

YOU CAN LEAD LIVESTOCK TO WATER... A SURVEY OF EXEMPT LIVESTOCK WELLS IN THE WEST

TIFFANY E. DOWELL*

I. The Prior Appropriation Doctrine.....	2
II. Exempt Wells Generally.....	3
III. Livestock Watering Exemptions by State	4
A. Alaska.....	5
B. Arizona.....	5
C. Colorado	6
D. Idaho.....	6
E. Kansas	6
F. Montana	7
G. Nebraska.....	7
H. Nevada.....	7
I. New Mexico	8
J. North Dakota	8
K. Oklahoma.....	9
L. Oregon	9
M. South Dakota	9
N. Texas.....	10
O. Utah.....	11
P. Washington	11
Q. Wyoming.....	12
IV. Litigation Concerning Livestock Watering Exemptions	12
A. Washington.....	12
B. South Dakota.....	17
C. Kansas	19
V. Conclusion.....	20

* Tiffany Dowell grew up on a family farm and ranch near Logan, New Mexico. She holds a Bachelor of Science in Agribusiness, Farm and Ranch Management from Oklahoma State University and a Juris Doctorate from the University of New Mexico. Ms. Dowell is currently an Assistant Professor and Extension Specialist in Agricultural Law at Texas A&M University.

Most western states require a person seeking to drill a well to obtain a permit from the state. Permit applications frequently trigger expensive and time-consuming processes, including requiring the state to investigate and make specific findings with regard to availability of water for the requested use and the potential impact the proposed use would have on other water users. Many statutory schemes, however, contain an exemption from these permitting processes for wells that applicants will use for livestock watering.

As the agricultural industry has changed and operations have grown over the decades since the enactment of these livestock well statutes, important questions regarding statutory interpretation have arisen. What qualifies as livestock watering? Do limitations exist, either based on the quantity of water appropriated or on the specific type of use of the water? How much water may a user appropriate for livestock purposes before the state requires a permit be obtained? Understanding the existing limitations on exempt livestock wells is necessary and important, both for the state's interest in conserving water and the producers' interest in ensuring compliance before investing extensive capital in an operation.

This article, which is limited to discussion of groundwater only, discusses each of the livestock watering exemptions in the West and the litigation that has surrounded these statutes. First, this article provides a basic overview of the prior appropriation doctrine and the concept of exempt wells. Next, this article looks specifically at statutory exemptions for livestock watering by state. Finally, this article reviews recent litigation surrounding livestock watering exemptions in the West.

I. THE PRIOR APPROPRIATION DOCTRINE

In the western United States, the principal of prior appropriation generally governs groundwater rights administration.¹ Unlike the riparian approach followed by most eastern states,² prior appropriation does not look at the location of the landowner in proximity to the water, but instead it provides a "first come, first served" basis for those who appropriate water for beneficial use.³ Prior appropriation begins with the premise that all groundwater belongs to the people of the state.⁴ The first person to divert water and put it to beneficial use obtains a right to such use, and that right is given priority over all subsequently obtained, or "junior," rights.⁵ Prior appropriation essentially means "first in time, first in right."⁶ Therefore, a senior water appropriator has a right to his or her share of water before a junior appropriator can obtain his or her share. In times of shortage, a senior appropriator will get his or her entire al-

1. John C. Tracy et al., *Exempt Wells: An Introduction*, 148 J. CONTEMP. WATER RESEARCH & EDUC. 1, 1 (2012).

2. See Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. COLO. L. REV. 675, 679-80 (2012).

3. See *id.* at 676-77, 680.

4. *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164, 1169 (Kan. 1981).

5. *Id.*; Benson, *supra* note 2, at 676-77.

6. Tracy, *supra* note 1, at 1.

lotment, and the junior appropriator might not get any water if there is not a sufficient quantity of water beyond the amount which the senior water right holder has the right to appropriate. Thirteen states follow the concept of prior appropriation to govern groundwater resources: Alaska, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.⁷

Most prior appropriation states require a potential appropriator to go through a permitting process before withdrawing water. This process varies by state but can be expensive and time consuming. For example, in New Mexico, an application for a well permit not only requires both published notice and a period for the filing of objections but also requires that prior to granting a permit, the state engineer make specific findings that water is available for appropriation, the proposed withdrawal will not impair existing water rights, and the proposed withdrawal is not against the public interest or conservation goals of the state.⁸ This application process can take many years and tens of thousands of dollars to complete.⁹

II. EXEMPT WELLS GENERALLY

Recognizing the burden placed on would-be appropriators and the minimal amount of water used by certain types of wells, many states have exempted certain types of wells from at least some portion of the permitting process.¹⁰ These have come to be known as “exempt wells.” Common exemptions include wells withdrawing only limited quantities of water or wells used for specific purposes, such as domestic use or livestock watering.¹¹

The rationale behind the exemptions is that the relatively small amount of water withdrawn does not justify the extensive permitting process usually required for larger withdrawals.¹² Additionally, due to the large number of domestic well applications, requiring the traditional permitting process for limited withdrawal wells would pose severe administrative difficulties for state governments.¹³ Some estimates indicate there may currently be over one million domestic wells in the West with tens of thousands more added each year.¹⁴

7. See Water Systems Council, *Who Owns the Water: A Summary of Existing Water Rights Laws* 3 (Oct. 2009).

8. N.M. STAT. ANN. §§ 72-12-3(D)-(E) (1978).

9. Brief for New Mexico Groundwater Association as Amicus Curiae Supporting Petitioner, *Bounds v. New Mexico*, 2011-NMCA-011, 252 P.3d 708 (2010), *overruled by* 2013-NMSC-037, 306 P.3d 457 (2013).

10. Tracy, *supra* note 1, at 1.

11. Nathan S. Bracken, *Scalpels v. Hammers: Mitigating Exempt Well Impacts*, 148 J. CONTEMP. WATER RESEARCH & EDUC. 24, 24 (2012).

12. Drew L. Kershen, *Domestic Well Exemption in Oklahoma Groundwater Law - Impact and Implications*, 64 OKLA. L. REV. 563, 564 (2012).

13. *Judge's Ruling Could Impact Domestic Well Permits*, ALBUQUERQUE JOURNAL, July 12, 2008, <http://www.abqjournal.com/news/state/apwell07-12-08.htm>.

14. Bracken, *supra* note 11, at 24.

All of the prior appropriation states, with the exception of Utah, recognize at least some form of exemption for certain wells.¹⁵ Additionally, four states that do not follow a strict prior appropriation approach for governing groundwater use also provide a form of exemption from their general statutory schemes for certain wells: Arizona, Nebraska, Oklahoma, and Texas.¹⁶ Thus, a total of sixteen states recognize exempt wells.

The portion of the permitting process from which exempt well applicants are excused varies by state. In Oregon, for example, although a livestock well applicant is excused from the registration and permitting requirements generally imposed, the applicant must still file the well with the Water Resources Department, pay a recording fee, and provide a map showing the location of the well.¹⁷ While most states only provide exemptions from some portion of the permitting process, three states – Idaho, South Dakota, and Wyoming – also exempt domestic wells from priority administration, meaning that exempt wells are not subject to curtailment in favor of senior water users in times of shortage.¹⁸

Similarly, the types of wells these statutory exemptions cover vary by state. Some states exempt certain types of wells without referencing the quantity of water. In Washington, for example, the statutory exemption for stock watering does not contain any limitation on the quantity of water that may be withdrawn for this purpose.¹⁹ Other states look not at the type of well but only at the quantity of water, allowing exemptions for any wells utilizing less than a set amount. Following this approach, Alaska provides an exemption from the permitting process for wells withdrawing less than “a significant amount of water,” regardless of the use.²⁰ Most states, however, apply a hybrid exemption, focusing both on the type of use and the quantity of water appropriated.²¹

III. LIVESTOCK WATERING EXEMPTIONS BY STATE

Of the sixteen states providing for exempt groundwater wells, all but Alaska and Montana recognize some form of specific exemption or priority treatment for wells utilized for livestock watering purposes. The parameters of each statute vary by state.

15. Jesse J. Richardson, Jr., *Existing Regulation of Exempt Wells in the United States*, 48 J. CONTEMP. WATER RESEARCH & EDUC. 3, 3-4 (2012).

16. *Id.* at 4.

17. ORE. REV. STAT. §§ 537.545 (5)-(7).

18. *See* Jesse J. Richardson, Jr. & Tiffany Dowell, *The Implications of Bounds v. State of New Mexico*, 148 J. CONTEMP. WATER RESEARCH & EDUC. 17, 18 (2012).

19. *See* WASH. REV. CODE ANN. § 90.44.050 (2013); *Five Corners Family Farmers v. Washington*, 268 P.3d 892, 900-01 (Wash. 2011).

20. *See* ALASKA ADMIN. CODE tit. 11, § 93.035(b) (2004).

21. *See, e.g.*, IDAHO CODE ANN. §§ 42-111(1)-(2) (1995).

A. ALASKA

Alaska requires potential appropriators to file an application before water may be appropriated.²² Although Alaska does not expressly exempt livestock wells, it provides an exemption from the application requirement for uses that do not qualify as “a significant amount of water.”²³ Regulations define a “significant amount of water” as the consumptive use of more than five thousand gallons from a single source in a single day; the daily or recurring consumptive use of more than five hundred gallons per day from a single source for more than ten days per year; the non-consumptive use of more than thirty thousand gallons per day from a single source; or any use that might adversely affect water rights of appropriators or of the public interest.²⁴ Thus, Alaska exempts wells withdrawing less than the defined amounts, including those used in connection with livestock, from the application process.

B. ARIZONA

Arizona provides an exemption for all withdrawals of groundwater for non-irrigation uses from wells with a pump capacity of thirty-five gallons per minute or less.²⁵ However, in 2006, Arizona imposed additional restrictions on drilling exempt wells located within one hundred feet of the service area of a municipal provider with an assured water supply designation within an active management area.²⁶

Additionally, in certain areas, stock watering wells are granted additional exemptions. Currently, in active management areas, withdrawals from exempt wells drilled after April 28, 1983 are limited to ten acre-feet per year for uses other than domestic or livestock.²⁷ Similarly, if subsequent active management areas are created in the future, no withdrawals would be permitted except those for domestic use or stock watering.²⁸ The applicable statute defines stock watering as “the watering of livestock, range livestock, or poultry.”²⁹ Within an active management area, Arizona exempts stock watering wells and releases a well owner from needing a groundwater right or withdrawal permit, complying with spacing rules, using water metering devices, paying groundwater withdrawal fees, and filing an annual groundwater use report.³⁰ Exempt well owners must only file a notice of intent to drill, use a licensed well driller, and pay the required filing fee before drilling may occur.³¹

22. ALASKA STAT. § 46.15.040(b) (1986); ALASKA ADMIN. CODE tit. 11, § 93.035(b) (2004).

23. ALASKA ADMIN. CODE tit. 11, §§ 93.035(a), (c).

24. *Id.* § 93.035(b).

25. ARIZ. REV. STAT. ANN. § 45-454(B) (2008); *see also id.* § 45-402(8) (2003).

26. *Id.* § 45-454(C) (2008).

27. *Id.* § 45-454(B)(2).

28. *Id.* § 45-454(B)(3).

29. *Id.* § 45-454(M)(3).

30. ARIZ. DEP’T OF WATER RES., EXEMPT WELLS (2006), *available at* http://www.azwater.gov/azdwt/StatewidePlanning/SWAG/documents/Exempt_wells080406.pdf.

31. ARIZ. REV. STAT. ANN. § 45-454(G).

C. COLORADO

Colorado provides an exemption from the permitting process for wells producing less than fifteen gallons per minute that are used for “the watering of poultry, domestic animals, and livestock on farms and ranches.”³² Colorado generally allows exempt stock watering wells only on tracts of land of thirty-five acres or more.³³ Different requirements, including limitations on the amount of water that may be pumped per minute, may be imposed on wells located within Designated Groundwater Basins.³⁴

D. IDAHO

Idaho exempts domestic wells from the permitting process, the payment of an application fee, and the requirement of a measurement device.³⁵ Idaho provides a two-prong definition of “domestic use.” The first prong of the test applies to stock watering, defining domestic use as including the use of water for “livestock and for any other purpose in connection therewith” if the total use does not exceed thirteen thousand gallons per day.³⁶ Even if stock wells fall within this definition, they are still subject to inspection and licensing requirements.³⁷

E. KANSAS

Kansas, too, exempts domestic wells from the state’s permit requirement.³⁸ However, domestic well owners are not exempt from providing information regarding water use to the chief engineer.³⁹ Kansas defines domestic uses as including water used “for the watering of livestock, poultry, farm and domestic animals used in operating a farm[.]”⁴⁰ To fall within the domestic use definition, livestock must be (1) pastured and not confined to a feedlot; (2) cattle feedlots must have fewer than one thousand head capacity; and (3) other animals in a confined feeding operation must consume less than fifteen acre-feet per year.⁴¹

32. COLO. REV. STAT. § 37-92-602(1)(b) (2013); COLO. DIV. OF WATER RES., GUIDE TO COLORADO WELL PERMITS, WATER RIGHTS, AND WATER ADMINISTRATION (2012) at 2, available at <http://water.state.co.us/DWRIPub/Documents/wellpermitguide.pdf>.

33. See COLO. REV. STAT. § 37-92-602; COLO. DIV. OF WATER RES., *supra* note 32, at 2; see also Sherry A. Caloia et al., *The Water Rights Determination and Administration Act of 1969: A Western Slope Perspective on the First Thirty Years*, 3 U. DENV. WATER L. REV. 39, 44 n.20 (1999).

34. See COLO. REV. STAT. § 37-92-602(1)(a); *id.* § 37-90-105(1)(b) (allowing exemption for livestock wells pumping up to 50 gallons per minute).

35. IDAHO CODE ANN. § 42-221(K)(1) (2012); *id.* § 42-227 (2001); *id.* § 42-701(7) (1998).

36. *Id.* § 42-111(1)(a) (1995).

37. *Id.* § 42-227 (2001).

38. KAN. STAT. ANN. § 82a-728(a) (1981).

39. *Id.* § 82a-705a (1957).

40. *Id.* § 82a-701(c) (2009).

41. See KAN. ADMIN. REGS. § 5-1-1(aaaa)(1) (2008) (distinguishing between “stockwatering” and “domestic use”); see also email from Lane Letourneau, Kan. Dep’t of Agric., to author (Sept. 9, 2012, 02:10 pm MDT) (on file with *Water Law Review*); email from Lane Letourneau,

Under this rule, while a well serving any number of cattle on pasture and any amount of water consumed could qualify as domestic, no cattle feedlots over one thousand head capacity may fall within the exception. Other types of livestock in confined operations, such as confinement hogs or sheep feedlots are not limited as to capacity, but are limited in the total amount of water a user may withdraw each year, whereas no such water quantity limitation is imposed on a cattle feedlot of less than one thousand head capacity.⁴²

F. MONTANA

Montana provides a quantity, rather than use, exemption to the permitting process and, therefore, does not expressly address livestock watering. Specifically, wells located outside domestic management areas are exempt if they appropriate thirty-five gallons a minute or less and do not exceed ten acre-feet of withdrawal per year.⁴³ Although these wells are exempt from the permitting process, a well owner must still file a notice of completion and, upon filing, the state is required to issue a certificate of water right.⁴⁴

G. NEBRASKA

Generally, Nebraska statutes exempt all single water wells that are only capable of pumping fifty gallons per minute or less.⁴⁵ In addition to state statutory requirements, Nebraska also allows local natural resource districts to pass rules, including permitting requirements for certain wells, but such additional permitting is not allowed for water “used to water range livestock.”⁴⁶ Also, although the state may issue stays on drilling in over-appropriated and fully appropriated basins, wells for the watering of range livestock are exempt from any such stay.⁴⁷ However, all wells, including exempt livestock wells, must register with the state.⁴⁸

H. NEVADA

Nevada provides a permitting exemption for domestic wells, including wells used for “the watering of livestock and any other domestic animals” so long as the withdrawal from the well does not exceed two acre-feet per year.⁴⁹

Kan. Dep’t of Agric., to author (Sept. 8, 2012, 05:39 pm MDT) (on file with *Water Law Review*). A vested right does exist for confined feeding facilities with a capacity of one thousand head or more that was privately owned and operated before May 1, 1986; such operations are certified for the lesser of their actual use or fifteen acre-feet of water per year. *Id.* § 5-2-4.

42. *Id.* § 5-1-1(aaaa)(1) (2008); see also email from Lane Letourneau to author (Sept. 9, 2012), *supra* note 41; email from Lane Letourneau to author (Sept. 8, 2012), *supra* note 41.

43. MONT. CODE ANN. § 85-2-306(3)(a)(iii) (2013).

44. *Id.* § 85-2-306(5).

45. NEB. REV. STAT. § 46-735(1)(b) (2004).

46. *Id.* § 46-735(1)(c).

47. *Id.* § 46-714(3)(f) (2009).

48. *Id.* § 46-602(1) (2013); see also email from Pam Bonebright, Neb. Dep’t of Natural Res., to author (Sept. 25, 2012, 6:15 am MDT) (on file with *Water Law Review*).

49. NEV. REV. STAT. §§ 534.013(2), .180(1) (2007).

The Nevada State Engineer does, however, retain the discretion to require registration of domestic wells⁵⁰ and to limit the depth of such wells or even prohibit drilling altogether if water districts or municipalities in the area can furnish water in lieu of a domestic well.⁵¹

I. NEW MEXICO

New Mexico not only requires that a person seeking to appropriate water for livestock purposes file an application with the state engineer but also requires the state engineer to grant the permit upon its filing, leaving the state engineer no discretion to review or analyze the application.⁵² Thus, livestock wells are exempt from the typical requirement of publication, notice, investigation, and findings by the state engineer.⁵³ If an applicant seeks to drill a livestock well on federal land, the applicant must submit proof to the state engineer that he or she is legally entitled to place livestock on the land where the water is to be used and he or she has received permission to access the portion of the land necessary to drill the well.⁵⁴ The New Mexico Supreme Court recently upheld a facial constitutional challenge brought against the domestic well statute, finding that the statute did not violate the constitutional doctrine of prior appropriation.⁵⁵

J. NORTH DAKOTA

Wells drilled for livestock purposes in North Dakota are exempt from the state's permit requirements so long as the total amount of water appropriated is less than 12.5 acre-feet per year.⁵⁶ North Dakota defines "livestock uses" as "the use of water for drinking purposes by herds, flocks, or bands of animals kept for commercial purposes."⁵⁷ All appropriators, including those drilling livestock wells, must notify the state engineer of the well's location and acre-foot capacity.⁵⁸

50. *Id.* § 534.180(2).

51. *Id.* §§ 534.120(3)(c)-(d).

52. *See* N.M. STAT. ANN. § 72-12-1.2 (West 2003).

53. *See id.*

54. *Id.*

55. *See* *Bounds v. New Mexico*, 2013-NMSC-037, 306 P.3d 457 (2013); *see also* Benson, *supra* note 1, at 700 n.146 (although the livestock watering statute is a separate provision and is not at issue in *Bounds*, the statutes are nearly identical, and the Court's ruling will likely be equally applicable).

56. N.D. CENT. CODE § 61-04-02 (2013). Although the statute applies to "constructed works, dams or dugouts", it is presumed that this includes the construction of wells. *See* Nathan Bracken, *Exempt Well Issues in the West*, 40 ENVTL. L. 141, 177 (2010).

57. *Id.* § 61-04-01.1(9).

58. *Id.*

K. OKLAHOMA

In Oklahoma, any person may appropriate groundwater from his or her own land for domestic use without a permit.⁵⁹ “Domestic use” includes the use of water by a natural individual for “farm and domestic animals up to the normal grazing capacity of the land[.]”⁶⁰ There is no express limitation on the amount of water that a domestic well may withdraw, but domestic wells are subject to sanctions against waste.⁶¹

The Oklahoma Water Resources Board expanded the definition of “domestic use” to include an exemption for water withdrawn by natural individuals for “agricultural purposes.”⁶² The Oklahoma Water Resource Board construes this regulation as applying a 5 acre foot per year limit on wells used for “agricultural purposes.”⁶³

Certainly the Oklahoma Water Resource Board’s “agricultural purposes” definition appears broader than the more limited statutory definition and would include, for example, a feedlot or dairy that would likely not fall within the statutory “domestic use” definition as it would have more cattle than the normal capacity of the land. Importantly, both of these definitions limit the exemption to “natural individuals,” thereby excluding corporations or partnerships from falling within the exemption.

L. OREGON

Oregon law exempts wells for several uses, including those for “stockwatering purposes,” from the requirements of registration and permitting.⁶⁴ A person drilling an exempt well, however, must file the exempt well with the Water Resources Department, pay a \$300 recording fee, and provide a map showing the location of the well within thirty days of drilling completion.⁶⁵

M. SOUTH DAKOTA

Generally, a person seeking to appropriate water in South Dakota must obtain a permit from the Water Management Board.⁶⁶ An exemption exists, however, for well owners seeking to make “reasonable domestic use” of water.⁶⁷ The state limits reasonable domestic use to twenty-five gallons per minute on an average daily basis and to 25,920 gallons per day or less as necessary for

59. OKLA. STAT. tit. 82, § 1020.3 (1973).

60. *Id.* § 1020.1(2).

61. *See id.* § 1020.3; *see also* email from Lou Klaver, Okla. Water Resources Bd., to author (Sept. 24, 2012, 12:03 pm MDT) (on file with *Water Law Review*).

62. OKLA. ADMIN. CODE 785:30-1-2 (2008).

63. Email from Lou Klaver to author, *supra* note 61.

64. OR. REV. STAT. § 537.545(1)(a).

65. *See id.* §§ 537.545 (5)–(7).

66. S.D. CODIFIED LAWS § 46-5-10 (1993).

67. *Id.* § 46-5-8.

domestic purposes.⁶⁸ Additionally, South Dakota considers domestic purposes to be the highest use of water, taking precedence over all appropriative rights.⁶⁹

The definition of “domestic use” includes stock watering.⁷⁰ Originally, however, the South Dakota statute did not provide a definition of “stock watering.” Courts were left to interpret the phrase, and, in doing so, strictly limited the permissible uses to the consumption of water by animals.⁷¹ In 2012, the South Dakota Legislature amended the statute to define the phrase more broadly than the court’s interpretation. Thus, under the current South Dakota law, stock watering is defined as “[u]se of water not exceeding eighteen gallons per minute on an average daily basis for livestock in a confinement operation, including water for drinking, sanitary and general welfare purposes, and for like purposes by those caring for the livestock[.]”⁷² Importantly, the quantity limitations for domestic use are applicable to stock watering as well.⁷³

N. TEXAS

In Texas, the preferred method of groundwater management is to place such management in the hands of various local groundwater conservation districts located throughout the state.⁷⁴ The Texas Water Code provides that wells “used solely” for providing water for livestock or poultry on a tract of land larger than ten acres that are “incapable of producing more than twenty-five thousand gallons of groundwater per day” are exempt from the permitting requirements of local groundwater conservation districts.⁷⁵ Thus, local groundwater conservation districts may not require a permit or restrict the production for exempt wells, even during times of drought.⁷⁶ Importantly, even though livestock wells are exempt from the permitting process, they must still be registered in accordance with the rules of the local district, be equipped and maintained to conform with rules regarding installation, and must have a drilling log on file with the local district.⁷⁷

68. S.D. ADMIN. R. 74:02:01:01(7) (2012).

69. S.D. CODIFIED LAWS § 46-1-5(1).

70. *See id.* § 46-1-6(7).

71. *See* In The Matter of the Petition for Declaratory Ruling Regarding the Applicability of Domestic Water Use for Longview Farm LLP’s Well, No. CIV. 09-63 (*Longview Farm*), 14 (1st Judicial Cir. Mar. 22, 2010).

72. S.D. CODIFIED LAWS § 46-1-6(7) (2012).

73. *See* S.D. ADMIN. R. 74:02:01:01(7); *see id.* 74:02:01:01(1) (if a confined feeding operation exceeds reasonable domestic use, it is deemed a “commercial use”).

74. TEX. WATER CODE ANN. § 36.0015 (West 2013).

75. *Id.* § 36.117(b)(1); *but see* §36.117(d)(1) (allowing a district to cancel a previously granted exemption and require a permit if the well is located in Hill Country Priority Groundwater Management Area and is no longer used solely for domestic or livestock watering).

76. *See* Carl R. Galant and Russell S. Johnson, *Exempt Uses of Groundwater and Surface Water*, 33 ST. BAR OF TEX., no. 3, Oil, Gas and Energy Resources Law Section Report, Mar. 2009, at 3, available at http://www.mcginislaw.com/images/uploads/news/09-03-01_Galant_Johnson_exempt_uses_of_groundwater.pdf.

77. *See* TEX. WATER CODE ANN. §§ 36.117(h)-(i) (West 2011).

These requirements, however, are merely a baseline, and local groundwater conservation districts may broaden the exemptions.⁷⁸ For example, the Brazos Valley Groundwater Conservation District doubles the maximum production allowed for exempt wells, allowing an exemption for domestic or livestock wells capable of producing up to fifty thousand gallons per day.⁷⁹ Similarly, the Bluebonnet Groundwater Conservation District exempts “agricultural wells” rather than the narrower stock well definition contained in the state statute from portions of the permitting process and from production limitations.⁸⁰

Also of note, at least one Texas groundwater conservation district expressly excludes Confined Animal Feeding Operations (“CAFOs”) from the livestock watering exemption.⁸¹ Thus, while a CAFO may not qualify for exemption in certain counties, they may well be able to drill a well without completing the permitting process in other areas of the state.

O. UTAH

Utah recognizes no exempt wells, finding instead that any impairment, even *de minimus*, is unacceptable.⁸² Thus, all livestock wells must go through the general permitting process with the Utah State Engineer.⁸³

P. WASHINGTON

Washington exempts certain wells from the permitting process, including wells used for “stock-watering purposes.”⁸⁴ There is no limitation on the quantity of water for stock-watering purposes under this statute.⁸⁵ Although the statute does not define the phrase “stock-watering purposes,” agency interpretation has given this phrase broad meaning beyond merely livestock consumption of water.⁸⁶ The state, however, may require exempt users to provide information regarding the means and quantity of water withdrawal.⁸⁷

78. See TEX. WATER CODE ANN. § 36.117(a) (West 2008).

79. BRAZOS VALLEY GROUNDWATER CONSERVATION DIST., RULES OF THE BRAZOS VALLEY GROUNDWATER CONSERVATION DIST., § 8.1(a) (2013), <http://brazosvalleygcd.org/wp-content/uploads/2012/12/BVGCD-Rules-Adopted-5-9-13.pdf>.

80. BLUEBONNET GROUNDWATER CONSERVATION DIST., RULES OF THE BLUEBONNET GROUNDWATER CONSERVATION DIST., § 8.3(B) - (C) (2013), <http://www.bluebonnetgroundwater.org/wp-content/uploads/2012/06/Bluebonnet-GCD-Rules-17-043.pdf>.

81. See NORTH PLAINS GROUNDWATER CONSERVATION DIST., RULES OF NORTH PLAINS GROUNDWATER CONSERVATION DIST., § 1.49(D), (N); 6.4 (2013), <http://www.northplainsgcd.org/downloads/category/5-district-documents.html>.

82. See, e.g., *Wayment v. Howard*, 144 P.3d 1147, 1151 n.11 (Utah 2006).

83. UTAH CODE ANN. § 73-3-2(1)(a) (West 2013).

84. WASH. REV. CODE ANN. § 90.44.050 (2013).

85. See *Five Corners Family Farmers v. Washington*, 268 P.3d 892, 900-01 (Wash. 2011).

86. See *infra* Parts IV(A)(2).

87. WASH. REV. CODE ANN. § 90.44.050 (2013).

Q. WYOMING

While Wyoming does not exempt stock wells from the permitting process, it does provide exemptions from certain requirements in the adjudication process.⁸⁸ Moreover, domestic and stock wells are given a “preferred right” over all other uses, regardless of the date of priority.⁸⁹ Thus, if a non-preferred well interferes with a preferred well, the non-preferred user must either reduce his use to eliminate the interference or provide water to the preferred user.⁹⁰ While Wyoming does not define “stock use,” it does limit the permissible rate of withdrawal to twenty-five gallons per minute.⁹¹

IV. LITIGATION CONCERNING LIVESTOCK WATERING EXEMPTIONS

Although domestic exemptions have been the focus of ongoing controversy throughout the West,⁹² there has been very little litigation specifically involving exempt wells for stock watering purposes. The cases that have been decided, however, indicate that the potential for future litigation is extremely high because similar issues are likely to arise in other states.

A. WASHINGTON

The most in-depth analysis of exempt livestock wells has occurred in the state of Washington. Like some other western states, wells used for stock-watering purposes are exempt from the permitting process.⁹³ Specifically, the statute provides that “any withdrawal of public ground waters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, . . . or for an industrial purpose not exceeding five thousand gallons a day” is exempt from the permitting process.⁹⁴ Additional statutory language refers to these withdrawals as “small withdrawals” and “minimal uses.”⁹⁵ This statute has generated two main questions: (1) Does the five thousand gallon exemption apply to wells used for stock-watering?; and (2) What constitutes stock-watering purposes?

88. WYO. STAT. ANN. §§ 41-3-930(a), -935(b) (2013); *see also* email from Lisa Lindemann, State Engineer’s Office to author (August 13, 2012 09:43 am MDT) (on file with *Water Law Review*).

89. *Id.* § 41-3-907.

90. *Id.* § 41-3-911(a).

91. *Id.* § 41-3-907.

92. *See* Richardson, *supra* note 15, at 3.

93. *See supra* Part III(P).

94. WASH. REV. CODE ANN. § 90.44.050 (2013).

95. *Id.*; *id.* § 90.44.051 (2013).

1. Quantity Limits

Since 1945, state agencies, the Washington Attorney General, and Washington courts have examined and interpreted the stock-watering exemption, often reaching different conclusions.

A. AGENCY INTERPRETATIONS

Historically, state agencies including the Department of Ecology and the Pollution Control Hearings Board, interpreted the statute to limit all withdrawals, including those for stock-watering purposes, to five thousand gallons per day.⁹⁶ In 2001, the Pollution Control Hearings Board reaffirmed this interpretation in *DeVries v. Department of Ecology*.⁹⁷

In *DeVries*, a dairy of 2,261 cows relied on the stock-watering exemption for its water use, which was between thirty-nine thousand and fifty-six thousand gallons per day.⁹⁸ The Department of Ecology argued the dairy violated the statute because the dairy exceeded the five thousand gallons per day limit, which the Department argued applied to stock-watering.⁹⁹ The dairy argued that the five thousand gallon exemption did not apply to water used for stock-watering purposes.¹⁰⁰

The Board found that the stock-watering exemption was limited to five thousand gallons per day.¹⁰¹ Relying upon the phrases “small” and “minimal” used in related portions of the statute, the Board concluded the Legislature must have intended the quantity limitation to apply to all four exempt purposes.¹⁰² This was consistent with the original purpose of the exemptions, “to save both the state and the small appropriators the trouble and expense involved in the permitting process since these small withdrawals were viewed as unlikely to have a significant impact on the water system or to affect the outcome of disputes.”¹⁰³ According to the Board, “[t]o read this section otherwise would result in an unlimited, and uncontrollable, potential for withdrawal of groundwater.”¹⁰⁴ Thus, the Board granted summary judgment to the Department on this issue.¹⁰⁵

96. See Cheney, PCHB 96-186 (Wash. Pollution Control Hearings Bd. Apr. 18, 1997); Fleming, PCHB 93-320, 94-7, 94-11 (Wash. Pollution Control Hearings Bd. Dec. 22, 1994); Green, PCHB Nos. 91-139, 91-141, 19-149 (Wash. Pollution Control Hearings Bd. 1993); memorandum from Jay J. Manning, Director, Dept. of Ecology 3 (Dec. 4, 2008).

97. *DeVries*, PCHB 01-073 (Wash. Pollution Control Hearings Bd. Sept. 27, 2001).

98. *Id.* at 4-5. The herd was expected to increase in size to 4,400 cows, which were expected to consume 110,000 gallons per day. Additionally, it was estimated that at completion, the amount of water used by employees, for washing the equipment, to mist the cattle, and for dust control would be somewhere less than 10,000 gallons per day. *Id.*

99. *Id.* at 7-8.

100. *Id.* at 7.

101. *Id.* at 16.

102. *Id.* at 15-16.

103. *Id.* at 17.

104. *Id.*

105. *Id.* at 19.

B. 2005 ATTORNEY GENERAL OPINION

In 2005, the Washington Attorney General released an opinion responding to an inquiry from two members of the Washington State Legislature who sought clarification as to whether the five thousand gallon limit in the exempt well statute applied to stock-watering.¹⁰⁶ The Attorney General, going against the prior interpretations of the Department of Ecology and the Pollution Control Hearings Board, found that the quantity limitation did not apply to the stock-watering exemption.¹⁰⁷ The Attorney General found the exemption “makes it plain that groundwater withdrawals for stock-watering are exempt from the permit requirement, and that the exemption is not limited to withdrawals of less than 5,000 gallons a day.”¹⁰⁸ The stock-watering prong of the exemption, unlike the other three categories, does not contain language specifically limiting the amount of the withdrawal.¹⁰⁹ Because the statute did not provide an express exemption and because the Attorney General reasoned that the subsequent statutory references to “small withdrawals” and “minimal uses” were simply shorthand for the exemptions the statute set forth, rather than an indication that a quantity exemption should apply, the stock-watering was exempt regardless of the volume of water withdrawn.¹¹⁰

Although the Attorney General recognized “it could be suggested that an ‘open-ended’ exemption for stock-watering is inherently inconsistent with the general policy of requiring permits for groundwater withdrawals in order to provide for an orderly and consistent administration of an important and limited public resource, the state’s water supply,” this did not alter the Attorney General’s conclusion.¹¹¹ The Attorney General reasoned the Legislature had carefully chosen its words in defining the exemptions and may have concluded the total amount of water used for this purpose was sufficiently small to allow an open-ended, categorical exemption.¹¹² Additionally, because the statute allows the Department of Ecology to obtain information on the use of groundwater for exempt uses, including stock-watering, if such withdrawals are harming the quantity of water available, the Department of Ecology can bring this to the attention of the Legislature.¹¹³ Thus, the Attorney General concluded there was no quantity limitation on exempt stock-watering wells.¹¹⁴

106. WASH. ATTORNEY GENERAL, AGO 2005 NO. 17, INTERPRETATION OF STATUTORY LANGUAGE EXEMPTING WITHDRAWALS OF GROUNDWATER FOR STOCK-WATERING (2005), available at http://www.atg.wa.gov/AGOOpinions/opinion.aspx?section=archive&id=5872#_ftn2.

107. *Id.* at 2.

108. *Id.* at 3.

109. *Id.* at 4.

110. *See id.* at 6.

111. *Id.* at 7.

112. *Id.*

113. *Id.* at 6–7.

114. *See id.* at 2.

C. JUDICIAL INTERPRETATIONS

In addition to the conflict between the state agencies and the Attorney General, dicta in various appellate court opinions differs as well. As the 2005 Attorney General's Opinion noted, in 2003 the Washington Court of Appeals read the statute as providing an unlimited quantity of water for stock-watering purposes.¹¹⁵ Although the case did not directly involve the stock-watering exemption specifically, the court in *Kim v. Pollution Control Hearing Bd.*, described the exemption as applying to "any amount of water for livestock[.]"¹¹⁶

The Washington Supreme Court, however, took the opposite view in *Postema v. Pollution Control Hearings Bd.*, explaining that the statute "allows domestic and stock watering uses of up to five thousand gallons without a permit[.]"¹¹⁷ The Supreme Court made a similar statement in *Hillis v. Department of Ecology*, holding a permit is not required for the withdrawal of water "not exceeding 5,000 gallons per day for single or group domestic uses or other specific purposes."¹¹⁸

In 2011, the Washington Supreme Court faced the precise question of whether the five thousand gallon limitation applies to stock-watering wells in *Five Corners Family Farmers v. Washington*. In that case, the Easterday Ranches sought to operate a large cattle feedlot, approximately thirty thousand head, in Franklin County, Washington.¹¹⁹ It was estimated the cattle would drink between 450,000 and 600,000 gallons of water per day.¹²⁰ Mr. Easterday contended, and the Department of Ecology agreed, the withdrawal of groundwater by the plaintiff constituted stock-watering purposes and was exempt from statutory permitting requirements.¹²¹ Five Corners Family Farmers, the Center for Environmental Law and Policy, and the Sierra Club filed a declaratory judgment action, seeking a ruling that the statutory stock-watering exemption was limited to five thousand gallons per day.¹²² The trial court held that the statute unambiguously provided an exemption for any quantity of water used for stock-watering purposes.¹²³

The Washington Supreme Court agreed, concluding "there is only one reasonable interpretation of RCW 90.44.050's exemption clause."¹²⁴ Under the court's reasoning, the statute is divided into four separate categories: (1) stock-watering purposes; (2) watering of a lawn or noncommercial garden not exceeding one-half acre in area; (3) for single group or domestic uses in an

115. *See id.* at 4 n.2.

116. *Kim v. Pollution Control Hearings Bd.*, 61 P.3d 1211, 1212 (Wash. Ct. App. 2003).

117. *Postema v. Pollution Control Hearings Bd.*, 11 P.3d 726, 739 (Wash. 2000) (en banc).

118. *Hillis v. Dept. of Ecology*, 932 P.2d 139, 142 (Wash. 1997) (en banc).

119. *Five Corners Family Farmers v. Washington*, 268 P.3d 892, 895 (Wash. 2011) (en banc).

120. *Id.*

121. *Id.* (explaining that Easterday Ranches acquired a water right from a neighboring farm that provided approximately 58,921 gallons of water per day for consumption by the cattle, but had no water right for the remaining water to be consumed).

122. *Id.*

123. *Id.*

124. *Id.* at 901.

amount not exceeding five thousand gallons per day; or (4) for an industrial purpose not exceeding five thousand gallons per day.¹²⁵ Each category is limited only by the specific qualifying phrase, and the stock-watering exemption contained no such phrase.¹²⁶ Thus, the Washington Supreme Court found that withdrawals of water for stock-watering purposes were not limited in quantity.¹²⁷

This type of issue could easily arise again in other states with statutes drafted similarly. In Oklahoma, for example, exempt domestic uses include “(1) the use of water for agriculture purposes by natural individuals, (2) use of water for fire protection, and (3) the use of water by non-household entities for drinking water purposes, restroom use, and the watering of lawns, provided that the amount of groundwater used for any such purposes does not exceed five-acre feet per year.”¹²⁸ It is certainly possible, if not likely, a question could arise as to whether the five-acre foot per year limitation applies to all of the domestic uses, or merely to the use of water by non-household entities described in the statute.

2. Permitted Uses

In addition to the question regarding whether Washington imposed a quantity limitation, the meaning of the phrase “stock-watering purposes” was also unclear. The statute provides no definition for this phrase,¹²⁹ nor is this phrase found in the dictionary.¹³⁰ Thus, the Pollution Control Hearings Board in *DeVries* was left to determine the type of uses the Legislature contemplated with little guidance.

First, the Board determined that the phrase “stock” was short for “live-stock” which is defined as “domestic animals kept for use on a farm or raised for sale or profit.”¹³¹ Based on this, the Board determined that the exemption was not limited to open range livestock, but could apply to animals kept in confinement or concentrated operations.¹³² Moreover, the exemption did not speak to the type or size of the operation, meaning that it applied equally to family farms and “commercial farming operation[s],” and applied to operations regardless of the number of animals housed.¹³³

Second, the Board noted that the Legislature elected to use the plural term “purposes,” indicating that more than one stock-watering purpose exists.¹³⁴ Based upon this, the Board held the exemption “covers all reasonable

125. *Id.*

126. *Id.*

127. *Id.* at 895.

128. Okla. Admin. Code § 785:30-1-2 (2011); *see also* Kershen, *supra* note 12, at 568 (discussing potential ambiguity in the statute with regard to the application of the five acre foot limit to agriculture purposes).

129. *DeVries*, PCHB 01-073, at 9.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

uses of water normally associated with the sound husbandry of livestock.”¹³⁵ The Board reasoned the exception applies to “all reasonable uses of water normally associated with the sound husbandry of livestock,” including drinking, feeding, cleaning stalls, washing cattle, washing feeding or milking equipment, controlling dust surrounding animals, and cooling the animals.¹³⁶

Other states have also taken a broad approach to defining stock-watering as more than water consumed by animals. Idaho, for example, defines domestic uses, which are exempt from the permitting process, as including water for “livestock and for any other purposes in connection therewith.”¹³⁷

B. SOUTH DAKOTA

Like in Washington, controversy surrounding the stock watering provision of the South Dakota statute has resulted in litigation.

1. Factual Background

Longview Farms, LLP (“Longview”) built a large scale, confined swine breeding facility in South Dakota consisting of 4,900 sows and producing up to 70,000 piglets per year.¹³⁸ Longview is a South Dakota limited liability partnership, and each of its owners resides in Iowa.¹³⁹ Longview first filed an application for a water rights permit for commercial use associated with its confined feeding operation, but later withdrew its application after several individuals requested a hearing on the permit.¹⁴⁰ Instead, Longview informed the state it would drill a well not exceeding reasonable domestic uses, as defined by South Dakota regulations.¹⁴¹ Longview would use the water from the well primarily for washing the facilities and the livestock and, if quality allowed, for consumption by pregnant or nursing sows.¹⁴² Longview represented the well would have a total water usage of seventeen thousand gallons per day, the use would not exceed eighteen gallons per minute, and the maximum pumping rate would be less than twenty-five gallons per minute.¹⁴³ Longview’s proposed production numbers, therefore, fell within “reasonable domestic use” as defined by South Dakota law.¹⁴⁴ Thus, the South Dakota Department of Environmental and Natural Resources did not require Longview to obtain a water rights permit to withdraw water from the well it constructed.¹⁴⁵

135. *Id.*

136. *Id.*

137. IDAHO CODE ANN. § 42-111(1)(A).

138. *Longview Farms*, No. CIV. 09-63, slip op. at 4 (N.D. 1st Judicial Cir. Mar. 22, 2010).

139. *Id.* at 3–4.

140. *Id.* at 2.

141. *Id.* at 5.

142. *Id.*

143. *Id.*

144. S.D. ADMIN. R. 74:02:01:01(7) (2012).

145. *Longview Farms*, slip op. at 2.

2. Water Rights Management Board Ruling

The group of individuals who had objected to Longview's commercial permit filed a petition with the Water Rights Management Board ("Board") seeking numerous declarations regarding the meaning of "stock watering" under the statute and its application to Longview.¹⁴⁶ Specifically, the petitioners sought determinations that Longview's proposed uses were not within the "domestic use" definition, commercial operations are not covered by the "stock watering" provision, the power washing of livestock facilities is not a "domestic use," and if regulations allowed Longview's actions, those regulations conflicted with South Dakota statutes.¹⁴⁷

The Board found in favor of Longview, denying each of the requests for injunction by a five-to-one vote.¹⁴⁸ Specifically, the Board found: (i) Longview was not required to obtain a permit because the proposed uses would not exceed the maximum withdrawal limit of twenty-five thousand nine hundred gallons per day and was within the limitations for allowable pump rate; (ii) the use of exempt well water for human sanitation and consumption is allowed; (iii) power washing of facilities and washing livestock are considered stock watering; and (iv) stock watering includes all uses of water for the benefit of the animals, including misting, washing, sanitation, and power washing of facilities where the animals are confined.¹⁴⁹ The petitioners appealed to the First Judicial Circuit Court.¹⁵⁰

3. First Judicial Circuit Court Decision

On appeal, the petitioners raised four issues: (i) whether the Board erred in determining Longview was exempt from permitting because its use would not exceed 25,920 gallons per day, irrespective of what it used the water for; (ii) whether the Board erred in determining water could be used for human consumption and sanitation even though Longview is not an "individual, family unit, or household" as required by statute; (iii) whether the Board erred in ruling Longview could use exempt wells to power wash its facilities; and (iv) whether the Board erred in determining Longview did not need a permit because the term "stock watering" includes "all uses of water for the benefit of the animals such as misting, washing, sanitation, or power washing facilities where livestock are confined."¹⁵¹ The court sided with the petitioners and reversed the decision of the Water Rights Management Board.¹⁵²

First, the court determined the mere fact that Longview's well would withdraw less water than permitted by the domestic exemption did not mean that it constituted "reasonable domestic use" of water.¹⁵³ The court held the statute

146. *Id.* at 2-3.

147. *Id.*

148. *Id.* at 3.

149. *Id.* at 8, 11, 14, 15.

150. *Id.* at 1, 6.

151. *Id.*

152. *Id.* at 2.

153. *Id.* at 10.

contained two separate requirements that must both be met to fall within the exemption: (i) the well may not exceed the maximum quantity of water per day or the maximum pumping rate; and (ii) water must be withdrawn and used for a reasonable domestic purpose simply because Longview sought to appropriate less than the maximum allowable quantity of water, it fell within the domestic use provision.¹⁵⁴

Second, the court found “stock watering” is limited to the consumption of water by animals for drinking.¹⁵⁵ Longview argued that the intended use of water – for human consumption and sanitation, power washing livestock facilities, and washing livestock – fell within the definition of “stock watering” because human hygiene is necessary to prevent disease and infection in a hog breeding and farrowing operation.¹⁵⁶ The court rejected this argument, finding that “stock watering does not include all uses of water for the benefit of animals,” but instead means “consumption of water by animals for drinking.”¹⁵⁷ The court also found the other uses proposed by Longview – washing of facilities and equipment, washing of animals, and misting of animals – constitute sanitation purposes, not stock watering.¹⁵⁸ Thus, Longview was required to obtain permits for such uses.¹⁵⁹

4. Legislative Action

In 2012, the South Dakota Legislature modified the state’s exempt well statute in order to broaden the definition of “stock watering” beyond the court’s construction in *Longview*. Specifically, the amendment expressly states “stock watering” includes “water for drinking, sanitary and general welfare purposes and for like purposes by those caring for the livestock[.]”¹⁶⁰ This amendment essentially overrules the court’s determination that stock watering is limited only to the water animals actually consumed.

C. KANSAS

Kansas courts have recognized, although not yet had occasion to directly address, potential issues arising from the Kansas livestock watering exemption:

“Does the term ‘livestock’ mean two cows for the purpose of furnishing dairy products to the farm family, or does it mean a commercial dairy? Or, perhaps does it mean feeding two steers for home consumption, or does it

154. *Id.*

155. *Id.* at 12–13. Based on the plain statutory language, the court also determined that domestic uses for sanitary purposes were limited to use by individuals, family units, and households.

156. *Id.* at 12, 14.

157. *Id.* at 13–14.

158. *Id.* at 15–16. These sanitary purposes are not exempt because the sanitary exemption is limited to individual, household and family use, thereby excluding a corporate, commercial entity like Longview.

159. *See id.* at 17.

160. S.D. CODIFIED LAWS § 46-1-6 (2012).

mean a feedlot containing several hundred cattle? These questions have not been before our Supreme Court.”¹⁶¹

In dicta, however, the Kansas Supreme Court stated feedlots and commercial dairies constitute industrial, rather than domestic uses.¹⁶² On the other hand, the court commented a farmer or rancher running a “normal” number of livestock on his or her land is a domestic user, even if the rancher owns, for example, one thousand head of cattle.¹⁶³ The resolution of this issue has been left for another day.

V. CONCLUSION

It certainly appears that the controversy surrounding water use in the West will only intensify as time goes on and as water becomes an increasingly scarce resource. Exemptions for livestock watering wells are likely to face both scrutiny and litigation in the coming years. It is critical for both government and landowners to understand the existing limits under current statutory exemptions with regard to livestock watering.

161. *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164, 1168 (Kan. 1981) (quoting Arno Windscheffel, *Kansas Water Rights: More Recent Developments*, 47 J. KAN. B.A. 217, 218 (1978)).

162. *Id.*

163. *See id.* The court fails to provide a definition of the term “normal” as used in the opinion.