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Rethinking the Use of General Stream Adjudications

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RETHINKING THE USE OF GENERAL STREAM ADJUDICATIONS

*Lawrence J. MacDonnell**

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I. INTRODUCTION

A general stream adjudication is a comprehensive proceeding, usually judicial, for determining the priorities, nature, and scope of all existing uses of

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water from a common source.¹ The original need for such a proceeding emerged in the nineteenth century because western states had not yet developed state-supervised procedures for establishing and recording water use rights, procedures that ensured an accurate record of each use's priority and extent.² Initially, states turned to courts as the mechanism for making these determinations by establishing a judicial proceeding in which all claimants using water from the same stream were to file declarations of their claim.³ On the basis of testimony from the claimants, the court then decreed the priority date and extent of each water right.⁴ The manifest limitations of the court process prompted most states to put in place permitting requirements for all new claims.⁵ A few states, beginning with Wyoming, also used administrative processes to review and finalize all claims previously established.⁶

Remarkably, general adjudications, just like those employed back in the nineteenth century, are still being used today in many western states.⁷ In part, states are using adjudications to bring pre-permit uses into their administrative water right systems.⁸ In a few cases, senior water users initiated the general adjudication seeking a determination of priorities so junior uses could be administered (curtailed) in times of shortage.⁹ Most commonly, states initiated

¹ For a comprehensive discussion of western water law generally and general stream adjudications specifically, see John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, Part I, 8 U. DENV. WATER L. REV. 355 (2005) [hereinafter Thorson I]; Part II, 9 U. DENV. WATER L. REV. 299 (2006) [hereinafter Thorson II]. A good summary of adjudication law is provided in A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES, Chapter 7 (Updated July 2014) [hereinafter Law of Water Rights].

² A. Dan Tarlock, *The Illusion of Finality in General Water Rights Adjudications*, 25 IDAHO L. REV. 271, 281 (1988–89) (“adjudications developed to correct the deficiencies of a non-centralized system of water rights acquisition and exercise”) [hereinafter Tarlock]. See also Lawrence J. MacDonnell, *Prior Appropriation: a Reassessment*, * U. DEN. WATER L. REV. *, * (2015) (forthcoming) [hereinafter Prior Appropriation].

³ See *infra* note 18 and accompanying text (Colorado developed the first adjudication process.).

⁴ See *infra* notes 19–27 and accompanying text.

⁵ See *infra* notes 28–30 and accompanying text.

⁶ See *infra* notes 32–34 and accompanying text.

⁷ A good overview of ongoing general adjudications around the West as of 2006 is provided in Thorson II, *supra* note 1, at 337–55.

⁸ Most commonly these are uses established under common law prior appropriation principles before states initiated permitting systems and that have not previously been adjudicated.

⁹ The ongoing general adjudication in the Gila basin began in this manner. See Joseph M. Feller, *The Adjudication that Ate Arizona Water Law*, 49 ARIZ. L. REV. 405 (2007) [hereinafter Feller]. For a useful but now somewhat dated summary of state laws respecting when private suits may be managed as a general adjudication, see Stuart T. Waldrip, *Water Rights - Finality of General Adjudication Proceedings in the Seventeen Western States*, 1966 UTAH L. REV. 152, 153–57 (1966) [hereinafter Waldrip].

general stream adjudications in recent years to obtain a determination of federal and Indian reserved water rights.¹⁰

Many commentators have noted the cumbersome nature of general stream adjudications, their length, their expense, and the sometimes unsatisfactory outcomes they produce.¹¹ Nevertheless, we are told: “While adjudications are inherently clumsy structures, westerners should probably get used to living with them.”¹²

This article begins in Part II A. with a general discussion of general stream adjudications, their origin in Colorado, their adoption and evolution in other states and in Colorado, and the constitutional and legal issues these processes have faced. Part II B. discusses use of general adjudications by individual water users, including the United States. Part II C. discusses the importance of the 1952 McCarran Amendment in renewing interest in the use of general adjudications. Part III explores the structure of general stream adjudications and considers whether that structure is legally necessary for the purpose of determining previously unadjudicated water rights. In particular, it examines the assumption that these proceedings require the participation of all water users because the determination of water rights is an adversarial process in which parties can only be bound if they are parties. The article concludes in Part IV that general adjudications are an anachronistic mechanism that are not legally necessary to determine previously unadjudicated non-federal water uses and that they are an unnecessarily complex and expensive process for this purpose. We begin with a discussion of general stream adjudications.

II. GENERAL STREAM ADJUDICATIONS: AN OVERVIEW

A. *Origins and Development*

In the world of western water, an adjudication is an official determination (administrative or judicial) of the *perfection* of an individual water right—that is, that an appropriator has placed water to beneficial use in accordance with

¹⁰ Thorson II, *supra* note 1, at 336 (“States commenced their water adjudications with the grim conviction that federal reserved rights did in fact exist, a concern somewhat softened by the fact that most of these rights would be determined in a forum perceived to be more favorable: state court.”); *see also* Tarlock, *supra* note 2, at 280 (“The [McCarran] Act was passed in 1952, but it did not begin to drive water rights adjudications until the Supreme Court interpreted it to apply to Indian and non-Indian water rights.”).

¹¹ *See* Tarlock, *supra* note 2, at 272 (“General adjudications are expensive and controversial.”); A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems & Solutions*, 30 LAND & WATER L. REV. 9, 10 (1995) [hereinafter Krogh] (“Water rights claimants, courts, legislatures, and agencies involved in water right adjudications are deeply frustrated by the complexity and resultant length and cost of these adjudications.”).

¹² Thorson II, *supra* note 1, at 464.

law.¹³ A *general* adjudication refers to a single proceeding that simultaneously determines the status of all claims to the use of water from the same source (such as a particular stream).¹⁴ In addition to verifying that each claimant has placed water to beneficial use in accordance with law, the adjudication determines or verifies the parameters of each right: its priority date, its point of diversion, its rate of diversion, its purpose of use, and its place of use. In this manner, an official record of all perfected rights is established that serves both as legal title of the rights and that can be used for administration of uses in times of water shortage.¹⁵

The need for some kind of process for establishing legal title and clarifying priorities arose because, originally, users simply took the water they wanted without any governmental supervision. As treatise writer Clesson Kinney noted in 1912:

Although a person may make a valid prior appropriation of the water of a natural stream or other source of natural water supply, he may record his notice in accordance with the law, he may apply the water to some beneficial use or purpose for many years, he may lay claim to his rights adversely to all the world, and yet this is not deemed a sufficient determination of his rights, for the reason that there may be many others who have made like appropriations from the same source of supply, and whose claims are bound in time in some manner to conflict with the claims of the prior appropriator.¹⁶

Courts were called upon to determine priorities of conflicting users in the context of a specific dispute, but the view emerged that it would be better to join all existing users in a single proceeding that resulted in a final determination (a decree) of the diversion rights and priorities of all rights.¹⁷ In this way, it was thought, each user would gain certainty and the state would obtain an official record of all uses.

¹³ The common law requirements for establishing a prior appropriation water right included intent to appropriate, notice to others of that intent, physical possession of some portion of water, and its application to beneficial use with diligence. *See* Prior Appropriation, *supra* note 2.

¹⁴ Under administrative systems as in Wyoming, individual claims can be adjudicated upon submission of proof of beneficial use. *See infra* note 34 and accompanying text.

¹⁵ States use this information to develop a tabulation of all rights from the same source that lists these rights in order of priority. This tabulation serves as the basis for regulating junior uses in times of water shortage.

¹⁶ 3 CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS AND THE ARID REGION DOCTRINE OF APPROPRIATION OF WATERS § 1531, p.2754 (2d ed. 1912) [hereinafter 3 Kinney].

¹⁷ *Id.* (“[T]he title to a water right is not perfect in any claimant until there has been an adjudication or legal determination of the same”).

Colorado, in 1879, was the first state to create a formal process for adjudicating water rights.¹⁸ As recounted by water historian Robert Dunbar, water users there proposed an administrative process to clarify use rights.¹⁹ The Colorado General Assembly, however, decided to place this responsibility with district court judges.²⁰ At a time when the legal rules governing appropriation of water were still in flux,²¹ the statute charged the district court with “adjudicating and settling all questions concerning the priority of appropriation of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within the same water district,”²² All water users were required to provide proof of the date they began constructing the facilities necessary to use water (to serve as the priority date) and the size of the ditch (to serve as the measure of the diversion right).²³ Colorado made it clear that failure to participate would preclude any future claim to a priority preceding any of those included in the decree.²⁴ Once a use was adjudicated, however, it was no longer necessary to participate in future adjudication proceedings.²⁵ The process envisioned a single decree that would establish the order of priority for all uses and the maximum rate of diversion for each.²⁶ It authorized the issuance of a certificate to each user that could be filed with the county clerk, thus serving as title of the water right.²⁷

¹⁸ 1879 Colo. Sess. Laws 99–05. See also Thorson I, *supra* note 1, at 409–11.

¹⁹ ROBERT DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 91 (1983) [hereinafter Dunbar].

²⁰ 1879 Colo. Sess. Laws 92. Dunbar, *supra* note 19, at 88. According to Thorson et al, “The committee rewrote the bill, believing the determination of property rights, including water rights, was the proper domain of the courts.” Thorson I, *supra* note 1, at 409.

²¹ See, e.g., Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

²² 1879 Colo. Sess. Laws 99. The first judge in Colorado asked to perform this function refused:

I cannot bring myself to depart from the English and American systems of jurisprudence. In the administration of justice in an English court there are always parties, and sometime four: the *actor*, the plaintiff; the *reus*, the thing; the *judex*, the court; and the *juratta*, the jurors; and each have their separate and proper functions to perform. I cannot consent . . . to bring myself to leave the judicial position in which I have been placed by the Constitution . . . and take the position of any *actor*, to go around to determine, without being solicited, what are the rights of the respective owners of the ditches in these several water districts.

Dunbar, *supra* note 19, at 94. The General Assembly modified the law in 1881 to provide that water users would petition the court to determine the various priorities. *Id.* at 96.

²³ *Id.*

²⁴ 1879 Colo. Sess. Laws 103. This rule became known as the postponement doctrine and continues in force today. COLO. REV. STAT. § 37-92-306 (2015).

²⁵ Since all subsequent priorities were junior to those previously adjudicated, there was no need for joinder of already decreed users. JAMES N. CORBRIDGE & TERESA A. RICE, VRANESH’S COLORADO WATER LAW, REV’D ED. 140 (1999) [hereinafter Corbridge & Rice]. There took, however, considerable amounts of litigation to reopen decrees for the purpose of inserting an earlier priority that had not been included in the original adjudication. *Id.*

²⁶ 1879 Colo. Sess. Laws 102.

²⁷ 1879 Colo. Sess. Laws 104.

Elwood Mead, a first-hand observer of this process in Colorado, saw a fundamental problem: water right determinations are more factual and technical in nature than legal.²⁸ Especially at that time, judges were generally unfamiliar with hydrology and the amount of water required to accomplish a particular use. Without some independent, on-site inspection to verify the claimant's information, a judge could only decree what the claimant requested—sometimes an amount greatly in excess of what was required for the use.²⁹ Mead's solution was to place this responsibility with trained professional engineers.³⁰

Under Mead's influence, the new State of Wyoming established in its constitution a "board of control," an administrative body that included the state engineer and four division superintendents, and gave it supervision of

²⁸ As Wyoming's Territorial Engineer, Mead attempted to create a record of water rights using existing court decrees. He describes the overwhelming problems he faced in *SECOND ANNUAL REPORT OF THE TERRITORIAL ENGINEER TO THE GOVERNOR OF WYOMING FOR THE YEAR 1889*, at 70–91.

²⁹ Thinking back in 1930 on his experience in Wyoming, Mead reported:

The first request received by the territorial engineer to exercise his authority in dividing the waters of a stream, was made early in 1888 by the city of Cheyenne, which under the McGinnis decree had the first right to the waters of Crow Creek. This request asked that the 75 ditches above the city be so regulated as to allow water so come to meet the needs of the city.

On consulting the decree it was found that not one of these seventy-five ditches were named or located. Instead, the decree made grants of water to individuals who might live in Cheyenne, on their farm, or in Hong Kong. I consulted the Judge and asked him how I was to determine what headgates to close or partly close in order that the city's requirements might be met. He said I would have to look up the individuals to whom the water had been granted and ascertain from them where they proposed to use the water allocated in the decree.

I also pointed out that the decree showed no relation between the actual use of water and the amount used. For example, Anon Simmons, with 28 acres of land, was granted a right to over 11 cubic feet of water a second, while the next appropriation, with 300 acres of land, was only given 5 acre feet of water a second. In other words, the first appropriation was given twenty times as much water for an acre of land as the second. I told the Judge I knew something about the opinions and prejudices of irrigators and that if I attempted to give one irrigator twenty times as much water for the same acres as I gave another, it was probable that I would be lynched, and his reply was the if I did not carry out the decree he would see that I was jailed!

ELWOOD MEAD, *RECOLLECTIONS OF IRRIGATION LEGISLATION IN WYOMING*, reprinted in *SELECTED WRITINGS OF ELWOOD MEAD ON WATER ADMINISTRATION IN WYOMING AND THE WEST* 8–9 (Anne MacKinnon and John W. Shields eds., 2000).

³⁰ As Kinney noted in 1912 in speaking about administrative determinations:

Under this system, at least, there is no longer the ludicrous spectacle of learned judges solemnly decreeing the right to use from two to ten times the amount of water flowing in the stream, or, in fact, amounts so great that the channel of the stream could not possibly carry them, and thus practically leaving the question at stake as unsettled as it was before the trial. . . .

3 Kinney, *supra* note 16, § 1531, p.2755.

“appropriation, distribution and diversion” of State waters.³¹ The Wyoming Legislature directed the new State Board of Control to examine all existing, undecreed water uses on a source-by-source basis and determine their priority date and the extent and nature of actual water use—essentially an administrative version of Colorado’s judicial adjudication.³² Breaking more new ground, these provisions further required that anyone now wanting to use water first obtain a permit from the state engineer.³³ Once water was applied to beneficial use, the permittee was to file proof of appropriation with the State; following inspection confirming the use in accordance with the terms of the permit, the Board of Control was to issue a certificate of appropriation, effectively adjudicating the right.³⁴ Thus, Wyoming gave an administrative board responsibility and authority to determine all water rights—both for pre-existing uses and for new uses.

In 1900, the Wyoming Supreme Court considered whether administrative determination of water rights was an unconstitutional exercise of judicial authority or otherwise impermissible.³⁵ Noting the particular importance of water to the State’s development and the constitutional assertion of State ownership of water to ensure its careful use, the court concluded:

The determination required to be made by the board is, in our opinion, primarily administrative rather than judicial in character. The proceeding is one in which a claimant does not obtain redress for an injury, but secures evidence of title to a valuable right,—a right to use a peculiar public commodity. That evidence of title comes properly from an administrative board, which, for the state in its sovereign capacity, represents the public, and is charged with the duty of conserving public as well as private interests.³⁶

³¹ WYO. CONST. art. 8, § 2.

³² Now codified at WYO. STAT. ANN. § 41-4-206 (2015). The procedures to be followed are specified at WYO. STAT. ANN. §§41-4-301–317 (2015). See also LAWRENCE J. MACDONNELL, TREATISE ON WYOMING WATER LAW 12, 15–16, 200–02 (2014) [hereinafter Wyoming Water Law].

³³ Now codified at WYO. STAT. ANN. § 41-4-501(a) (2015).

³⁴ WYO. STAT. ANN. § 41-4-511 (2015).

³⁵ *Farm Investment Co. v. Carpenter*, 61 P. 258 (Wyo. 1900).

³⁶ *Id.* at 267. It analogized the process to the actions of the Land Office in the Department of Interior issuing patents to properly entered public lands. The court noted:

In the development of the irrigation problem under the rule of prior appropriation, perplexing questions are continually arising, of a technical and practical character. As between an investigation in the courts and by the board, it would seem that an administrative board, with experience and peculiar knowledge along this particular line, can, in the first instance, solve the questions involved, with due regard to private and public interests, conduct the requisite investigation, and make the ascertainment of individual rights, with greater facility, at less expense to interested parties, and with a larger degree of satisfaction to all concerned.

The Nebraska Legislature adopted a system closely modeled after that of Wyoming.³⁷ The Nebraska Supreme Court upheld the constitutionality of the State's administrative process for determination of water rights in 1903.³⁸

Other state courts, however, resisted use of administrative determination of water rights, finding that administrative determination violated the separation of powers organization established under the federal and state constitutions or other perceived legal requirements.³⁹ Thus, in 1921 the Texas Supreme Court decided that provisions of a statute giving power to an administrative board to determine water rights, unconstitutionally gave the legislative branch judicial power.⁴⁰ The court concluded that "no power is more properly or certainly attached to the judicial department than that which determines controverted rights to property by means of binding judgments."⁴¹

In the meantime, the newly formed United States Reclamation Service proposed that states adopt a process for clarifying the extent of existing rights and, therefore, the remaining amount of unappropriated water available for development. The process would employ state administrators to do hydrographic surveys and clarify the extent of existing uses. Then it would provide that information to the state attorney general, who would initiate a general court adjudication to obtain legal determination of existing rights.⁴² In 1909, Oregon

Id. at 266–67. Waldrip, *supra* note 9, at 158 (footnotes omitted) distinguished the Wyoming approach from the Colorado approach in this way:

The Wyoming court has held that determinations under this system are not quiet title suits, but merely a necessary antecedent to proper distribution of the state's water by its administrative branch. Thus, they differ in basic theory from their judicial cousins, whose basis lies in a judicial action to quiet title to the rights.

The quiet title analogy is critiqued in *infra* notes 164–65 and accompanying text.

³⁷ Dunbar, *supra* note 19, at 107.

³⁸ Crawford Co. v. Hathaway, 93 N.W. 781, 795 (Neb. 1903). *See also* Enter. Irr. Dist. v. Tri-State Land Co., 138 N.W. 171 (Neb. 1912); Ormsby Cnty. v. Kearney, 142 P. 803 (Nev. 1914); Vineyard Land & Stock Co. v. Dist. Ct. of Fourth Judicial Dist. of Nevada in and for Elko Cnty., 171 P. 166 (Nev. 1918).

³⁹ A good summary of the checkered history of court review of state statutory provisions for determination of water rights is provided in Krogh, *supra* note 11, at 41–52.

⁴⁰ Bd. of Water Eng'rs v. McKnight, 229 S.W. 301 (Tex. 1921).

⁴¹ *Id.* at 304.

⁴² Often referred to as the Bien Code for its drafter, Reclamation employee Morris Bien, this model influenced legislators in several states seeking new Reclamation projects, including Oregon and Washington. *See* Thorson I, *supra* note 1, at 413–14. According to Thorson et al:

Upon completion of the survey, the agency delivered its information to the state attorney general, often in the form of a proposed determination. The state attorney general then brought suit within a specified period, usually sixty days, and made all water users in the basin parties to the action. The Code also gave the attorney general the authority to intervene in pending private water adjudications. After a mandatory

adopted this approach.⁴³ The Oregon Supreme Court and the United States Supreme Court upheld these provisions against various constitutional challenges, including alleged violation of separation of powers.⁴⁴ Several other states adopted some version of this so-called “hybrid” model.⁴⁵

B. General Adjudications Initiated by Water Users

In the absence of some state-initiated determination process, courts decided that individual water users could file an action for such determination.⁴⁶ More expansively, some courts decided that such actions could also be used to join all other users of water from the same source.⁴⁷ The rationale was to avoid multiple

period for objections had elapsed, and the court completed hearings on the objections, the court issued a final decree. Throughout the proceedings, the court could call upon the administrative agency to provide it with hydrological facts.

Thorson I, *supra* note 1, at 414 (footnotes omitted).

⁴³ Codified today at OR. REV. ST. § 539.150 (2015). A useful summary of state approaches is provided in Krogh, *supra* note 11 at 19–30.

⁴⁴ *In re Willow Creek*, 144 P. 505 (Ore. 1914); *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440 (1916). The Oregon Court stated:

The statute prescribing the duties to be performed by the water board and its members in their respective official capacities in a determination of water rights does not confer judicial powers or duties upon the board or such officers in any sense as indicated by the Constitution. Their duties are executive or administrative in their nature. In proceedings under the statute the board is not authorized to make determinations which are final in character.

In re Willow Creek, 144 P. at 512.

⁴⁵ See, e.g., N.M. STAT. ANN. § 72-4-15 (2015); NEV. REV. STAT. § 533.090 (2015); N.D. CENT. CODE § 61-03-16 (2015). See also Krogh, *supra* note 11, at 19–30.

⁴⁶ 3 Kinney, *supra* note 16, § 1532, p.2756.

⁴⁷ 3 Kinney, *supra* note 16, § 1532, p.2756 (“It is held that in order to avoid a multiplicity of suits, where a large number of persons claim rights to use or divert the waters of a stream by virtue of riparian rights, appropriations, prescription, or otherwise, a suit in equity is the proper proceeding to determine such rights and to enjoin the infringement thereof.”). See also *Frost v. Alturas Water Co.*, 81 P. 996, 997 (Idaho 1905) (involving an action brought by 20 water users against about 700 other users from the same source):

An examination of the decisions of this court in irrigation cases for the last 25 years discloses the fact that the practice pursued by the plaintiffs in this case as to joinder of parties plaintiff and defendant has been uniformly followed, and apparently recognized by the court, as well as the members of the bar; and, while the question here raised has never before been passed upon by this court, many cases, open to the same objection as here urged, have been from time to time before the court. This practice has become general and well recognized in this state in irrigation cases, although never before mooted in this court. It is clear that all the appropriators and users of water from a common source have in a manner a common interest in having the rights of the respective appropriators determined and quieted by the courts, and in a decree enjoining any and all appropriators who are inclined to interfere with or obstruct the rights of others or divert water to which they are not entitled from so

lawsuits seeking determination of water rights.⁴⁸ A few states enacted statutes specifically authorizing water users to initiate adjudications.⁴⁹

The United States has filed actions in federal district courts seeking general adjudication of all rights to use water from particular sources in order to clarify rights it was seeking. Thus, to protect interests of irrigators in the Newlands Reclamation Project in Nevada, the United States sought adjudication of all upstream rights on the Truckee and Carson rivers.⁵⁰ The litigation that helped lead to enactment of the McCarran Amendment was a quiet title action brought by the United States against 3,000 other parties to establish riparian rights in lands acquired as a military base in California.⁵¹ While commonly presented as a quiet title action, these cases assume that federal and Indian water rights must be determined in an adversarial proceeding that includes all other users of water from the same source.

Such litigation raised a number of issues. Courts are accustomed to resolving legal disputes between specific parties, and in some instances these cases resulted from specific disputes between parties.⁵² The disputes often emerged because of the absence of defined priorities and the inability of senior appropriators to limit uses of upstream junior appropriators.⁵³ In some of these cases, however,

doing by the restraining and injunctive power of a court of equity. Such a joinder we think authorized by sections 4101, 4102, Rev. St. 1887. The reason for such a practice is peculiarly strong and urgent in irrigation cases under the law as it exists in this state.

⁴⁸ 3 Kinney, *supra* note 16, § 1532, p.2756.

⁴⁹ See, e.g., UTAH CODE ANN. § 73-4-1 (2015) (authorizing five or more water users from the same source to petition the state engineer to initiate an investigation of all water rights. The state engineer then can decide whether a general adjudication is warranted.). The Utah Code also provides that when any person initiates an action involving the determination of the rights of a “major part of the water of the source of supply or the rights of 10 or more of the claimants of the source of supply,” the court clerk is to notify the state engineer. UTAH CODE ANN. § 73-4-3 (2015).

⁵⁰ This litigation produced what is known as the Orr Ditch decree, discussed in *Nevada v. United States*, 463 U.S. 110 (1983). See also *United States v. Walker River Irrigation Dist.*, 11 F. Supp. 158 (D. Nev. 1935) (action against all users of water from the Walker River); *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286 (9th Cir. 1981) (quiet title action initiated in 1925 to determine all rights to use Carson River).

⁵¹ *California v. United States*, 235 F.2d 647, 652 (9th Cir. 1956).

⁵² For an example of the kinds of complexities that can arise from specific disputes that are involved in proceedings to determine priorities, see *General Determination of the Rights to the use of All the Water, Both Surface and Underground, Within the Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete and Juab Counties in Utah*, 982 P.2d 65 (Utah 1999); see also Feller, *supra* note 9 (discussing conflicts that ultimately got folded into the Gila River adjudication in Arizona).

⁵³ For a case involving the need to determine priorities of rights not determined in a previous adjudication, see *McKean v. Lassen*, 298 P.2d 827 (Utah 1956).

other non-disputing water users were joined under the theory that determination of their priorities might avoid future controversy.⁵⁴ Indeed, the original general adjudication statute enacted in Colorado resulted from just such a situation.⁵⁵ But an adjudication is, at base, a process for determining priorities, not resolving specific disputes.⁵⁶ Processes that enable the mixing of water right determinations and resolution of specific disputes are bound to be contentious and complex, an image that was evoked well in this early Utah Supreme Court decision:

The theory of a river system adjudication is to fix each appropriator's rights and priorities so it will be definitely known whether he is or is not injuring another by taking his water. While it partakes of the nature of a declaratory judgment in many of its aspects, it also involves a number of local controversies which, instead of being tried as individual suits, are tried on objections to the findings of the State Engineer, all in one overarching suit. For the reason that there are involved numerous local controversies which are adjudicated by the decree and a declaratory judgment in reference to uncontested findings, thus combining not only many controversies in one suit but controverted and uncontroverted adjudications in the same suit, provision had to be made by statute.⁵⁷

Other courts struggled with how to characterize the nature of the general adjudication proceedings. In 1894, the Colorado Supreme Court declared: "The statutory proceeding to adjudicate priorities of right to the use of water is not an ordinary civil action or proceeding. It is a proceeding *sui generis*, to which the rules governing ordinary civil actions are not always applicable."⁵⁸ In 1895, the Colorado Supreme Court stated: "The present action is in the nature of a bill of peace, or an action of *quia timet*, and is quite analogous to an action to quiet title to real estate"⁵⁹ The Montana Supreme Court called such litigation a water right suit and declared: "A water right suit, such as this, where all parties are seeking relief, is different from most, if not all, other kinds of action."⁶⁰

⁵⁴ See, e.g., *Sloan v. Byers*, 97 P. 855 (Mont. 1908).

⁵⁵ *Dunbar*, *supra* note 19, at 88–89.

⁵⁶ See *supra* note 53 and accompanying text.

⁵⁷ *Spanish Fork W. Field Irrigation Co. v. Dist. Crt.*, 104 P.2d 353, 364 (Utah 1940) (Wolfe, concurring).

⁵⁸ *People ex rel. Sterling Irrigation Co. v. Downer*, 36 P. 787 (Colo. 1894) (in syllabus).

⁵⁹ *Louden Irrigating Canal Co. v. Handy Ditch Co.*, 43 P. 535, 537 (Colo. 1895).

⁶⁰ *Osnes Livestock v. Warren*, 62 P.2d 206, 215 (Mont. 1936).

In an ordinary civil action, a court only has jurisdiction to decide matters when the parties and the subject matter are within the scope of its authority.⁶¹ Streams may well extend beyond the geographical jurisdiction of a district court, thus potentially limiting that court's ability to consider matters involving water users from the same source but located in different jurisdictions.⁶² Moreover, issues have arisen when users, not party to a previous adjudication action, seek recognition of their priority.⁶³ Problems also have arisen in determining whether an action is simply an ordinary civil proceeding or is regarded as a general adjudication.⁶⁴ Courts have differed in whether to characterize such litigation as *in personam* or *in rem*—that is, whether the court's decision binds only the parties to the case or whether its decision determines the status of a thing (property) and thus, binds all concerned with that thing.⁶⁵ Quiet title suits, which involve competing claims to ownership of a particular piece of property, are regarded as *in personam*—applying only to the parties to the case. Some courts have applied this same rationale to water right suits, limiting the force of the decision only to those actually party to the proceeding. Others have characterized such suits as *in rem* and thus applying to everyone with an interest in the use of the water source.⁶⁶

Once states instituted permit systems with administrative processes for determination of completed water rights, the need for general adjudication proceedings applied only to those uses established prior to the permit system.⁶⁷ Only a few states, however, proactively determined the status of such water uses.⁶⁸ Others simply relied on privately-initiated adjudications; in a few cases, authorizing state agencies to enter the adjudication either as a party or to provide technical assistance to the court.⁶⁹ Colorado retained its court-based approach under which those seeking to make an appropriation of water file a petition with

⁶¹ AM. JUR. *Courts* § 60.

⁶² See, e.g., *Taylor v. Hulett*, 97 P. 37, 38 (Idaho 1908).

⁶³ See, e.g., *Farm Inv. Co. v. Carpenter*, 61 P. 258, 269 (Wyo. 1900).

⁶⁴ See, e.g., *Salt Lake City v. Anderson*, 148 P.2d 346, 348–50 (Utah 1944).

⁶⁵ 3 Kinney, *supra* note 16, §1534, pp.2762–63. See *Nevada v. United States*, 463 U.S. 110, 143–44 (1973) (“Thus, even though quiet title actions are in personam actions, water adjudications are more in the nature of in rem proceedings.”).

⁶⁶ 3 Kinney, *supra* note 16, § 1534, p.2762.

⁶⁷ Montana did not establish a comprehensive permit system until 1973. 1973 Mont. Laws, ch. 452, codified at MONT. CODE ANN. § 85-2-302. Consequently all uses established prior to that date must now be reviewed and adjudicated.

⁶⁸ Wyoming was the first state to direct its administrative agency to completely adjudicate all water uses established prior to the institution of its permit system in 1891. Wyoming Water Law, *supra* note 32, at 12.

⁶⁹ See, e.g., UTAH CODE ANN. § 73-4-1 (2015).

the court to obtain a decree establishing the priority date and the extent of the proposed water use.⁷⁰

C. *Modern Use under the McCarran Amendment*

The resurrection of interest in judicial general stream adjudications primarily resulted from passage of the McCarran Amendment in 1952,⁷¹ its requirement that the proceeding involve a “suit” for adjudication of water rights,⁷² and decisions of the United States Supreme Court deciding that state courts in such general stream adjudications can determine federal and Indian reserved water rights.⁷³ The ability to force the United States to submit its reserved rights claims

⁷⁰ Now codified at COLO. REV. STAT. § 37-92-302(1)(a) (2015). In 1969 Colorado revised its adjudication procedures to address a number of problems that had arisen over the years. See Corbridge & Rice, *supra* note 25, at 139–43.

⁷¹ The amendment was enacted as section 208(a)-(c) of the Department of Justice Appropriation Act. Act of July 10, 1952, Pub. L. No. 945, 66 Stat. 560 (current version at 43 U.S.C. § 666 (2014)). It reads as follows:

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, order, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

Id.

⁷² Thorson II, *supra* note 1, at 358 (“While the United States Supreme Court has not had the opportunity to review a purely administrative adjudication, it is highly probable that such a proceeding, even with the opportunity of an appeal to a court under the state administrative procedures act, would not satisfy traditional notions of a judicial ‘suit.’”).

⁷³ For an extended discussion of the McCarran Amendment, federal reserved rights, and the use of general stream adjudications, see Lawrence J. MacDonnell, *General Stream Adjudications, the McCarran Amendment, and Federal Reserved Rights*, 15 WYO. L. REV. 313 (2015) [hereinafter GSAs]. The key U.S. Supreme Court decisions are: *United States v. Dist. Crt. for Eagle Cnty.*, 401 U.S. 520 (1971); *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976); and *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). The U.S. Supreme Court announced the existence of implied reserved rights to water necessary to achieve the purposes of a reservation of federal lands in *Winters v. United States*, 207 U.S. 564 (1908).

The shift back in the direction of judicial adjudications is contrary to the conclusion reached in 1966 in a comprehensive student note that examined adjudication laws in the western states at that time. See Waldrip, *supra* note 9, at 151–52 (“The dwindling of constitutional objection, together with the growth of administrative law, has encouraged a trend toward administrative determination of water rights.”).

for determination in state court has provided a powerful incentive for states to initiate general stream adjudications.⁷⁴

The United States sought to resist being joined in state water right proceedings, arguing that they did not meet the requirements imposed under the McCarran Amendment. The earliest such case involved an attempt by riparian land owners in California to obtain an injunction in state court precluding the Bureau of Reclamation from storing water in one of its storage facilities.⁷⁵ Because the suit did not include all water users from the source and did not seek adjudication of priorities, the U.S. Supreme Court ruled the United States could not be forced to join.⁷⁶

Efforts to resist joinder in a Colorado adjudication proceeding were unsuccessful, however, even though a limited number of water users were party to the action.⁷⁷ The United States again sought to resist joinder in a general adjudication proceeding by the State of Oregon for the Klamath Basin by arguing that the Oregon process did not meet the comprehensiveness requirement in the McCarran Amendment.⁷⁸ In particular, the United States noted that much of the proceeding would be managed administratively and that the proceeding only applied to those with uses established prior to Oregon's institution of a permitting system in 1909.⁷⁹ Observing, however, that water rights must finally be decreed by a court under the Oregon system and that the U.S. Supreme Court had previously upheld the adequacy of the Colorado process that did not directly include all water users, the United States Court of Appeals for the Ninth Circuit denied relief to the United States.⁸⁰

The desire of western states to determine the existence of federal and tribal claims to water and to quantify those claims in state court has prompted several states to initiate general stream adjudications in recent years, sometimes based on new legislation that attempts to provide for adjudications that meet the perceived requirements of the McCarran Amendment.⁸¹ Typically, western states establish a special court or designate an existing court and give it jurisdiction, comprehensive enough to encompass all matters within a given river system.⁸² They direct the

⁷⁴ See GSAs, *supra* note 73.

⁷⁵ Dugan v. Rank, 372 U.S. 609 (1963).

⁷⁶ *Id.* at 618.

⁷⁷ United States v. Dist. Crt. in and for the Cnty. of Eagle, 458 P.2d 760, 761 (Colo. 1969); *see also* Colo. River Water Cons. Dist. v. United States, 424 U.S. 800 (1976).

⁷⁸ United States v. Oregon, 44 F.3d 758, 765 (9th Cir. 1994).

⁷⁹ *Id.* at 767.

⁸⁰ *Oregon*, 44 F.3d at 770.

⁸¹ *See, e.g.*, MONT. CODE ANN. § 85-2-212 *et seq.*; Law of Water Resources, *supra* note 1, § 7.1.

⁸² *See, e.g.*, WYO. STAT. ANN. § 1-37-106(a) (2015).

state itself to initiate the general adjudication.⁸³ They identify the water uses that are to be considered.⁸⁴ And these states establish procedures for providing notice and joining users in the process.⁸⁵ They have incorporated some new features intended to make the process function better.⁸⁶

III. THE PURPOSES FOR USING GENERAL ADJUDICATIONS

Professor Tarlock provided this explanation for the contemporary use of general stream adjudications:

There are three reasons for the current push to adjudicate water rights on a grand scale other than to keep water lawyers employed: (1) the adjudication of water rights increases the security of all water rights because all use rights on a stream system are precisely defined and all users can accurately predict the risks of curtailment in times of shortage; (2) state water management will be enhanced because water use data will be accurate and the state can therefore make better choices in the allocation of unappropriated water, especially for instream flow appropriations and reservations as well as to better target water marketing opportunities for those states interested in the concept; and (3) inchoate federal Indian and non-Indian reserved rights claimed can be qualified, and thus the great federal cloud on western water titles could be removed or at least substantially limited.⁸⁷

Thus, clarity of title to vested or perfected water rights and the extent of claims to a water source is a primary objective.⁸⁸ Such clarity of state records is thought to facilitate better water management, presumably because priorities are clear and merchantable title is established.⁸⁹ Indeed, state records respecting ownership of

⁸³ See, e.g., WYO. STAT. ANN. § 1-37-106(a)(iv) (2015).

⁸⁴ See, e.g., WYO. STAT. ANN. § 1-37-106(a)(i)(A)(II-IV) (2015).

⁸⁵ See, e.g., WYO. STAT. ANN. § 1-37-106(a)(ii) (2015).

⁸⁶ See, e.g., IDAHO CODE ANN. § 42-1401B(1) (2015) (“may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state.”).

⁸⁷ Tarlock, *supra* note 2, at 272.

⁸⁸ See Krogh, *supra* note 11, at 12 (“The fundamental reason for water right adjudications in the western states is the lack of an accurate record of water rights.”).

⁸⁹ Tarlock, *supra* note 2, at 272 (“state water management will be enhanced because water use data will be accurate and the state can therefore make better choices in the allocation of unappropriated water, especially for instream flow appropriations and reservations as well as to better target water marketing opportunities for those states interested in the concept. . . .”). *But see* Thorson II, *supra* note 1, at 436 (“Even in areas where courts enter final decrees, there is little evidence to indicate that adjudicated rights lead to better water management.”).

water rights and use of water are woefully inadequate.⁹⁰ In this age of increasing needs for more effective management of water and for transfers of some existing water uses to new uses, it is long past time for states to improve their records.⁹¹ One might ask, however, whether general stream adjudications are the best mechanism for improving state water records.⁹²

Thorson et al. state:

The fundamental public policy objective of comprehensive general stream adjudications is to improve water management in the arid west. Three related goals could satisfy this public policy if water adjudications accomplished: (1) the confirmation of existing water rights; (2) the quantification of federal reserved water rights; and (3) the creation of a centralized listing of water rights.⁹³

Near the conclusion of their two-part discussion, Thorson et al. conclude: “the true value of a general stream adjudication is to create the impetus for water users to reach settlement about allocation and administration,”⁹⁴

These authors, despite their conclusion that general adjudications are here to stay, offer little reason to be happy about that conclusion. Having stated

⁹⁰ Indeed, an examination of water records in Wyoming in 1970 found considerable disparities between existing records and actual, on-the-ground water practices. Michael V. McIntire, *The Disparity Between State Water Rights Records and Actual Water Use Patterns* “I Wonder Where the Water Went?”, 5 LAND & WATER L. REV. 27 (1970). Considerable differences were found between the total acreage authorized for irrigation and the amount of land actually irrigated. *Id.* at 27. The study suggested the likelihood that some of the irrigated lands might not be those authorized in state records. *Id.* at 28. In addition, the study reported differences between the total volume of water authorized for diversion and actual diversions. *Id.* at 27–28. While total diversions fell below total authorized amounts, several individual diversions substantially exceeded their authorizations. *Id.* at 28. Another difference was the location of the point of diversion. *Id.* at 29. As the author notes, Wyoming did not require state review of changes of point of diversion until 1965. Finally, the report noted that there were a large number of permits outstanding for which no facilities had yet been built. *Id.* at 29–30; see also Jackson B. Battle, *Paper Clouds Over the Waters: Shelf Filings and Hyperextended Permits in Wyoming*, 22 LAND & WATER L. REV. 673 (1987).

⁹¹ There is an inherent fluidity about water rights that frustrates any hope for absolute clarity. See Tarlock, *supra* note 2, at 273.

⁹² Private services are now available that offer more accurate and comprehensive information about state water rights than the records maintained by the states themselves. See, e.g., Ponderosa Advisors LLC, *Water Sage*, <http://ponderosa-advisors.com/OurServices.html> (last visited June 29, 2015).

⁹³ Thorson II, *supra* note 1, at 436. They conclude general stream adjudications “have fallen short of the goals principally because they remain incomplete.” *Id.* at 463.

⁹⁴ Thorson II, *supra* note 1, at 462. Feller, *supra* note 9, at 431 notes, however, that “convening of a massive proceeding to determine all water rights on a stream creates another type of inefficiency, namely, it forces the litigation of countless issues that, in the absence of such a proceeding, might never have arisen in the course of actual disputes.” *Id.*

that improved water management is the primary purpose of general stream adjudications, they then say: “[f]rom an *effectiveness* vantage point, it is difficult to demonstrate that adjudications have significantly improved water management in the region.”⁹⁵ But they go on to state: “[e]ven in areas where courts enter final decrees, there is little evidence to indicate that adjudicated rights lead to better water management.”⁹⁶ Next they state: “[f]rom an *efficiency* perspective, stream adjudications fare even worse. Governments and private parties have poured lavish amounts of time and money into these cases to achieve only a small number of finalized water rights. In most actually finalized, results [sic] in a gigantic per-right cost of adjudication.”⁹⁷ In particular, they point to the delays seemingly inherent in the process.⁹⁸

The solution, according to Thorson et al., seems to be to complete the ongoing adjudications.⁹⁹ Yet, as Professor Tarlock has noted, finality in the matter of water rights may be an illusion: “the very nature of a water right combined with the range of state and federal interests being asserted in water allocation preclude the level of certainty and finality that states are seeking.”¹⁰⁰

We turn next to an examination of two recently completed general adjudications.

IV. EXPERIENCE WITH USING GENERAL ADJUDICATIONS: THE BIG HORN AND SNAKE RIVER EXAMPLES

A. The Big Horn General Stream Adjudication

On January 22, 1977, the Wyoming Legislature enacted a new statute authorizing the State Attorney General to initiate a general adjudication to determine the “nature, extent, and relative priority of the water rights of all persons in any river system”¹⁰¹ The purpose of the adjudication was to

⁹⁵ Thorson II, *supra* note 1, at 436.

⁹⁶ *Id.* They qualify that statement by saying that Colorado may be an exception because of its continuous adjudication process.

⁹⁷ *Id.*

⁹⁸ *Id.* at 436–37. The Gila River Adjudication in Arizona provides a good example of this problem. See Scott B. McElroy & Jeff J. Davis, *Revisiting Colorado River Water Conservation District v. United States—There Must Be a Better Way*, 27 ARIZ. ST. L.J. 597, 612 (1995) [hereinafter McElroy & Davis]; see also Feller, *supra* note 9.

⁹⁹ They conclude that general stream adjudications “have fallen short of the goals principally because they remain incomplete.” Thorson II, *supra* note 1 at 463.

¹⁰⁰ Tarlock, *supra* note 2, at 273.

¹⁰¹ WYO. STAT. ANN. § 1-37-106 (2015). Remember that Wyoming long ago had established a process for general stream adjudications that were to be conducted by its Board of Control. WYO. STAT. ANN. § 41-4-206 (2015). Wyoming Water Law, *supra* note 32, at 12, 200.

(1) confirm existing decreed or adjudicated rights; (2) confirm the status of uncanceled permits and adjudicate those that had been perfected; and (3) determine the extent and priority date of any other right to use river system water and adjudicate such rights.¹⁰² On January 24, 1977 the State filed its complaint in the District Court for the Fifth Judicial District, seeking the general adjudication of the “nature, extent, and relative priority of all the water rights of all persons in the Big Horn River System . . . and all other sources in Water Division Number Three”¹⁰³ The Complaint asked the court to initiate a general adjudication action and to find that it had jurisdiction over the United States under the McCarran Amendment, 43 U.S.C. § 666.

Finalized on September 5, 2014,¹⁰⁴ the adjudication addressed questions of Indian reserved rights associated with the Wind River Indian Reservation (Phase I), federal reserved rights for national forests, Yellowstone National Park, and Bureau of Land Management lands reserved for their springs and waterholes (Phase II), and the status of all certificated and adjudicated water uses and uncertificated permits for uses in the Big Horn basin (Phase III). Based on detailed consideration of all practicably irrigable acreage within the reservation, the courts found a total of 54,216 acres of what were termed *historic* lands, with an allowable use of 290,490 acre-feet/year and 53,760 acres of what were termed *future* lands with an allowable use of 209,372 acre-feet/year.¹⁰⁵ The historic lands involved more than 1,700 individual tracts.¹⁰⁶ Many of these tracts (about 1,300) held state permits that had to be removed; reserved rights were then attached to about 28,000 acres with a total allowable use of about 158,000 acre-feet.¹⁰⁷ The process also confirmed the use of 685 wells, used mostly for domestic or stock watering.¹⁰⁸ In addition, the adjudication determined that so-called *Walton* rights existed for 15,315.57 acres with an allowable use of about 90,000 acre-feet of water per year.¹⁰⁹

¹⁰² WYO. STAT. ANN. § 1-37-106 (a)(i)(A)(II-IV) (2015). A comprehensive discussion of this adjudication is provided in Jason A. Robison, *Wyoming's Big Horn General Stream Adjudication*, 15 WYO. L. REV. 243 (2015) [hereinafter Robison].

¹⁰³ In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, Complaint, January 24, 1977. The Complaint noted the land area under consideration covered more than thirteen million acres, about twenty-one percent of the State of Wyoming. *Id.* ¶ 12, p. 3.

¹⁰⁴ In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, Final Order (September 5, 2014), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/9-29-14a.PDF>.

¹⁰⁵ Interview with Nancy McCann, Big Horn Adjudication, Office of the Wyoming State Engineer (August 26, 2014).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* Walton rights hold a priority date of 1868, the date the reservation was established. See Wyoming Water Law, *supra* note 32, at 220–21.

Non-Indian federal reserved rights were resolved through negotiation and entered into the adjudication through a stipulation and agreement submitted to the court on November 20, 1982.¹¹⁰ Included in this settlement were Yellowstone National Park, Big Horn Canyon National Recreation Area, Public Water Reserves, Stock Driveways, Wood River Administrative Site, Big Horn National Forest, and Shoshone National Forest.¹¹¹

Phase III of the adjudication concerned all claims of right to use water within the basin under state law. By agreement, all certificated/decreed rights determined prior to January 1, 1975 were confirmed without review.¹¹² Review concerned permits that had not obtained a certificate of appropriation or had been only partially adjudicated. This included 4,610 surface water permits (2,709 ditches, 931 enlargements, 660 reservoirs, and 310 stock reservoirs).¹¹³ Only about thirty percent of these permits ended up getting adjudicated; the remaining permits were cancelled.¹¹⁴ In addition, there were 10,600 unadjudicated groundwater permits.¹¹⁵ Of these, about 7,730 were adjudicated without field inspection as *de minimis* (less than twenty-five gallons per minute).¹¹⁶ Less than 500 well permits received certification.¹¹⁷ The remaining permits were cancelled.¹¹⁸

Given that Wyoming decided not to examine already adjudicated rights and that all pre-permit-system claims had long ago been incorporated into the state system, the dominant issue in this phase of the adjudication concerned outstanding permits that had not obtained a certificate of appropriation from the Board of Control. Wyoming law since 1891 has required anyone wanting to use waters of the State to first obtain a permit from the state engineer.¹¹⁹ Permittees to use surface water are given a time period (no more than five years) within which

¹¹⁰ Stipulation and Agreement; Re: Partial Interlocutory Decree Covering United States' Non-Indian Claims, November 20, 1982. This decree was finalized in 2005. Final Phase II Decree Covering the United States' Non-Indian Claims.

¹¹¹ Interview with Nancy McCann, Big Horn Adjudication, Office of the Wyoming State Engineer (September 9, 2014).

¹¹² These rights were contained in the September 1978 Tabulation of Adjudicated Water Rights, including over 200 pages of surface water rights and 78 groundwater rights. Interview with Nancy McCann, Big Horn Adjudication, Office of the Wyoming State Engineer (August 28, 2014).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* The Legislature eliminated the map requirement for such wells. While adjudicated, these wells do not receive certificates of appropriation.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ WYO. STAT. ANN. § 41-4-501(a). See also Wyoming Water Law, *supra* note 32, at 13, 100 (2015).

facilities necessary to put water to beneficial use must be completed.¹²⁰ Ditch permittees are further given a specified time within which they must put water to beneficial use; within five years from this date they are required to submit “proof of appropriation.”¹²¹ A permit also is required prior to the construction of a well for the use of groundwater.¹²² By statute, groundwater permittees are given no more than three years from the date of permit approval to complete the well and apply water to beneficial use.¹²³ There are separate provisions for adjudication of groundwater wells.¹²⁴

The large number of permitted but unadjudicated claims is consistent with earlier findings.¹²⁵ Part of the problem is simply the staff time required to process proofs of appropriation that are submitted.¹²⁶ Another problem may be that permittees do not understand they are required to notify the State Engineer when they have completed construction of the necessary facilities.¹²⁷ And, despite the fact the Wyoming Supreme Court has made this clear, many permittees do not understand their rights are not “perfected” until they have received a certificate

¹²⁰ WYO. STAT. ANN. § 41-4-506 (2015). The State Engineer may extend this period. Permits also are required prior to construction of storage facilities. WYO. STAT. ANN. § 41-3-301(a) (2015). While the application is to specify the time that construction will begin and the time required for its completion, there is no requirement that the permit include these as conditions. Nor is there any requirement to put water to beneficial use by any date certain or to submit proofs to that effect. Parties seeking a secondary permit to use water from a reservoir also must obtain a permit. WYO. STAT. ANN. § 41-3-302 (2015). Here the statute provides: “When beneficial use has been completed and perfected under the said secondary permit the division superintendent shall take the proof of the water user under such permit and the final certificate of appropriations shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit.” *Id.*

¹²¹ WYO. STAT. ANN. § 41-3-302 (2015) (“final proof of appropriation must be submitted within five (5) years after the date specified for the completion of the application of the water to beneficial use.”). *But see* WYO. STAT. ANN. § 41-4-511 (2015) (“Whenever an appropriation of water has been perfected in accordance with any permit issued by the state engineer, the appropriator may submit final proof of appropriation of water at any time within the time specified by W.S. 414506, . . .”).

¹²² WYO. STAT. ANN. § 41-3-930(a) (2015).

¹²³ WYO. STAT. ANN. § 41-3-934 (2015). The State Engineer may extend the period.

¹²⁴ WYO. STAT. ANN. § 41-3-935 (2015). The State Engineer may order an adjudication of wells but, otherwise, it does not appear that adjudication is required. WYO. STAT. ANN. § 41-3-935(d) (2015). The adjudication of stock water or domestic wells authorized under 41-3-907 may be initiated by the state engineer or by the well owner. WYO. STAT. ANN. § 41-3-935(b) (2015). Wyoming Water Law, *supra* note 32 at 142–43.

¹²⁵ Jackson B. Battle, *Paper Clouds Over the Waters: Shelf Filings and Hyperextended Permits in Wyoming*, 22 LAND & WATER L. REV. 673 (1987); *see also* McIntire, *supra* note 90.

¹²⁶ Interview with Nancy McCann, Big Horn Adjudication, Office of the Wyoming State Engineer (August 25, 2014).

¹²⁷ WYO. STAT. ANN. § 41-4-506 (2015). This provision states: “Default by the holder of the permit in any of the specified requirements shall work a forfeiture of the water right involved. The state engineer may upon such default cancel the permit.” *Id.* The State Engineer must first notify the permittee of the default.

from the Board of Control.¹²⁸ Still another issue may be statutory uncertainties. The requirements appear to vary depending on whether the permit is for ditches, for storage, or for groundwater wells. These issues suggest the need for clarification of permittee responsibility and for clear direction to the state engineer to take the steps necessary to cancel permits that are not in compliance with their terms.¹²⁹

The adjudication process required thirty-seven years. The State had to provide notice of the proceeding to every person with a claim of right to use either surface water or groundwater of the Big Horn basin, an enormously complicated and time-consuming task that ultimately identified more than 20,000 parties.¹³⁰ It required the services of six special masters, five district court judges, involved six decisions by the Wyoming Supreme Court, and one decision by the U.S. Supreme Court.¹³¹ It cost the State of Wyoming an estimated \$20–25 million dollars and uncounted millions expended by the United States, the tribes, and the other parties.¹³² It quantified tribal reserved rights but left unresolved contentious issues respecting their use and administration.¹³³ It cleaned up the status of about 15,000 adjudicated permits, mostly small groundwater wells.¹³⁴ Views differ whether the final results justify the process, but all seem to be happy that it is over.¹³⁵

¹²⁸ The Wyoming Supreme Court has discussed at length the difference in the status of a permit and an adjudicated right. *Green River Dev. Corp. v. FMC Corp.*, 660 P.2d 339 (Wyo. 1983).

¹²⁹ While Wyoming law places specific time limits on permittees, it also requires the State Engineer to notify the permittees three months before the expiration of the time. WYO. STAT. ANN. § 41-4-506 (2015). The statute states: “Default by the holder of the permit in any of the specified requirements shall work a forfeiture of the water right involved.” *Id.* But then it adds: “The state engineer may upon such default cancel the permit.” *Id.* The ambiguity in these two statements appears to have allowed “forfeited” permits to remain in the state water rights system. In 1985 the State Engineer established an affidavit process enabling reinstatement of “expired” surface water permits. Memorandum from George F. Christopoulos, State Engineer, Affidavit Procedure for Expired Rights and Permits Where Beneficial Use Was Made More Than 20 Years Ago (January 3, 1985).

¹³⁰ Interview with Nancy McCann, Big Horn Adjudication, Office of the Wyoming State Engineer (August 27, 2014).

¹³¹ Judge Skar to Sign Historic Final Decree in the Big Horn River General Adjudication, *Press Release Big Horn River General Adjudication* (copy on file with author).

¹³² Interview with Nancy McCann, Big Horn Adjudication, Office of the Wyoming State Engineer (December 22, 2014).

¹³³ The tribes sought to use their adjudicated future use rights to maintain a minimum flow level in the Wind River. The Wyoming Supreme Court determined that these rights could only be used for agricultural purposes on the reservation. *In re The General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273 (Wyo. 1992).

¹³⁴ Interview with Nancy McCann, Big Horn Adjudication, Office of the Wyoming State Engineer (August 28, 2014).

¹³⁵ Interview with Nancy McCann, Big Horn Adjudication, Office of the Wyoming State Engineer (August 25, 2014).

B. *The Snake River Basin Adjudication*

The Idaho Supreme Court initiated the Snake River Basin Adjudication (SRBA) on June 19, 1987.¹³⁶ The process concluded on August 25, 2014.¹³⁷ The SRBA considered 151,604 claims to use water throughout the basin, an area covering approximately three quarters of the State of Idaho.¹³⁸ Idaho decided to examine all claims to use water, including those previously licensed or decreed, those established outside the State permitting system, and all federal and Indian claims.¹³⁹ All parties with a claim to use basin water were required to file a claim with the SRBA court, including the roughly 60,000 with some state record of their right.¹⁴⁰ Of the approximately 151,000 claims filed in the adjudication, about 138,000 claims were based on state law, and about 13,000 claims were based on federal or Indian reserved water rights.¹⁴¹ Initially the State carried out individual field inspections of all claims to verify the nature and extent of their use.¹⁴² By the late 1990s the State shifted to the use of aerial photography

¹³⁶ In the settlement of the so-called Swan Falls litigation, the State committed to pursuing an adjudication of all water rights in the Snake Basin. See David B. Shaw, Idaho Dep't of Water Resources, *Snake River Basin Adjudication* (August 1988). The State of Idaho identified four objectives for the Snake River Adjudication:

1. Identification and quantification of waters in the Snake River Basin will provide the Department of Water Resources the information to manage the river and enforce minimum flows.
2. Clear definitions of water rights will protect valid claims against future challenges and facilitate transfers and trading of such rights.
3. A general adjudication will result in quantification of federal and Indian water rights which until now have been unresolved.
4. The adjudication will define the amount of water available for development over and above the proposed new minimum flows.

Cited in Clive J. Strong, *The First Twenty Years of the Snake River Basin Adjudication: Is There an End in Sight?*, 50 *ADVOCATE* (IDAHO) 14, fn.24 (Jan. 2007) [hereinafter Strong I].

¹³⁷ Clive J. Strong, *SRBA Retrospective: A 27-Year Effort*, 57 *ADVOCATE* (IDAHO) 28 (Dec. 2014) [hereinafter Strong II].

¹³⁸ Telephone interview with Clive Strong and Carter Fritschle, Idaho Dep't of Water Resources (August 28, 2014) [hereinafter Strong/Fritschle Interview].

¹³⁹ Idaho established a permitting system for surface water rights in 1903, but the Idaho Supreme Court decided that it was still permissible to establish rights through direct appropriation and beneficial use of water. *Sand Point Water & Light Co. v. Panhandle Dev. Co.*, 83 P. 347 (Idaho 1905). In 1963 the legislature expressly required all groundwater users to obtain a permit and extended this requirement to surface water users in 1971. Strong/Fritschle Interview, *supra* note 138.

¹⁴⁰ Of these approximately 60,000 records, about 50,000 were based on licenses, decrees, or permits. Strong/Fritschle Interview, *supra* note 138. The remaining 10,000 represented what are called "statutory" claims—that is, claims based on beneficial use and recorded with the State.

¹⁴¹ *Id.*

¹⁴² *Id.*

that it incorporated in a geographical information system.¹⁴³ Of the state-law claims based on decrees, licenses, permits, or statutory claims, about 3,000 were disallowed.¹⁴⁴ The claims based on beneficial use (statutory claims) were generally disallowed because the claimants did not provide adequate evidence of actual beneficial use.¹⁴⁵ The disallowed claims based on prior decrees or licenses were in the minority, and these claims were disallowed because the water use was found to have been forfeited or abandoned.¹⁴⁶ Another 7,000 (approximately) prior decrees, licenses, permits, or statutory claims were never claimed in the SRBA, and consequently decreed as “unclaimed disallowed” by the SRBA Court.¹⁴⁷ It is estimated that less than ten percent of the recommendations submitted by the Idaho Department of Water Resources to the court were contested.¹⁴⁸

The State successfully negotiated settlement of tribal reserved rights, producing outcomes that are viewed as models of such agreements.¹⁴⁹ The Idaho Supreme Court generally took a very narrow view of reserved rights for federal land reservations in the State, however.¹⁵⁰ Consequently, “[t]he United States filed more than 13,000 federal reserved water rights claims in the SRBA. Of these claims, the United States was decreed 1,346 and disallowed slightly more than 11,700.”¹⁵¹

Experience under the SRBA offers several potentially valuable lessons. Despite the fact that this process examined all outstanding claims and included thousands of federal and tribal claims, it was completed in a relatively short twenty-seven years. One of the keys was the redefinition of the role of the Idaho Department of Water Resources (IDWR) from party to the proceeding to technical assistant to the process.¹⁵² Another was the use of aerial photography and geographic information systems to verify locations and extent of water uses, rather than time-intensive individual field investigations.¹⁵³ A third was the use of active dispute resolution processes to resolve differences between IDWR initial

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* The State decided that domestic and stock water wells did not need to be licensed.

¹⁴⁸ *Id.* The Department utilized an aggressive process of consultation and dispute resolution with claimants that successfully resolved most of the disagreements.

¹⁴⁹ See Strong II, *supra* note 137, at 28–29.

¹⁵⁰ See the discussion in GSAs, *supra* note 73.

¹⁵¹ Strong II, *supra* note 137, at 28.

¹⁵² Strong/Fritschle Interview, *supra* note 138. Legislative changes in 1994 were necessary to make this possible.

¹⁵³ *Id.*

recommendations and the claimants' positions.¹⁵⁴ A fourth was the successful use of settlement processes to resolve Indian reserved water rights.¹⁵⁵ A fifth was an effective case management process that divided the task into more manageable sub-basins, that dealt effectively with treatment of basin wide issues to resolve questions that then could be applied to all claims, and that placed resolution of state-law-based claims and federal/Indian claims on parallel tracks.¹⁵⁶ A final important factor was the strong commitment of the legislature to the process, evidenced by its continued substantial financial support.¹⁵⁷

The Snake River adjudication dealt with a much larger number of claims than did the Big Horn and managed to reach resolution in fewer years. The State expended about \$93 million over the twenty-seven-year process.¹⁵⁸ There are no reported estimates for the costs incurred by other parties. Idaho law states that failure to provide proof of beneficial use within the required time causes a permit to "lapse," apparently explaining why there were so few outstanding undeveloped permits.¹⁵⁹ While the process appears to have worked relatively efficiently for state law-based uses, the outcomes for federal reserved right claims were more problematic.¹⁶⁰

V. RETHINKING THE USE OF GENERAL STREAM ADJUDICATIONS

General stream adjudications are an artifact of a different era. They arose because states had not established procedures for supervising the use of water, so there were no reliable records establishing priority dates and other elements of use. Courts struggled with this role, seeking to fit these proceedings into more traditional forms of litigation while testing the flexibility of ordinary procedural requirements to take account of the many obvious differences in determining water rights. Who are plaintiffs and defendants in a general adjudication? Who must be a party? What kind of notice is required? Who is responsible for serving notice? What is the status of a water user who is not joined in the action? What type of pleadings must be filed and what kinds of proof must be included? Should parties be represented by counsel? What level of participation is required of the parties? Should the state be a party or should it serve as a technical assistant to the

¹⁵⁴ *Id.* The IDWA developed its preliminary findings and conclusions and submitted them to the claimants. If claimants objected and the IDWA did not agree, the information was submitted to a mandatory settlement process.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Brian Smith, *As Water Rights Review Closes, Management Questions Loom*, MAGICVALLEY.COM (Aug. 26, 2014).

¹⁵⁹ IDAHO CODE ANN. § 42-218(a) (2015). Interview with Carter Fritschle (September 3, 2014).

¹⁶⁰ See GSAs, *supra* note 73.

court? Must the court accept previous decrees determining priorities and diversion rights? Should the court accept previous administrative determinations of perfected rights? Should the court consider present and historic use in quantifying the rights? How should the adjudication handle claims already initiated but under which water has not been applied to beneficial use? On what basis may a court eliminate claims on the basis of forfeiture or abandonment?¹⁶¹

This part examines three fundamental premises upon which general stream adjudications appear to be based: (1) that determination of a vested water right is an adversarial process, (2) that therefore all water users from the same source need to be party to the process so they can protect their interests and so they will be bound by the results, and (3) that courts must decree the existence of vested water rights. We consider whether these premises require use of a general stream adjudication to determine water rights.

A. Are General Stream Adjudications an Adversarial Process?

The basic premise of a general stream adjudication—that it is a dispute among all water users from the same source of water that requires resolution—fits into the judicial approach most often used, but is it an accurate representation of the actual purpose of the process? There are, of course, disputes between users of water from the same source that go to court for resolution.¹⁶² If the priorities of the competing users have not previously been determined, the court will likely have to make that determination to resolve the dispute. But resolution of disputes about conflicting uses should be distinguished from processes intended simply to verify and make official the priority and extent of a common law appropriation. It appears that courts have mixed these two types of processes together when discussing general stream adjudications, perhaps because of the initiation of general stream adjudications in some cases by water users involved in some dispute with other water users and perhaps because they are courts used to resolving specific disputes.¹⁶³

The judicial adjudication process took on the nature of an adversarial proceeding, with a *plaintiff* water user petitioning the court to *quiet* his title (meaning to establish his title) as against all other users of water from the same source. Courts decided that they could entertain suits to determine the “relative”

¹⁶¹ See Thorson II, *supra* note 1, at 356–432 (discussing how states and courts have attempted to address these many issues).

¹⁶² See *supra* notes 52–53 and accompanying text.

¹⁶³ See *supra* notes 46–49 and accompanying text (respecting the ability of individual water users to initiate general stream adjudications).

priorities of users from the same source brought by one party “against” all other users.¹⁶⁴ Thus the Utah Supreme Court said:

The purposes of an action to determine rights to the use of water, and the legal principles by which it is controlled, are the same as in an action to determine title to real estate. The difference in the nature of the subject-matter, and the fact that two or more persons may have the legal right to use parts of the same water source, or even the identical water, need not confuse the legal aspect of the matter. The right to use a definite quantity of water of a particular source is just as specific a thing, in legal contemplation, as an estate in land, and the title to one is quieted in precisely the same manner as the other.¹⁶⁵

But, in fact, these proceedings are not the same as quiet title actions used to resolve ownership disputes to the same property.¹⁶⁶ Rather, they involve investigations about whose rights to use water from the same source have vested earliest so as to gain the protection of having a senior priority. The property at issue in a general stream adjudication is not water itself, but individual rights to use water. Adjudications involve determination of key aspects of the right of use, aspects that are unique and particular to that use. Thus, unlike quiet title actions, adjudications of water rights are not for the purpose of determining who has title to individual water rights, but for the purpose of establishing title. These adjudications do not remove a cloud on title to real property, but verify that all necessary legal requirements to establish a water right have been met and document key elements of the right—priority, use, and quantity. And, as the Wyoming Supreme Court concluded in 1900, they involve the ratification of private rights to use a public resource and enable administration of those rights in times of shortage.¹⁶⁷

An adjudication is simply a determination of the priority and extent of a water right.¹⁶⁸ These are purely factual matters, based on law. A priority date is determined, based on the actions of the individual appropriator as required by law.¹⁶⁹ The extent of the appropriation is measured by the amount of water

¹⁶⁴ 3 Kinney, *supra* note 16, § 1543, p.2775. Priorities are in fact not relative but absolute. They do not depend on other priorities but are specific to the circumstances of each appropriation.

¹⁶⁵ Logan, Hyde Park & Smithfield Canal Co. v. Logan City, 269 P. 776, 778 (Utah 1928).

¹⁶⁶ For a statement of the purpose of quiet title actions, see 65 AM. JUR. 2D *Quieting Title* § 1.

¹⁶⁷ Farm Investment Co. v. Carpenter, 61 P. 258, 266–67 (Wyo. 1900).

¹⁶⁸ See *supra* notes 13–15 and accompanying text.

¹⁶⁹ So, for example, under common law prior appropriation the priority dated from the posting of notice of intent to appropriate, so long as actual beneficial use of water then occurred in a timely manner. See *Prior Appropriation*, *supra* note 2. Colorado in 1879 decided to base the

necessary to accomplish the intended use.¹⁷⁰ Unlike under the riparian doctrine, prior appropriation water rights are not correlative—that is, their use is not dependent on the needs of other users from the same source of supply.¹⁷¹ While the existence of a large senior use is potentially *adverse* to a downstream junior water users, its existence and extent do not in any way depend on the downstream user's needs or interests. Other users may wish to participate in the determination of water rights, but their involvement extends only to ensuring that the facts upon which the determination is made are accurate and the law is being properly applied.¹⁷² Legal use of water by a senior appropriator, by definition, cannot injure a junior appropriator.¹⁷³

B. Does a Determination of a Water Right Require a Proceeding Involving All Users of Water from the Same Source?

Colorado's original adjudication statute envisioned a single proceeding simultaneously involving all water users from the same source of supply.¹⁷⁴ Wyoming followed this approach to enable determination of all existing rights, but provided for individual adjudications for all subsequent uses established under its new permit system.¹⁷⁵ Oregon followed this model but without directing a state-supervised determination of all rights established prior to the institution of its permit system.¹⁷⁶ Even Colorado changed its approach so that those with already adjudicated rights no longer had to be party to additional adjudications.¹⁷⁷

priority date on the date construction of water diversion and delivery facilities began. *See supra* note 23 and accompanying text. Today, in permitting states the priority date is the date the application to appropriate water is filed with the state. *See, e.g.,* Wyoming Water Law, *supra* note 32, at 101.

¹⁷⁰ Prior to the development of administrative procedures the amount of an appropriation was measured by the size of the diversion facilities. *See* Prior Appropriation, *supra* note 2. The actual needs for water to grow crops became better understood, the measure of an appropriation shifted to the quantity of water necessary to achieve the intended use—known as the duty of water. *See, e.g.,* Wyoming Water Law, *supra* note 32, at 111–12.

¹⁷¹ An explanation of the correlative nature of riparian water rights is provided in Law of Water Rights, § 3:60, *supra* note 1. Riparian uses must be “reasonable.”

¹⁷² In Colorado, such participation by those filing statements of opposition to the determination of a water right is said to be for the purpose of ensuring “strict proof.” *See, e.g.,* Concerning the Application for Water Rights of Turkey Canon Ranch LLC, 937 P.2d 739, 753 (Colo. 1997); Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co., 195 P.3d 674, 686 (Colo. 2008) (“Any person or organization may maintain a statement of opposition for the purpose of holding the applicant for a conditional water right to a standard of strict proof.”).

¹⁷³ Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 ENVTL. L. 37, 42–43 (2002).

¹⁷⁴ *See supra* note 26 and accompanying text.

¹⁷⁵ *See supra* note 34 and accompanying text.

¹⁷⁶ OR. REV. STAT. § 539.010 (2015).

¹⁷⁷ *See* Corbridge & Rice, *supra* note 25, at 139–42.

Despite the clear recognition that those with previously adjudicated rights do not need to be party to subsequent adjudications, the matter remains unclear under the laws of states whose statutes call for the inclusion of all parties and under the McCarran Amendment's requirements for a comprehensive adjudication.¹⁷⁸

The view seems to be that because all water users from the same source are potentially affected by the determination of other users' priorities, they need to be involved in such determinations. Thus, the U.S. Supreme Court, when reviewing the Oregon adjudication process, stated: "the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purposes, . . ."¹⁷⁹ The Nevada Supreme Court opined:

In a suit to quiet title to water rights, such as this, the main purpose is to determine the respective rights of the parties to the use of the water. A decree which leaves the controversy between the parties unsettled, unadjudicated, undetermined, and subject to future litigation, defeats the very purpose for which the action is brought.¹⁸⁰

Referring to what it called "water suits," the Idaho Supreme Court stated:

In a water suit, an appropriator from a certain stream would have to bring an action against each and every other appropriator from the same stream before he could have his rights finally adjudicated as to all of such appropriators. His bringing a suit against one appropriator would not settle his rights. It would leave him with other litigation to settle them, and for that reason he is permitted to join as plaintiff or defendant every other appropriator of water from the stream.¹⁸¹

The Senate Report accompanying the McCarran Amendment stated: "by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a

¹⁷⁸ See, e.g., ARIZ. REV. STAT. § 45-251(2) (2015) ("General adjudication" means an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source."); NEV. REV. STAT. § 533.095(2)(b) (2015); N.M. STAT. ANN. § 72-4-17 (2015); S.D. CODIFIED LAWS § 46-10-1 (2015). The U.S. Supreme Court held the requirements of the McCarran Amendment met under Colorado's unique ongoing adjudication system. See *supra* note 77 and accompanying text.

¹⁷⁹ *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440, 449 (1916). The Court seemed to be basing this view on the need to gain a complete record of all claims so there could be effective administration of uses. *Id.* at 447.

¹⁸⁰ *Pacific Live Stock Co. v. Ellison Ranching Co.*, 286 P. 120, 123 (Nev. 1930).

¹⁸¹ *Creer v. Bancroft Land & Irrigation Co.*, 90 P. 228, 231 (Idaho 1907).

stream, in practically every case, are interested and necessary parties to any court proceeding.¹⁸² In *Nevada v. United States*, the U.S. Supreme Court emphasized the importance of finality in explaining the purpose of joining all parties in a general adjudication.¹⁸³ The Wyoming Supreme Court suggested that “[g]iven the very nature of water rights (‘first in time is first in right’), the complexity of a general stream adjudication such as this one, and the limited nature of the resource itself, we can presume prejudice to others competing for water on this river system.”¹⁸⁴

Again, these statements all seem to reflect the view that water right determinations are adversarial and that all users need to participate to protect their interests. Yet, as discussed, virtually all states using a permitting system provide for individual adjudication or determination that the permitted use has matured into a vested right.¹⁸⁵ Colorado determines new water rights individually, addressing the potential problem of adversity by providing that newly adjudicated rights cannot be senior to previously adjudicated rights.¹⁸⁶ This requirement has the salubrious effect of motivating appropriators to move quickly to get their appropriations adjudicated. But other states regularly adjudicate individual rights without postponing their actual priority date in this manner.¹⁸⁷

We return again to the question: what is the purpose of a *general* adjudication? Aside from the effect of the McCarran Amendment, is there any legal necessity for using a general adjudication to determine water rights? More specifically, is there anything about the determination of rights established prior to the institution of a permitting system that might necessitate the use of a general adjudication? Certainly there is the practical reality of the remoteness in time when these uses were established and the absence of any public supervision. But the factual

¹⁸² Reproduced in *In re Snake River Basin Water System*, 764 P.2d 78, 84 (Idaho 1988).

¹⁸³ A quiet title action for the adjudication of water rights, such as the *Orr Ditch* suit, is distinctively equipped to serve these policies because

“it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply.”

Nevada v. United States, 463 U.S. 110, 129 n.10 (1983) (quoting 3 CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS AND THE ARID REGION DOCTRINE OF APPROPRIATION OF WATERS § 1535, at 2764 (2d ed. 1912)).

¹⁸⁴ *In re Big Horn River System*, 85 P.3d 981, 996 (Wyo. 2004). In the Court’s view, one party’s interest in gaining determination of a senior priority is adverse to the interest of other users with junior priorities.

¹⁸⁵ See *supra* notes 174–76 and accompanying text.

¹⁸⁶ See *supra* note 177 and accompanying text.

¹⁸⁷ See, e.g., WYO. STAT. ANN. § 41-4-511 (2015); see also Wyoming Water Law, *supra* note 32, at 108–10.

challenges are the same whether these rights are determined on a case-by-case basis or in some kind of comprehensive proceeding that joins all cases together. The arguments for a general adjudication focus on the need to avoid piecemeal litigation and the supposed benefits of getting everyone's priorities established in a single proceeding.¹⁸⁸ But these arguments fail to acknowledge the enormously greater complexity of such proceedings and the degree to which numerous other issues are likely to arise that can prolong and complicate the proceeding.¹⁸⁹

The concept that all users should be joined in a single proceeding may also reflect the circumstances in which the use of such proceedings arose.¹⁹⁰ Under common law prior appropriation, rights of use emerged out of the unregulated actions of individual appropriators.¹⁹¹ There was no public supervision and only the most primitive of records. The rules governing appropriation were still in formation. Joining all users in a single proceeding not only had the appeal of establishing a complete record of rights at that time and potentially avoiding multiple law suits,¹⁹² it also ensured that whatever decision rules the court used would be applied equally to all and that competing appropriators would help ensure more accurate claims of use. As a legal proceeding, it was viewed as necessary to have all users as parties so they would be bound by the decree.¹⁹³

But the identification and inclusion of all claimants to the use of water from a particular source presented significant challenges.¹⁹⁴ Parties inadvertently omitted from an adjudication might later argue they were not bound by it.¹⁹⁵ Courts have

¹⁸⁸ See *supra* note 48 and accompanying text.

¹⁸⁹ See *supra* note 57 and accompanying text.

¹⁹⁰ At a time in which there were no state administrative procedures for establishing and determining new rights, there was the concern that a dispute between two parties would not preclude the institution of a suit by other water users that prompted the use of multi-party judicial adjudications. See *supra* note 48 and accompanying text.

¹⁹¹ See Prior Appropriation, *supra* note 2.

¹⁹² 3 Kinney, *supra* note 16, § 1543, p.2774.

¹⁹³ *Id.* ("A decree attempting to adjudicate and settle the rights as between two appropriators or claimants in an action between themselves only as parties would not bind in any way the other appropriators and users of the water from the same source, and not made parties to the action."). See also Waldrip, *supra* note 9, at 153, n.12 ("Since the alternative would be continual lawsuits over any but the most meager of water sources, general determination for an entire stream system or drainage basin, joining a large number of parties in one suit, represents the only rational means of limiting litigation.").

¹⁹⁴ See, e.g., Thorson II, *supra* note 1, at 378–81. See, e.g., General Determination of the Rights to the use of All the Water, Both Surface and Underground, Within the Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete and Juab Counties in Utah, 982 P.2d 65 (Utah 1999)

¹⁹⁵ See, e.g., State *ex rel.* Reeder v. Dist. Ct., 47 P.2d 653 (Mont. 1935); Albert W. Stone, *Are There Any Adjudicated Streams in Montana?*, 19 MONT. L. REV. 19 (1957–58).

struggled with how to treat water uses that had not been included in previous adjudications, and state law varies considerably.¹⁹⁶ Issues have arisen about whether it is necessary to join every type of user, no matter how small.¹⁹⁷ And, as mentioned, not all states require the joinder of all users in a general adjudication.¹⁹⁸

C. *Is a Judicial Decree Necessary to Determine Water Rights?*

Another explanation for the use of judicial general adjudications was the view that only courts can determine property rights.¹⁹⁹ The fact that most states adopted a requirement for final approval by courts suggests these legislators might have believed this was true.²⁰⁰ A widely held view at that time was that the separation of powers precluded administrative agencies from exercising what were viewed as judicial duties.²⁰¹ Alternatively, the use of courts might simply have reflected the view by legislators, many of whom are lawyers, that courts are preferred to administrative agencies.²⁰² Still another possibility is that the use of a judicial

¹⁹⁶ A good but dated discussion of this topic, including differences among the states, is provided in Waldrip, *supra* note 9, at 164–77.

¹⁹⁷ See Thorson II, *supra* note 1, at 367 (de minimis uses for stock watering and domestic purposes).

¹⁹⁸ Thomas H. Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 *ECOLOGY L.Q.* 627, 657–68 (1988); Thorson II, *supra* note 1, at 367–68. See also *supra* notes 182–84 and accompanying text.

¹⁹⁹ See *supra* note 40 and accompanying text. Use of the term “adjudication” inherently suggests a judicial function, although today many administrative bodies are given adjudicative authority. As discussed *supra* note 39, courts initially resisted the idea that an administrative body could exercise anything resembling judicial authority. With the rise of administrative law in the twentieth century the lines between judicial and administrative functions have blurred considerably. See, e.g., Freytag v. Comm’r, 501 U.S. 868, 910 (1991) (Scalia, concurring) (‘Adjudication,’ in other words, is no more an ‘inherently’ judicial function than the promulgation of rules governing primary conduct is an ‘inherently’ legislative one.’).

²⁰⁰ This role for courts was included even in those states that otherwise put most of the responsibility for making the determinations with administrative officers. See, e.g., OR. REV. STAT. § 539.150 (2015).

²⁰¹ See *supra* note 40 and accompanying text. The idea of separation of legislative, executive, and judicial powers incorporated into the U.S. Constitution represented an attempt to limit power. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. REV.* 573, 575 (1984) (“These three powers of government are kept radically separate, because if the same body exercised all three of them, or even two, it might no longer be possible to keep it within the constraints of law.”).

²⁰² Krogh, *supra* note 11, at 24 notes the preference among lawyers/legislators for judicial proceedings. Dunbar, *supra* note 19, at 92 found this preference in Colorado back in the late 1870s and early 1880s. See also 3 Kinney, *supra* note 16, § 1595, p.2902 (The more we study the workings of the laws of State control as to the determination by governing boards, in the first instance, of existing rights to the use of water, the more firmly we are convinced that all judicial or “quasi-judicial” powers should be taken from the State engineer and governing boards, and vested in the courts, as is the case in Colorado, where, under our form of government, that power properly belongs.).

process reflected, in part, the absence of well-developed administrative processes at the time.²⁰³ With robust development of administrative law and procedure during the twentieth century, these concerns can no longer support the view that only courts can determine water rights.²⁰⁴

The determination of the priority and extent of a water right is predominately a factual matter, often involving technical questions outside the legal arena. As stated by the Nevada Supreme Court:

Now the preliminary proceedings before the state board of control, in taking testimony and making findings of fact concerning the rights of the various claimants to the waters of a given stream, are, in my judgment, not judicial, but rather administrative. The powers of the board are not brought into action by the filing of a paper in the nature of a complaint setting up asserted rights, but by the mere presentation to it of a petition or request by one or more users of water, without any allegations of issuable facts, other than that the petitioner is a water user on the stream, and a request for the determination of the relative rights of the various claimants to such waters. No affirmative relief is asked, and no adverse pleadings are required or permitted, or issues joined, until after the evidence taken by the board is open to the inspection of the various claimants and owners.²⁰⁵

While many western states have chosen to give courts a role in the final determination of water rights, there does not appear to be any legal requirement to do so.

VI. POSSIBLE NEXT STEPS

This article argues that general stream adjudications have little if any utility at this stage of water decision-making in the West. It is widely agreed that general adjudications are complex, burdensome, and expensive.²⁰⁶ They originated in an era in which there was no alternative mechanism for determining rights established under common law prior appropriation principles. First utilized in courts, they took on the trappings of traditional litigation, with plaintiffs and defendants positioned as adverse parties, with actions characterized as quiet title actions rather than adjudications, with traditional notions of litigation such as

²⁰³ See *supra* note 183 and accompanying text.

²⁰⁴ See generally Moses Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration*, 3 ROCKY MT. L. REV. 161 (1928–29) [hereinafter Lasky].

²⁰⁵ *Ormsby County v. Kearney*, 142 P. 803, 808 (Nev. 1914).

²⁰⁶ See *supra* note 11 and accompanying text.

requiring joinder of parties so that the outcome—a decree—would be binding on all users of water, with the concomitant problems of notice, and with many courts acting to resolve other controversies that existed between users as part of the same process. These processes took on a life of their own that extended far beyond their original purpose—the determination of the priority and extent of water uses.

All the western states now have some kind of statutorily-established process for determining water rights.²⁰⁷ In all states except Colorado, these processes begin with the issuance of a permit and end with the issuance of a certificate or license verifying that the authorized use has been perfected—that is, water has been applied to beneficial use in accordance with the terms of the permit.²⁰⁸ Why not use the established verification processes to determine the status of any outstanding pre-state-process water uses? Under this approach, the state legislatures would need to enact a statute requiring all parties with established water uses that have not been processed under the statutory water right laws or previously decreed to provide *proof of appropriation* or the equivalent with the appropriate state entity.²⁰⁹ The state entity would review these proofs in the same manner as for those submitted as part of the permitting process.²¹⁰ The major issue is likely to be the priority date. Thus the new law or implementing regulations should make explicit the nature of the proof that will be required to establish the priority date. While there should, of course, be reasonable notice of each proceeding, with opportunity for participation by other interested parties, the state entity would be charged with making the determination based on the information presented, as supplemented by its own investigations. Reliance would be placed on the state to protect all interests, including those of users whose priorities turn out to be junior.

As demonstrated in Big Horn, adjudications can be useful to update the status of permitted but undetermined (unadjudicated) claims.²¹¹ Perhaps a better way to manage this problem is with clear rules, actively implemented, that ensure permittees build the necessary facilities and place water to beneficial use within the prescribed time(s) or are cancelled. Idaho's laws and procedures appear to promote this outcome.²¹²

²⁰⁷ Thorson II, *supra* note 1, at 337–55.

²⁰⁸ Law of Water Resources, *supra* note 1, § 5:44.

²⁰⁹ It appears that, in some states, the state water agency takes on the responsibility of searching out water uses to establish their continuing viability as water rights. *See, e.g.*, Amy Joi O'Donoghue, *The water question: The staggering problem of determining water rights*, DESERET NEWS (May 16, 2014), <http://www.deseretnews.com/article/865617715/The-water-question-The-staggering-problem-of-determining-water-rights.html?pg=all#h5rLLZy4wMkkHeC8.03> (describing the efforts of the Utah Division of Water Rights to adjudicate water rights).

²¹⁰ Presumably the state would rely on photographic and infrared imagery to verify uses and would develop up-to-date GIS maps and databases for future water management purposes. *See supra* note 153 and accompanying text.

²¹¹ *See supra* notes 112–18 and accompanying text.

²¹² *See supra* note 159 and accompanying text.

Adjudications also can remove unused claims from the record. Far more efficient, however, would be active use of already existing state procedures for determining abandonment and forfeiture.²¹³ The problem here appears to be reluctance to use these procedures, not their limitations.

To the degree that state general adjudications are motivated by the desire to determine federal and Indian reserved rights in state court, removing this authority would remove this motivation. One means by which this authority could be removed would be if the U.S. Supreme Court reversed itself and decided that reserved rights should in fact be determined in federal, rather than state, court.²¹⁴ Alternatively, Congress could pass legislation establishing special procedures for determining reserved rights,²¹⁵ directing that reserved rights be determined in federal courts, or otherwise clarifying its intention with respect to implied reserved rights. It is widely agreed that settlements are the preferred strategy for determining reserved water rights so Congress could direct the use of such settlements whenever possible.²¹⁶ An important model is provided by Montana's Reserved Rights Compact Commission that is being used to reach agreement on federal and Indian reserved rights in that State.²¹⁷

There is something audacious and, at same time, almost foolhardy about undertaking a general stream adjudication at this stage of water development in the West. The sheer number of outstanding claims and rights is daunting.²¹⁸ The problems of notice are manifold.²¹⁹ Case management presents major challenges.²²⁰ The potential burden on each claimant/water right holder can be significant.

²¹³ For example, Wyoming authorizes the state engineer to initiate forfeiture actions to cancel rights not used for five or more years. WYO. STAT. ANN. § 41-3-402 (2015).

²¹⁴ For a more complete discussion, see GSAs, *supra* note 73.

²¹⁵ An example of one legislative attempt is provided in Thorson I, *supra* note 1, at 467 (discussing a 1975 proposal during the Ford Administration).

²¹⁶ See, e.g., David H. Getches, *Foreword*, in BONNIE COLBY, ET AL., *NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST*, xvi (2005). *But see* Rebecca Tsosie, *Tribal Sovereignty and Intergovernmental Cooperation*, in *TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS* 33 (Thorson, Britton, & Colby eds., 2006) ("many tribal leaders feel they should litigate first and have a court affirm their rights, thus vesting in themselves greater political power at the head of a negotiating table"). See also Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CAL. L. REV. 1133 (2010).

²¹⁷ For a good overview, see Merianne A. Standsbury, *Negotiating Winters: A Comparative Case Study of the Montana Reserved Waterrights Compact Commission*, 27 PUB. LAND & RESOURCES L. REV. 131 (2006). The Montana Statewide General Adjudication has been placed on hold, pending settlement of outstanding reserved water rights. See also Strong II, *supra* note 137 (discussing settlements in Idaho's Snake River Basin Adjudication).

²¹⁸ Strong states that the Montana statewide adjudication has 219,000 claims, that there are 82,000 claims in the Gila adjudication, and that there were 158,591 claims in the Snake River adjudication. Strong II, *supra* note 137, at 28–29.

²¹⁹ See, e.g., Thorson I, *supra* note 1, at 378.

²²⁰ *Id.* at 398.

Costs to all participants, including the general tax-paying public, are surprisingly high.²²¹ While previously unadjudicated uses can be given a better title²²² and can be integrated into the state water rights records, there are only modest improvements in the existing state records—improvements that potentially could have been achieved through other, simpler means.²²³ Adjudications can sometimes help clarify unresolved matters of state law,²²⁴ but they can also raise unresolved issues of state law that might better have been addressed in a specific dispute between two parties.²²⁵

This article calls into question our use of general stream adjudications. These are processes that arose in a different era, one heavily steeped in use of courts and judicial processes to manage disputes and protect rights. While progressive thinkers like Elwood Mead introduced an administrative alternative as early as 1890, most western states were not willing to empower administrators to be the ultimate arbiters of the existence of vested water rights. Yet experience has highlighted the extraordinary complexity associated with the use of general adjudications, their enormous costs to the state and the participants, the decades of time they require to complete, and the modest benefits they produce. More troubling, in some respects, is their use for determination of federal and Indian reserved water rights, the inevitable difficulties of asking state courts to determine rights based on interests often perceived to be adverse to the state, and the maze of outcomes emanating from various state courts.²²⁶

States that were slow in instituting public supervision of water uses now face the challenge of integrating uses into their administrative systems. General adjudications are not an effective mechanism to accomplish this purpose. Unfortunately the McCarran Amendment and the U.S. Supreme Court's decisions to allow federal and Indian reserved rights to be determined in general adjudication have reinvigorated their use. It is time to reverse course, to use existing state laws and review processes to clean up pre-permit rights and other problems, and to determine federal and Indian reserved rights in federal courts or through settlement processes.

²²¹ The recently completed Snake River Adjudication cost the State of Idaho an estimated \$93 million. See *supra* note 158 and accompanying text. There is no estimate of the costs incurred by the United States, the tribes, or other parties.

²²² Thorson et al. suggest that, in an age of water marketing, clarifying titles is one of the important benefits of general adjudications. Thorson I, *supra* note 1, at 457–58. It is unclear whether the public should bear this cost or whether title clarification should be the responsibility of the parties to the water transfer transaction.

²²³ See *supra* notes 207–09 and accompanying text.

²²⁴ See, e.g., Strong I, *supra* note 136, at 15, noting that the adjudication resulted in several Idaho Supreme Court decisions helping to clarify matters of Idaho water law.

²²⁵ See, e.g., Feller, *supra* note 9, at 419–20, noting the substantial delays caused by interlocutory appeals to the Arizona Supreme Court as part of the Gila Adjudication.

²²⁶ This concern is more fully explored in GSAs, *supra* note 73.