pipeline project is successful.

Learn more about the fight to save the Arbuckle-Simpson Aquifer by going to arbsimaquifer.net on the Internet.