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## Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems & (and) Solutions

A. Lynne Krogh

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## WATER RIGHT ADJUDICATIONS IN THE WESTERN STATES: PROCEDURES, CONSTITUTIONALITY, PROBLEMS & SOLUTIONS

*A. Lynne Krogh\**

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Many of the western states<sup>1</sup> have entered into ambitious efforts for the comprehensive adjudication of water rights. Unfortunately, most of these states have encountered serious obstacles in their adjudication efforts. Water right claimants, courts, legislatures, and agencies involved in water right adjudications are deeply frustrated by the complexity and resultant length and cost of these adjudications.

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1. "Western states" herein refers to the seventeen continental states, from North Dakota south to Texas, and states west.

Montana, Idaho, and Arizona have the largest adjudication efforts currently underway. Montana is currently engaged in a statewide adjudication of water rights that began in 1979.<sup>2</sup> Idaho is currently engaged in an adjudication of the Snake River Basin,<sup>3</sup> including approximately 87% of the state, that began in 1987. Arizona is currently engaged in adjudications of the Little Colorado and Gila Rivers,<sup>4</sup> including approximately 65% of the state, that began in 1978 and 1974 respectively.

During the pendency of these adjudications, mounting frustration has garnered legislative attention in each of these states. Consideration of statutory revisions of both adjudication procedure and substantive water law is a priority item in the upcoming legislative session in Arizona.<sup>5</sup> Idaho significantly revised its statute in 1994.<sup>6</sup> The Montana adjudication statute has been the subject of revision in every session since the adjudication commenced, and is likely to be a subject of consideration in the next session.<sup>7</sup> Analysis of adjudication procedures, and identification of means to improve the adjudication process, is therefore a continuing concern of those involved in water right adjudications.

This article reviews the development of specialized water right adjudication processes, and compares the procedures developed in the various western states to promote a complete, accurate, fair and efficient adjudication of water rights. In addition, this article summarizes judicial decisions regarding the constitutionality of state adjudication statutes. The case summary includes decisions addressing the relative roles of the legislative, executive, and judicial branches of government in water right adjudications.

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2. MONT. CODE ANN. § 85-2-211 (1993).

3. *In re* SRBA, Twin Falls County Civ. No. 39576 (5th Jud. Dist. Idaho Nov. 19, 1987) [hereinafter SRBA].

4. *In re* the General Adjudication of All Rights to Use Water in the Little Colorado River System and Source, Apache County Sup. Ct. No. 6417 (Ariz. Feb. 17, 1978); *In re* the General Adjudication of All Rights to Use Water in the Gila River Water System, Maricopa County Sup. Ct. Nos. W-1, W-2, W-3, W-4 (Ariz. April 26, 1974).

5. Larry Linser & Steve Olsen, MEMORANDUM TO JOINT SELECT LEGISLATIVE COMMITTEE ON GENERAL STREAM ADJUDICATIONS (June 1, 1994) [hereinafter MEMORANDUM]; REPORT BY THE ARIZONA DEPARTMENT OF WATER RESOURCES TO THE JOINT SELECT COMMITTEE ON ARIZONA GENERAL STREAM ADJUDICATIONS (1994) [hereinafter REPORT].

6. 1994 Idaho Sess. Laws ch. 454, 455.

7. 1981 Mont. Laws ch. 253, 268; 1983 Mont. Laws ch. 277, 448, 526; 1985 Mont. Laws ch. 394, 667; 1987 Mont. Laws ch. 358, 438, 535, 651; 1989 Mont. Laws ch. 426, 586, 604, 605; 1991 Mont. Laws ch. 343, 784, 805; 1993 Mont. Laws ch. 629.

## DEVELOPMENT OF ADJUDICATION PROCESSES

*I. Necessity for Adjudication: Accurate Record of Water Rights*

The fundamental reason for water right adjudications in the western states is the lack of an accurate record of water rights. For example, Idaho lacks an accurate record of water rights primarily due to the relatively recent adoption of mandatory permit and transfer processes following decades of undocumented appropriations and changes in use.<sup>8</sup> An accurate record of water rights is needed for certainty of title to water rights, distribution of water in accordance with those rights, and water resource planning.

*A. Certainty of title*

Buyers and sellers, borrowers and lenders act at great risk, due to uncertainty as to the validity and extent of water rights. This uncertainty results in substantial and sometimes crushing loss to individuals, whose belief in the validity and extent of the water rights they purchased, or sold with warranties, proves to be without adequate foundation.<sup>9</sup> Uncertainty decreases the value of property and discourages investment. Wary buyers and sellers are often unable to secure any reasonable level of assurance as to the validity and extent of water rights, even with diligent efforts at investigation. Obstacles to marketing of water rights also prevent the use of voluntary transfers as a mechanism to address compelling water allocation issues.<sup>10</sup>

*B. Water distribution*

Although conditions of scarcity are the norm in the arid western states, most water users have nonetheless come to expect a relatively

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8. Idaho first adopted a mandatory application, permit, and license procedure for new appropriations of surface water in 1971 and for groundwater in 1963. IDAHO CODE §§ 42-201, -229 (1990). A statute mandating application to and approval by IDWR for changes in use of all rights was enacted in 1969. Id. § 42-222 (Supp. 1994).

9. *See, e.g., Thieme v. Worst*, 745 P.2d 1076 (Idaho Ct. App. 1987). Purchasers brought an action against vendors and real estate brokers for rescission of contract based on alleged misrepresentation as to availability of irrigation water. The court found no misrepresentation on the part of the brokers, but denied the brokers' claim to attorney fees on the basis that the action was not brought frivolously. The trial court denied the request for rescission, but reformed the contract to include a duty by the vendors to make water deliverable, found the reformed contract to have been breached and awarded damages.

10. *See generally* RODNEY T. SMITH, *TRADING WATER: AN ECONOMIC AND LEGAL FRAMEWORK FOR WATER MARKETING* (1988); NATIONAL RESEARCH COUNCIL, *WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT* (1992); MARK REISNER, *OVERTAPPED OASIS* (1990).

dependable supply for most of their historic uses. The continued presence of water at irrigation headgates, residential faucets, and commercial pipes lulls many into the belief that documentation of water rights is mere paperwork, the details of which can be left for another day. Most of the western states, however, are experiencing an extended period of extreme drought conditions. Disputes erupt as water users find water unavailable for uses they have made for years, decades, even generations. Water users turn to judicial or administrative processes to enforce delivery of water to which, by virtue of long-standing use, they firmly believe they are entitled. The water users' need for water is often immediate, but courts and executive agencies are incapable of meeting that need when questions as to the validity and extent of the water right must first be answered through time-consuming judicial or administrative processes.<sup>11</sup> This is particularly true since delivery of water to one water user often means non-delivery to another, potentially raising issues as to the validity, extent, and relative priority of other users' water rights.

The ultimate goal of an adjudication is therefore not simply to make sure everyone has their paperwork in order. The ultimate goal is to provide the information necessary to ensure that paper water rights translate into actual *wet* water.

### C. Resource planning

Accurate information as to water supply and water rights is necessary for resource planning at local, state, regional, and national levels under both state and federal mandates. For example, processing of applications for new appropriations of water rights requires a determination of whether unappropriated water is available to appropriate.<sup>12</sup> Processing of applications for changes in use of water rights requires a determination of whether a change will result in injury to other rights.<sup>13</sup> Both depend on a determination of the existence and extent of other rights. In addition, many states have statutes providing for development and implementation of comprehensive state water plans.<sup>14</sup> Various federal laws which have the

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11. For example, the administrative mechanism for distribution of water in Idaho is the creation of water districts by IDWR, the designation of watermasters who distribute water within the district, and the assessment of the district's costs against the district water users. Water districts can be created only for adjudicated sources, however. IDAHO CODE § 42-604 (1990 & Supp. 1994). Adjudication is a prerequisite to creation of water districts because an accurate list of water rights is necessary for the watermaster to properly distribute water. *See, e.g.,* Nettleton v. Higginson, 558 P.2d 1048, 1054 (Idaho 1977).

12. *See, e.g.,* IDAHO CODE § 42-203A (Supp. 1994).

13. *See, e.g.,* IDAHO CODE § 42-222 (Supp. 1994).

14. *See, e.g.,* IDAHO CODE § 42-1734A (1990), which provides for comprehensive state water planning, including designation of protected rivers.

potential to significantly disrupt current water uses, such as those governing the licensing of hydropower projects, require federal agencies to consider state water plans in their decision-making processes.<sup>15</sup>

Modern lifestyles and modern economies place increasing demands on available water resources. These demands include the uses that form the traditional foundation for western economies, primarily for agriculture but also for mining and timber products. They also include the domestic and commercial uses in the many fast-growing metropolitan areas, and the smaller cities, towns and other local communities. And finally, modern demands include water for preservation and restoration of scenic and wildlife areas that are the balm for many a troubled spirit as well the basis for a tourism industry that is fast becoming a foundation of modern western economies.

As the demand for water increases, so does the controversy surrounding water resource decision-making. Although controversy increases awareness of major water resource issues, it also generates animosities that impede resolution of those issues. Resolution of the many difficult water resource issues requires informed decision-making. Accurate and complete information as to the validity and extent of existing water rights is a fundamental aspect of the water resource information base that is a necessary foundation for water resource decision-making.

#### D. Water rights established under federal law

The uncertainty created by the assertion of potentially substantial but as yet unquantified reserved water rights by the United States and the Indian tribes has created further impetus for the adjudication of water rights.<sup>16</sup> The McCarran Amendment waives the sovereign immunity of the United States to joinder in suits for the adjudication and administration of water rights.<sup>17</sup> The need for certainty as to the nature and extent of federal and Indian water rights, and the desirability of utilizing specialized state court procedures for the determination of those water rights, has been recognized by the McCarran Amendment as well as by various decisions of the United States Supreme Court decided pursuant to the McCarran Amendment.<sup>18</sup> Uncertainty as to the extent of the McCarran

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15. See 16 U.S.C. §§ 797(c), 839b (1988).

16. See, e.g., *Winters v. United States*, 207 U.S. 564 (1908).

17. 43 U.S.C. § 666 (1988 & Supp. 1993).

18. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983), *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *United States v. District Court in and for Eagle County*, 401 U.S. 520 (1971).

Amendment's requirement of "comprehensiveness" has further promoted the adjudication of water rights through one or a few large-scale adjudications of major watersheds, rather than through a series of smaller-scale adjudications of tributaries within a major watershed.<sup>19</sup>

## II. *Water Right Adjudications at Common Law*

Prior to the adoption of statutory adjudication procedures, water right adjudications were brought and proceeded pursuant to the procedures generally applicable to civil actions for the determination of title to real property.<sup>20</sup> A claimant would file a complaint with the court asserting water rights and alleging interference by one or more defendants; the defendant(s) would file answer(s) denying the complaint and cross-complaint(s) asserting their rights.<sup>21</sup>

Since the actions were binding only on named parties, piecemeal litigation, with the attendant consequences of multiple actions and inconsistent judgments, often resulted. For example, Idaho's Lemhi River Basin is one of the smaller tributaries of the Snake River, yet IDWR records show sixty-eight decrees of water rights entered prior to 1972 and the creation of fourteen water districts for the distribution of water by watermasters on various portions of the Lemhi River and its tributaries.<sup>22</sup>

Joinder of all potential claimants was necessary to avoid piecemeal litigation, but joinder imposed a costly burden on claimant(s) bringing the action. For example, in Idaho's Big Lost River Basin, the Utah Construction Company, developer of a large storage project, brought an action in 1919 for the determination of all rights to the use of surface water from the Big Lost River and tributaries.<sup>23</sup> The company served approximately 950 defendants, and the decree determined approximately 940 water rights, making this adjudication one of the largest of its time.<sup>24</sup>

Limited technology and lack of information created further difficulties for claimants, who bore the burden of proof on water rights, and for

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19. The McCarran Amendment waives sovereign immunity in suits for the determination of water rights from "a river system or other source." 43 U.S.C. § 666 (1988 & Supp. 1993). The cases cited in note 18 *supra* indicate that the purpose of the McCarran Amendment is to waive sovereign immunity in general adjudications for the determination of all rights from a source. Given the myriad hydrologic connections between "sources", the extent of the "source" required to be adjudicated is unclear.

20. 2 WATERS AND WATER RIGHTS § 15.01 at 207-08 (Robert E. Beck, ed., 1991 & Supp. 1993).

21. See, e.g., *infra* notes 23, 26, 28, 30 and 32.

22. See also Albert W. Stone, *The Long Count on Dempsey: No Final Decision on Water Right Adjudication*, 31 MONT. L. REV. 1 (1969). The author reviews litigation on Dempsey Creek, involving 14 lawsuits and 8 appellate decisions.

23. *Utah Construction Co. v. Abbott*, Equity No. 222 (D. Idaho 1923).

24. *Id.*



courts, which faced an enormous task to sort through pleadings, take evidence, and create a list of water rights. Many decrees were entered based on stipulations, with little or no independent review of their technical or legal sufficiency. The results include inflated water rights, unadministrable decrees, lack of consistency in the description of water rights, and simple errors due to manual processing.

For example, the docket sheet in the *Utah Construction Company* proceedings shows 569 handwritten entries, including 55 answers/cross-complaints, and 197 stipulations.<sup>25</sup> An adjudication of Idaho's Weiser River Basin produced a decree in 1921 that determined about 500 rights.<sup>26</sup> The decree's provisions as to place of use are ambiguous because the lands owned by the appropriators are described in the decree, but a general provision provides that the water rights are appurtenant to the lands of parties which are "directly under and served with said water by and from the canals, ditches, and tributary streams above-mentioned."<sup>27</sup> An adjudication of Idaho's Boise River Basin produced a decree in 1906 that determined about 260 rights.<sup>28</sup> No provision is made as to season of use or purpose of use, and the descriptions of many points of diversion are ambiguous, such as the following: "diverted at a point on said river above the City of Boise" or "diverted at a point on the south bank of said river about 11 miles above Boise City."<sup>29</sup> An adjudication of Idaho's Riley/Billingsley Creek Basin produced a decree in 1932 that determined about 140 rights.<sup>30</sup> Water rights presumably used for irrigation were decreed as appurtenant to tracts, a substantial portion of which include canyon rims, lava and river beds, and other lands not susceptible of irrigation under then-existing or current methods.<sup>31</sup>

These decrees are among the more thorough and accurate for their time. Other decrees entirely omit points of diversion, places of use, purposes of use, and other essential elements of a water right. For example, one Idaho decree even omits an amount and priority date, instead determining rights to "shares."<sup>32</sup>

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25. *Id.*

26. *Muir v. Allison*, Seventh Judicial Dist. in and for Washington County (Idaho June 20, 1921).

27. *Id.*

28. *Farmers' Coop. Ditch Co. v. Riverside Irrig. Dist.*, Seventh Judicial District in and for Canyon County (Idaho Jan. 18, 1906).

29. *Id.*

30. *New Int'l Mortgage Bank v. Idaho Power Co.*, Equity No. 1602 (S.D. Idaho 1932).

31. *Id.*

32. *Eaton v. Fisher*, Third Judicial Dist. in and for Bingham County (Idaho Mar. 20, 1905). Add the potential for forfeiture and the likelihood of numerous unrecorded changes in use in the decades following these decrees, and the necessity to readjudicate the water rights becomes apparent. Modern decrees can be expected to be more final than in the past due to mandatory transfer procedures and administrative forfei-

### III. *Enactment of Adjudication Statutes*

The western states responded to the problems described above by enacting statutes that in varying degrees (1) define procedures to be followed in the adjudication, and (2) delegate certain functions to an executive officer or agency.<sup>33</sup> These statutes promote the complete, accurate, fair, and efficient determination of water rights by: (1) providing procedures specifically designed to address the unique problems encountered in large water rights adjudications, (2) utilizing the specialized expertise of the state water resource agency, and (3) shifting to a state agency a portion of the costs otherwise borne by the claimants.

The functions assigned to a state agency generally include some combination of the following.<sup>34</sup>

- Joinder of claimants
- Receipt of claims to water rights
- Examination of the water system and uses
- Initial determination of water rights
- Participation in judicial resolution of contested matters, as party, referee/special master, or witness/expert
- Preparation of decrees/certificates of water rights
- Administration of water rights pending final determination

The judicial procedures addressed by statute generally include some combination of the following.<sup>35</sup>

- Jurisdiction
- Venue
- Notice and joinder
- Parties
- Pleadings
- Burden of proof
- Evidence
- Reference
- Contents of decrees

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ture procedures; adjudication procedures for joinder of all claimants, including unknown claimants; greater accuracy and consistency in the description of rights in decrees; and resolution of issues necessary for administration as part of the determination of water rights.

33. See *infra* notes 43-45, 49-55, 73-80 and accompanying text.

34. *Id.*

35. *Id.*

Statutes addressing water right adjudications were adopted at an early date in most western states. Legislative efforts to address water right adjudications began in Colorado, Montana, Wyoming and Nebraska before the turn of the century.<sup>36</sup> Oklahoma, North Dakota, New Mexico, South Dakota, Oregon, Utah and Idaho first acted near the turn of the century.<sup>37</sup> Arizona, Washington, Nevada and California followed shortly after the turn of the century.<sup>38</sup> Kansas and Texas first addressed the matter in 1945 and 1967 respectively.<sup>39</sup>

In many instances, the states adopted adjudication provisions as part of comprehensive water legislation addressing both the appropriation of new water rights and the determination of existing water rights.<sup>40</sup> In some instances, revisions to the adjudication statutes were part of comprehensive water legislation.<sup>41</sup> The adjudication statutes were frequently amended, on occasion by comprehensive revisions, more often to make less major adjustments.<sup>42</sup> As might be expected, the most frequent statutory tinkering generally occurred in states with the most detailed adjudication statutes, those setting forth integrated adjudication systems and statutory water court systems, both of which are further described in the following section.

## COMPARISON OF STATE ADJUDICATION SYSTEMS

### I. Summary of Adjudication Statutes

Although the details of the western state adjudication statutes vary greatly, they can be classified into three general categories: those which

36. 1879 Colo. Sess. Laws p. 94; 1885 Mont. Laws p. 132; 1890-1891 Wyo. Sess. Laws ch. 8; 1895 Neb. Laws ch. 69.

37. 1905 Terr. Okla. Laws ch. 21; 1905 N.D. Sess. Laws ch. 34; 1907 N.M. Laws ch. 49; 1907 S.D. Sess. Laws ch. 180; 1905 Or. Laws ch. 228; 1909 Utah Laws ch. 62; 1903 Idaho Sess. Laws p. 223.

38. 1919 Ariz. Sess. Laws ch. 164; 1917 Wash. Laws ch. 117; 1913 Nev. Sess. Laws ch. 140; 1913 Cal. Stat. ch. 586.

39. 1945 Kan. Sess. Laws ch. 390; 1967 Tex. Gen. Laws ch. 45.

40. These states include Nebraska, Kansas, Wyoming, Oklahoma, North Dakota, New Mexico, Arizona, Washington, California, and Idaho. See *supra* notes 36 to 39.

41. See, e.g., 1955 S.D. Laws ch. 430; 1969 Colo. Sess. Laws ch. 373; 1919 Utah Laws ch. 67; 1909 Or. Laws ch. 216.

42. Major revisions include, for example, a switch from the Bien Code system to a more integrated system in Oregon in 1909, in Utah in 1919, and in Idaho in 1969; the water court system adopted in Colorado in 1943 and comprehensively revised in 1969; the water court system adopted in Montana in 1979 in preparation for its statewide adjudication; the statute addressing the alternative judicial procedure enacted in Wyoming in 1977; and the switch from an integrated system to an administrative system back to an integrated system in Arizona in the 1970's. See, e.g., *supra* note 41; 1969 Idaho Sess. Laws ch. 279; 1943 Colo. Sess. Laws ch. 190; 1979 Mont. Laws ch. 697; 1977 Wyo. Sess. Laws ch. 2; 1974 Ariz. Sess. Laws ch. 122; 1979 Ariz. Sess. Laws ch. 139. See *infra* note 68 as to Bien Code systems.

describe primarily administrative systems, those which describe primarily judicial systems, and those in the middle which might be labeled "integrated." In those characterized herein as primarily administrative, the role of the judiciary is limited to judicial review of agency determinations. In those characterized herein as primarily judicial, the role of the state water resource agency is generally limited to participation as a party in the judicial determination of water rights (even though the state water resource agency may have duties with respect to the investigation of claims to or uses of water from the water system). In those characterized herein as integrated, the state water resource agency has a reporting function which forms the basis for a later judicial determination of water rights. The tables in the following sections summarize the water right adjudication statutes in each of the western states, noting both the major administrative procedures/functions and the major judicial procedures/functions.

## II. *Primarily Administrative*

State/Water Resources Agency	Administrative Functions/Procedures	Judicial Functions/Procedures
NEBRASKA Department of Water Resources <sup>43</sup>	<ul style="list-style-type: none"> <li>•Make proper arrangements to determine rights</li> <li>•Determine rights</li> </ul>	•Judicial review
KANSAS Chief Engineer Division of Water Resources, Board of Agriculture <sup>44</sup>	<ul style="list-style-type: none"> <li>•Notice (including publication)</li> <li>•Claims-taking</li> <li>•Opportunity for contest</li> <li>•Hearing</li> <li>•Order of determination</li> </ul>	•Judicial review
WYOMING Board of Control <sup>45</sup>	<ul style="list-style-type: none"> <li>•Notice (including publication)</li> <li>•Claims-taking</li> <li>•Exam of stream system</li> <li>•Hearing on claims</li> <li>•Notice, opportunity to inspect record, opportunity for contest, hearings on contests</li> <li>•Final order</li> </ul>	•Judicial review

43. NEB. REV. STAT. § 46-226 (1993).

44. KAN. STAT. ANN. §§ 82a-704a (1989).

45. WYO. STAT. §§ 41-4-301 to -408 (1977 & Supp. 1994).

There are two principal advantages to an administrative system for the adjudication of water rights. First, the determination of water rights is vested in an agency with specialized knowledge and expertise as to water rights. This specialized expertise arises from decades of experience on the part of agencies who are vested with the responsibility to implement and administer the myriad laws and policies of the state regarding its water resources.<sup>46</sup> By virtue of its experience pursuant to these duties, the agencies and their staff necessarily acquire relevant data and expertise as to the scientific, policy, and legal aspects regarding the determination of water rights and the distribution of water in accordance with those rights.

- **Water right/water user information:** State water resource agencies generally serve as official repositories of water right information. The agency stores not only its own files as to new appropriations, changes in use, and other administrative actions regarding water rights, but also judicial decrees and orders regarding water rights.<sup>47</sup> In addition to knowledge of technical matters regarding water rights, agency staff also develop considerable familiarity with water users and the issues of concern to claimants, including factual, legal, and political issues that give rise to water right disputes.
- **Scientific expertise and information:** The determination of water rights and distribution of water in accordance with those rights is heavily dependent on the physical realities of water. In the performance of their administrative duties, state water resource agencies develop extensive information and expertise in hydrology, engineering, and other related fields. This expertise is essential to determination of the factual and legal issues of water rights in a manner that is consistent with the physical realities of water distribution. In addition, large water right adjudications require the storage and analysis of large amounts of data; state water resource agencies have developed data processing capabilities that can be readily adapted and used for water right adjudications.
- **Policy expertise as to the administration of the laws of the state regarding water resources:** The determination of water rights is

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46. For example, the office of the Idaho State Engineer, predecessor to IDWR, was created in 1903. See 1903 Idaho Sess. Laws p. 223. Various chapters of IDAHO CODE, Title 42 (1990 & Supp. 1994) denote the duties of IDWR.

47. See, e.g., IDAHO CODE § 42-1403 (Supp. 1994) (requiring court clerks to provide IDWR with certified copies of water right decrees).

but one aspect of the administration of the water resources of the state. The determination of water rights forms the fundamental basis for other aspects of water resource administration such as distribution of water, processing of applications for new appropriations and changes in use of existing appropriations, and water resource planning.<sup>48</sup> The policy expertise developed by state water resource agencies is essential to the determination of water rights in a manner that gives due regard to the water resource policies of the state and promotes the determination of water rights consistent with an integrated program of water resource administration.

- **Legal expertise as to water law:** The law of water rights, water right adjudication, and water right administration is a narrowly specialized field of law. Water resource agencies necessarily must develop a detailed knowledge of this narrow field. Although courts have unquestioned legal expertise, judicial staff must develop and maintain expertise throughout the broader spectrum of law. Development of a detailed knowledge of the narrow field of water rights and water right administration can be a significant burden for judicial staff.

The other advantage of primarily administrative systems is that administrative procedures are generally less formal and therefore less costly than judicial procedures. The vast majority of water rights can and do proceed to final determination without dispute, which makes the cost of formal proceedings, particularly formal judicial proceedings, unnecessary and wasteful. Even in disputed matters, the specialized expertise of agency staff can be instrumental in achieving informal resolution.

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48. See *supra* notes 11-15 and accompanying text.

*III. Primarily Judicial*

State/Water Resources Agency	Administrative Functions/Procedures	Judicial Functions/Procedures
OKLAHOMA Water Resources Board <sup>49</sup>	<ul style="list-style-type: none"> <li>•Board may bring action (and if so, joins parties)</li> <li>•Court may direct board to furnish data</li> </ul>	<ul style="list-style-type: none"> <li>•Elements of right to be decreed are specified</li> </ul>
SOUTH DAKOTA Water Management Board <sup>50</sup>	<ul style="list-style-type: none"> <li>•Attorney General [hereinafter AG] to bring action when AG or Board deems it in public interest</li> <li>•Joinder procedure (including publication)</li> <li>•Board joins parties</li> </ul>	<ul style="list-style-type: none"> <li>•Venue and exclusive jurisdiction of court</li> <li>•Procedure as in civil actions except as provided by statute</li> <li>•Orders of Board are prima facie evidence</li> <li>•Appointment of watermaster to administer interim or final decrees</li> </ul>
WYOMING Board of Control <sup>51</sup>	<ul style="list-style-type: none"> <li>•AG may bring action (and if so, joins parties)</li> <li>•Joinder procedure (including publication)</li> <li>•Board reports on issues certified to it by court</li> </ul>	<ul style="list-style-type: none"> <li>•Certify issues of fact and law to Board as appropriate</li> <li>•In determining rights, court is to confirm rights evidenced by decree or license and determine status of cancelled permits</li> </ul>
NORTH DAKOTA State Engineer <sup>52</sup>	<ul style="list-style-type: none"> <li>•SE to furnish hydrographic survey</li> <li>•AG to bring action (and if so, joins parties)</li> </ul>	<ul style="list-style-type: none"> <li>•Apportionment of costs of survey among parties</li> <li>•Elements of rights to be decreed are specified</li> </ul>
NEW MEXICO State Engineer <sup>53</sup>	<ul style="list-style-type: none"> <li>•SE to furnish hydrographic survey</li> <li>•AG to bring suit at request of SE (and if so, joins parties)</li> <li>•Joinder procedure (including publication)</li> </ul>	<ul style="list-style-type: none"> <li>•Venue and exclusive jurisdiction of court</li> <li>•Survey admissible evidence subject to rebuttal</li> <li>•Elements of rights to be decreed are specified</li> </ul>

49. OKLA. STAT. tit. 82, §§ 105.6 to .8 (1990).

50. S.D. CODIFIED LAWS ANN. §§ 46-10-1 to -8.1 (1987).

51. WYO. STAT. § 1-37-106 (1988).

52. N.D. CENT. CODE ANN. §§ 61-03-16 to -19 (1985).

53. N.M. STAT. ANN. §§ 72-4-13 to -20 (Michie 1985).

<p><b>COLORADO</b> State Engineer<sup>54</sup></p>	<ul style="list-style-type: none"> <li>• Can participate as party by filing notice of opposition; otherwise can be directed to appear and provide information</li> </ul>	<ul style="list-style-type: none"> <li>• Water court determines rights and changes in use of rights when applied for</li> <li>• Application</li> <li>• Notice by water clerk</li> <li>• Opportunity to file notices in opposition</li> <li>• Informal investigation and determination by referee</li> <li>• Notice and opportunity for protest, hearing and determination by water judge</li> <li>• Opportunity for appeal</li> </ul>
<p><b>MONTANA</b> Department of Natural Resources and Conservation<sup>55</sup></p>	<ul style="list-style-type: none"> <li>• Claims-taking</li> <li>• Claim review and field exam at direction of water court</li> <li>• Can participate as party by filing objection</li> </ul>	<ul style="list-style-type: none"> <li>• Water court determines existing rights</li> <li>• Notice by supreme court (including publication)</li> <li>• Entry of temporary preliminary decree with notice, opportunity to object and hearings on objections</li> <li>• Entry of preliminary decree with notice, opportunity to object and hearings on objections</li> <li>• Entry of final decree with opportunity for appeal</li> <li>• Claims are prima facie evidence</li> <li>• Interim administration on entry of temporary preliminary decree</li> </ul>

There are two principal disadvantages to a primarily administrative system, which have led most states to chose primarily judicial or integrated systems for the determination of water rights. The first disadvantage is the question whether the federal government has waived its sovereign immunity to joinder in primarily administrative adjudications. The McCarran Amendment consents to joinder of the United States in "suits" for the determination and administration of water rights.<sup>56</sup> The question is therefore whether the term "suits" was intended to distinguish between administrative and judicial actions. The answer to this question is of sufficient doubt, and the consequences of sufficient importance, that Wyoming has adopted a primarily judicial system for the determination of water rights as an alternative to that state's primarily administrative system.<sup>57</sup>

54. COLO. REV. STAT. §§ 37-92-301 to -306.1 (West 1990 & Supp. 1994).

55. MONT. CODE ANN. §§ 85-2-211 to -243 & §§ 3-7-101 to -502 (1993).

56. See *supra* notes 17-19 and accompanying text.

57. WYO. STAT. § 1-37-106 (1988); See also W. Michael Kleppinger, Comment, *Determination of Federal Water Rights Pursuant to the McCarran Amendment: General Adjudications in Wyoming*, 12 LAND & WATER L. REV. 457 (1977).



The second disadvantage of primarily administrative systems is the issue of political acceptability. Determination of property rights has historically been a judicial function. Many persons, particularly among the legal community, believe that the courts are the appropriate forum for the determination of water rights. Although the determination of water rights is heavily dependent on the physical realities of water, the final determination of a water right or group of water rights frequently hinges on issues of law, the final arbiter of which is and must be the courts. Although judicial processes can be abused, the judicial process nonetheless offers the full panoply of procedures intended to ensure that all participants receive due process of law. Moreover, although informal processes are often successful in resolving water right disputes, the availability of judicial processes and judicial authority is often necessary to ensure diligent efforts by the parties to reach agreement.

In addition, many claimants are distrustful of the idea of vesting authority for the determination of water rights in an agency already vested with regulatory authority over water and water rights.<sup>58</sup> This is particularly true as: (1) state water resource agencies have been vested with ever-increasing regulatory responsibilities, and (2) as the agencies have evolved from their historic mission to promote water development, to their modern mission to develop balanced water resource management programs that address all interests in the state's water resources, including environmental interests.

Thus, a wholesale transfer of the water right determination function to an administrative agency is not in every state a suitable response to the historic problems encountered in judicial adjudication proceedings. Most western states have therefore sought other means to address the need for specialized expertise and the cost of judicial adjudication processes.

Colorado and Montana have dealt with these problems by enacting detailed legislation that created specialized water courts and estab-

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58. The United States Department of Justice and various Indian tribes have been particularly distrustful of statutory adjudication processes that vest decision-making functions in state agencies. In the past, the United States and the tribes have unsuccessfully sought to avoid state court determination of federal and Indian water rights pursuant to the McCarran Amendment, due to a perception that state courts would be "institutionally biased" against claims to water established under federal law. See the cases cited in note 18, *supra*. The United States and the tribes have more recently turned to contesting the decision-making authority of a state agency in an adjudication, again due to a perception of "institutional bias" against claims to water rights established under federal law. See *infra* notes 163-169, 212-214 and accompanying text.

lished informal proceedings for the preliminary determination of water rights.<sup>59</sup> Colorado's effort has been more successful than that in Montana, primarily due to two factors. First, a critical lack of funding for both the water court and the Montana Department of Natural Resources and Conservation has precluded an adequate review of most water right claims. A high percentage of uncontested claims therefore contain substantial errors, omissions, and inconsistencies.<sup>60</sup> Second, there are substantial differences in scope between the two states' current adjudication activities. Colorado's courts are well established and previously existing state law rights have already been decreed, whereas Montana's water courts were recently established to determine all existing water rights.<sup>61</sup> Even in the water court systems, the state water resource agency plays a significant role, in both states as a potential party in court proceedings, and in Montana through claims-taking, claim review, and such other assistance as the court requires.<sup>62</sup>

New Mexico and Wyoming are the other two states with substantial adjudication efforts underway<sup>63</sup> pursuant to adjudication statutes establishing primarily judicial systems.<sup>64</sup> New Mexico and Wyoming have dealt with the need for specialized expertise and the cost of formal judicial proceedings by adopting practices which have the same practical effect as statutes establishing integrated systems.<sup>65</sup> In New Mexico, once the State Engineer completes the hydrographic survey, the Attorney General files the action and joins the claimants as provided by statute.<sup>66</sup> The Attorney General then serves offers of judgment on all claimants based on the State Engineer's hydrographic survey, and the court confirms the accepted offers.<sup>67</sup> This practice of the agen-

59. See *supra* notes 54-55 and accompanying text.

60. In an effort to solve this problem, the Montana water court has adopted the practice of examining on its own motion claims that have major discrepancies with information provided by the state water resource agency. The propriety of this practice is currently pending decision, *In re Water Court Procedures in Addressing the Factual and Legal Issues Called in On Motion of the Water Court*, Water Court Case No. WC-92-3 (Mont. Oct. 22, 1992).

61. See generally *supra* notes 54-55 and accompanying text. Colorado is unique in that the water courts process new appropriations and changes in use. In other western states, these functions are vested in an administrative agency. See 2 WATERS AND WATER RIGHTS, *supra* note 20 at §§ 14.01, 14.04, 16.01(c).

62. See *supra* notes 54-55 and accompanying text.

63. NEW MEXICO STATE ENGINEER OFFICE, NEW MEXICO WATER RIGHT ADJUDICATION SUITS 1 (1989); *In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, Washakie County No. 86-0012 (5th Jud. Dist. Wyo. filed Jan. 24, 1977).

64. See *supra* notes 53, 51 and accompanying text.

65. See *infra* notes 73-80 and accompanying text. Integrated systems are further discussed below in section IV.

66. See *supra* note 53 and accompanying text.

67. See NEW MEXICO STATE ENGINEER OFFICE, WATER RIGHTS ADJUDICATION 1 (1987).

cies in New Mexico has the same practical effect as the report, objection and partial decree of uncontested matters in the integrated systems.<sup>68</sup> The New Mexico Supreme Court has also upheld the authority of the district court to adopt a procedure for entry of interim decrees and appointment of an interim watermaster.<sup>69</sup> This practice has the same practical effect as interim administration upon a preliminary agency determination found in most integrated systems.<sup>70</sup>

In Wyoming, the court in the Big Horn River adjudication has by pretrial order adopted the statutory administrative procedure as a preliminary determination procedure for state-issued permits.<sup>71</sup> As discussed below, a preliminary agency determination is a key feature of most integrated systems.<sup>72</sup>

Agency and judicial practices in New Mexico and Wyoming have thus blurred the distinction between primarily judicial and integrated systems for the adjudication of water rights. In both states, this has been the result of cooperative efforts by the courts and the state agencies involved in water right adjudications. In New Mexico particularly, the cooperative efforts of the court and the state agencies to address the unique problems of water rights adjudications have made legislative action largely unnecessary.

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68. See *infra* notes 74-80 and accompanying text. The New Mexico statute is generally characterized herein as establishing a primarily judicial system when compared to statutes establishing integrated systems. The New Mexico system, however, is an example of the first integrated system known as the Bien Code system. The Bien Code was drafted by Morris Bien, an engineer with the U.S. Bureau of Reclamation. Bien Code systems are characterized by preparation of a hydrographic survey by the state water resource agency and delivery to the attorney general who then commences or intervenes in suits for the determination of water rights. See 2 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 458-59 (1974). Several of the states that currently have systems characterized herein as integrated started with Bien Code systems, and over the years delegated additional functions to the state water resource agency. See *supra* note 42.

69. State *ex rel.* Reynolds v. Pecos Valley Artesian Conservancy Dist., 663 P.2d 358, 360 (N.M. 1983).

70. See *infra* notes 73-78 and accompanying text.

71. *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources: Amended Big Horn Adjudication, Phase III—Procedures, Washakie County No. 86-0012 (5th Jud. Dist. Wyo. filed Jan. 22, 1986).

72. See *infra* notes 74-80 and accompanying text.

*IV. Integrated*

State/Water Resource Agency	Administrative Functions/Procedures	Judicial Functions/Procedures
<p>ARIZONA</p> <p>Department of Water Resources<sup>73</sup></p>	<ul style="list-style-type: none"> <li>•Notice/joinder (including publication)</li> <li>•Exam and report including information as to each claim but no recommendations</li> <li>•Procedure includes preliminary report, notice, opportunity for comment</li> <li>•May adopt rules</li> <li>•Other technical assistance as court or master directs</li> </ul>	<ul style="list-style-type: none"> <li>•Commencement on petition of AG or water users</li> <li>•Claims-taking</li> <li>•Opportunity to object to agency report, hearings on objections, special master report including determination of all rights</li> <li>•Notice, opportunity to object to master's report, and hearings on objections by court</li> <li>•Opportunity for appeal</li> <li>•Agency report admissible subject to objection</li> <li>•Previously decreed rights accepted absent proof of abandonment</li> <li>•Civil rules apply unless inconsistent with statute</li> <li>•Continuing jurisdiction of court for administration</li> </ul>
<p>IDAHO</p> <p>Department of Water Resources<sup>74</sup></p>	<ul style="list-style-type: none"> <li>•Request to AG to petition for commencement</li> <li>•Notice of petition</li> <li>•Notice/joinder on entry of commencement order (including publication)</li> <li>•Taking of state law claims</li> <li>•Exam and report including recommendations of state law claims, matters necessary for administration, but not data</li> <li>•Notice of report</li> <li>•Supplemental reports to objections to state law rights</li> <li>•Interim Administration based on report on order of court</li> </ul>	<ul style="list-style-type: none"> <li>•Commencement on petition of AG</li> <li>•Opportunity to object to report and hearings on objections</li> <li>•Uncontested portions to be decreed</li> <li>•As to contested portions, report is prima facie evidence and burden is on claimant/objector to rebut</li> <li>•Taking of federal law claims</li> <li>•Hearings on federal law claims (claimant must provide notice and make prima facie case even where uncontested)</li> <li>•Opportunity for appeal</li> <li>•Civil rules apply</li> <li>•Decree to include matters necessary for administration</li> <li>•Elements of water right to be decreed are specified</li> <li>•Orders regarding interim administration</li> </ul>

73. ARIZ. REV. STAT. ANN. §§ 45-251 to -260 (1994).

74. IDAHO CODE ANN. §§ 42-1401 to -1428 (1990 &amp; Supp. 1994).

State/Water Resource Agency	Administrative Functions/Procedures	Judicial Functions/Procedures
<p style="text-align: center;">UTAH State Engineer<sup>75</sup></p>	<ul style="list-style-type: none"> <li>•File action with court</li> <li>•Notice/joinder (including publication)</li> <li>•Claims-taking</li> <li>•Exam and report including recommendations but not data</li> <li>•Notice of report</li> <li>•Interim administration based on report and until otherwise ordered or decreed</li> <li>•Party to objections</li> </ul>	<ul style="list-style-type: none"> <li>•Opportunity to object to report and hearings on objections</li> <li>•Uncontested portions to be decreed</li> <li>•Opportunity for appeal</li> <li>•Claims competent evidence unless put in issue</li> <li>•Elements of water right to be decreed are specified</li> </ul>
<p style="text-align: center;">WASHINGTON Department of Ecology<sup>76</sup></p>	<ul style="list-style-type: none"> <li>•File action with court</li> <li>•Notice/joinder (including publication)</li> <li>•Exam and report including determination of rights and agency record</li> <li>•Procedure includes hearing on claims</li> <li>•Notice of report</li> <li>•Party to objections</li> <li>•Court may refer objections for further determination</li> <li>•Upon completion, issues water right certificates</li> </ul>	<ul style="list-style-type: none"> <li>•Claims-taking</li> <li>•Opportunity to object to report and hearings on claims</li> <li>•Uncontested portions to be decreed</li> <li>•Opportunity for appeal</li> <li>•Procedures "as in case of reference of a suit in equity"</li> <li>•Orders regarding interim administration</li> </ul>

75. UTAH CODE ANN. §§ 73-4-1 to -24 (1989 & Supp. 1994).

76. WASH. REV. CODE ANN. §§ 90.03.110 to .245 (West 1992).

<p><b>OREGON</b> Water Resources Department<sup>77</sup></p>	<ul style="list-style-type: none"> <li>•Commencement</li> <li>•Notice/joiner (including publication)</li> <li>•Claims-taking</li> <li>•Exam and report including determination of rights and agency record</li> <li>•Procedure includes hearings on claims, notice, opportunity to inspect record and contest claims, hearing on contests</li> <li>•Notice of report</li> <li>•May adopt rules</li> <li>•Interim administration in accordance with report until otherwise ordered or decreed</li> <li>•Party to objections</li> <li>•Upon completion, issue water right certificates</li> </ul>	<ul style="list-style-type: none"> <li>•Opportunity to object to report and hearings on objections</li> <li>•Uncontested portions to be decreed</li> <li>•Opportunity for appeal</li> <li>•Procedures "like that in actions not triable by jury"</li> </ul>
<p><b>NEVADA</b> State Engineer<sup>78</sup></p>	<ul style="list-style-type: none"> <li>•Commencement</li> <li>•Notice/joiner (including publication)</li> <li>•Claims-taking</li> <li>•Exam and report including determination of rights and agency record</li> <li>•Procedure includes preliminary report, notice, opportunity to object hearings on objections</li> <li>•Notice of report</li> <li>•May adopt rules</li> <li>•Interim administration in accordance with report until otherwise ordered or decreed</li> <li>•Party to objections</li> <li>•Court may refer objections for further determination</li> <li>•Upon completion, issue water right certificates, unless decree contains listing of water rights</li> </ul>	<ul style="list-style-type: none"> <li>•Opportunity to object to report and hearings on objections</li> <li>•Hearings "as nearly as may be" in accordance with civil rules</li> <li>•Opportunity for appeal</li> <li>•All evidence obtained by SE admissible</li> </ul>

77. OR. REV. STAT. §§ 539.005 to .240 (Supp. 1994).

78. NEV. REV. STAT. §§ 533.090 to .320 (1986 & Supp. 1993).

State/Water Resource Agency	Administrative Functions/Procedures	Judicial Functions/Procedures
<p><b>CALIFORNIA</b></p> <p>State Water Resources Control Board<sup>79</sup></p>	<ul style="list-style-type: none"> <li>•Commencement</li> <li>•Notice/joiner (including publication)</li> <li>•Exam and report including determination of rights and agency record</li> <li>•Procedure includes preliminary report, notice, opportunity to object, hearings on objections</li> <li>•Notice of report</li> <li>•Party to objections</li> <li>•Court may refer objections for further determination</li> </ul>	<ul style="list-style-type: none"> <li>•Opportunity to object to report and hearings on objections</li> <li>•Uncontested portions to be decreed</li> <li>•Opportunity for appeal</li> <li>•Hearings "as nearly as may be" in accordance with civil rules</li> <li>•Elements of water right to be decreed are specified</li> <li>•Apportionment of costs of board among parties</li> </ul>
<p><b>TEXAS</b></p> <p>Texas Water Commission<sup>80</sup></p>	<ul style="list-style-type: none"> <li>•Commencement</li> <li>•Notice/joiner (including publication)</li> <li>•Exam and report of claims including determination of rights and agency record</li> <li>•Procedure includes hearings on claims, preliminary report, notice, opportunity to object, and hearings on objections</li> <li>•Notice of report</li> <li>•Party to objections</li> <li>•Court may refer objections for further determination</li> <li>•Upon completion, issue water right certificates</li> </ul>	<ul style="list-style-type: none"> <li>•Opportunity to object to report and hearings on objections</li> <li>•Uncontested portions to be decreed</li> <li>•Opportunity for appeal.</li> <li>•Elements of right to be decreed are specified</li> </ul>

Most of the western states have responded to the need for specialized expertise and the cost of judicial proceedings by adopting integrated adjudication systems comprised of both administrative and judicial components.<sup>81</sup> The primary feature of integrated systems is the preparation of a report by the state water resource agency that forms the basis for a later judicial determination of water rights.<sup>82</sup>

79. CAL. WATER CODE §§ 2500-2866 (1984 & Supp. 1994).

80. TEX. WATER CODE ANN. §§ 11.301 to .324 (West 1988).

81. See *supra* notes 73-80 and accompanying text.

82. *Id.*

As noted above, agency and judicial practices have blurred the distinction between primarily judicial systems and integrated systems.<sup>83</sup> At the same time, in some integrated system states such as Oregon and Texas, the extent of the functions delegated to the agency, as well as policies of judicial deference to agency expertise,<sup>84</sup> have blurred the distinction between primarily administrative and integrated systems.

There are, however, notable distinctions between the adjudication procedures and the agency functions in the integrated systems used in the various states. The utility of the more notable procedures and agency functions is discussed below. The discussion uses examples primarily from the Idaho adjudication statute, but also includes distinguishing examples from other states.

#### A. Commencement

In Idaho, water users may petition IDWR for an adjudication of water rights.<sup>85</sup> If IDWR deems that the public interest will be served by a general adjudication, IDWR requests the Idaho Attorney General to petition the court to commence the adjudication, and the adjudication is commenced by order of the court.<sup>86</sup> In other states, such as Nevada, the adjudication is commenced by the state water resource agency, and the judicial phase of the adjudication does not begin until the agency files its report with the court.<sup>87</sup>

The Idaho statute thus creates a more integrated system, where the adjudication commences by a combination of agency and judicial action, then switches to a primarily administrative phase, and then to a primarily judicial phase. The Nevada statute creates a clearer line between agency function and judicial function. The advantage of this feature of the Nevada system is that it offers less opportunity for litigation of preliminary matters, particularly issues as to the boundaries between agency function and judicial function.

#### B. Notice and joinder

IDWR is required to prepare a notice of commencement of the adjudication containing statutorily specified information, and must serve

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83. See *supra* notes 63-72 and accompanying text.

84. See *infra* notes 170-172, 202-207 and accompanying text.

85. IDAHO CODE § 42-1405 (Supp. 1994).

86. *Id.* §§ 42-1405 to -1407.

87. NEV. REV. STAT. §§ 533.090 to .165 (1991 & Supp. 1994).



the notice by mail on claimants who can be reasonably identified, and by publication to all others.<sup>88</sup> This procedure ensures a comprehensive adjudication by joining all claimants, including unknown claimants. It promotes efficiency by providing a procedure for joining claimants that is less costly than the traditional personal service of a complaint and summons. It also promotes due process, because the information required to be included in the notice is substantially more extensive than the information included in a traditional complaint and summons. Delegation of this function to a state agency promotes fairness, because the burden of joinder no longer falls on one or a few claimants.

### C. Claims-taking

Idaho's adjudication statute specifies the contents of a notice of claim, and provides for the filing of claims with IDWR.<sup>89</sup> The claim in effect substitutes for the complaint or cross-complaint in which claimants would historically aver their water rights. Specifying the contents of the notice of claim promotes a complete pleading by the claimants of all of the elements of the water right to be determined. The principal benefit of filing the claims with the state water resource agency is that it makes the data management resources of the agency available in the adjudication, reducing the document management burden on the court. A much more significant benefit is that IDWR staff are available to assist the claimants in filing claims, which reduces the burden on claimants, and promotes the consistency and completeness of claims.

### D. Examination and report of claims

IDWR is required to examine the water system and all claims to water rights acquired under state law, to prepare and file with the court a report containing its recommendations as to those claims, and to serve notice of the filing of the report on the claimants in the adjudication.<sup>90</sup> This procedure promotes accuracy and consistency by assuring an independent review of all claims. Agency recommendation of water rights promotes efficiency by providing an informal process that will resolve most matters. Service of notice of the report on all claimants promotes fairness and efficiency by relieving individual claimants of the burden of serving notice of their claims on all other claimants.

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88. IDAHO CODE § 42-1408 (Supp. 1994).

89. *Id.* § 42-1409.

90. *Id.* §§ 42-1410 to -1411.

Examination and reporting is by far the most significant function of state water resource agencies in water right adjudications. Although examination and reporting is a feature of all integrated adjudication systems, there are significant differences among the states in the nature and extent of the examination and reporting function.<sup>91</sup>

The Idaho procedure is distinguishable from the Arizona procedure in that the Arizona Department of Water Resources only provides data and not a list of water rights.<sup>92</sup> The data is then subject to objection, and upon resolution of the objections, the special master prepares a list of water rights.<sup>93</sup> The list is then subject to further objection and determination by the court.<sup>94</sup> This cumbersome procedure has been the subject of recent criticism and is a priority for recommended improvements to the process.<sup>95</sup>

The remaining integrated states provide for preliminary determinations of water rights, but differ as to the amount of "process" required in those initial determinations.<sup>96</sup> In those states with the least process, such as Idaho,<sup>97</sup> the practical effect is that the agency's function is claim verification to ensure that adequate information exists to support recommendation of the claim. Such systems place less emphasis on resolution of disputed matters at the agency level. This initial informal determination promotes efficiency: most issues as to most water rights can be resolved without formal administrative or judicial proceedings, simply through informal communications between claimants and agency staff. With regard to disputed matters, efficiency is not served by providing both a formal administrative proceeding and a formal judicial proceeding.

Texas provides the most "process," including hearings on claims, preparation of a preliminary report, objections to the report, hearings on objections, and opportunity for rehearing before the agency.<sup>98</sup> The advantage of the Texas procedure is that more disputed matters are likely to be resolved at the administrative level.<sup>99</sup> Judicial policy in Texas is to mini-

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91. See *supra* notes 73-80 and accompanying text.

92. ARIZ. REV. STAT. ANN. § 45-256 (1994).

93. *Id.* § 45-257.

94. *Id.*

95. See MEMORANDUM and REPORT, *supra* note 5.

96. See *supra* notes 74-80 and accompanying text.

97. The Idaho statute permits but does not require IDWR to hold fact-finding hearings. IDAHO CODE § 42-1410 (Supp. 1994).

98. TEX. WATER CODE ANN. §§ 11.308 to .316 (West 1988).

99. An informal preliminary report procedure has been adopted in Idaho to promote the resolution of objections prior to filing the director's report. See "Order Clarifying Procedures To Be Followed To Correct Errors Prior to Filing of Director's Reports" in *In re SRBA, Twin Falls County Civ. No. 39576* (5th Jud. Dist. Idaho July 25, 1991).

mize the opportunity for duplicative judicial proceedings following formal administrative proceedings by generally relying upon the agency record and agency determinations as to matters within the agency's expertise.<sup>100</sup>

The Washington procedure is in the middle of the spectrum, providing for hearings on claims, but no objection procedure before the agency.<sup>101</sup> Thus, although the Washington procedure assures a claimant a full opportunity to be heard by the agency either as to the claimant's own claim or the claims of others, it does not provide an opportunity for resolution of disagreements between the claimant and the agency prior to initiation of judicial proceedings. Judicial policy in Washington has been to address this need by referring objections to the agency's initial determination back to the agency for further proceedings.<sup>102</sup>

#### E. Water rights based on federal law

The Idaho procedure also differs from other state integrated systems in that IDWR does not make recommendations as to water rights established under federal law. Idaho recently revised the procedure for such claims in response to a decision of the United States Supreme Court that the United States is immune from the filing fee requirement of the Idaho adjudication statute.<sup>103</sup>

Previously, the adjudication statute required the Director to prepare a report containing both the original claims, as well as abstracts that summarized the claims without changing them in any substantive manner.<sup>104</sup> Notice to other claimants of the federal claims was achieved through service by IDWR of a notice of filing the report.<sup>105</sup> The 1994 amendments to the adjudication statute delete any reporting requirement for federal law claims, and provide a procedure whereby the claimant can serve notice or can contract with IDWR for this service.<sup>106</sup> The amendments therefore

100. See *infra* notes 202-207 and accompanying text.

101. WASH. REV. CODE ANN. § 90.03.170 (1992).

102. The Washington statute specifically provides for such reference. *Id.* § 90.03.200.

103. *United States v. Idaho*, — U.S. —, 113 S. Ct. 1893 (1993). The Court stated: "While we therefore accept the proposition that the . . . McCarran Amendment submits the United States generally to state adjective [procedural] law, as well as to state substantive law of water rights, we do not believe it subjects the United States to the payment of the sort of fees that Idaho sought to exact here." *Id.* at 1897.

104. 1969 Idaho Sess. Laws ch. 279, § 8, *repealed* by 1986 Idaho Sess. Laws ch. 220, § 12 (codified at IDAHO CODE § 42-1410 (1990)). Claims were to be abstracted because they would be easier to review if they were in the same form as IDWR's recommendations of water rights appropriated under state law.

105. *Id.*

106. IDAHO CODE § 42-1411A (Supp. 1994).

changed the notice procedure: the previous statute shifted the burden of notice from the claimant to IDWR, and the amendments shift it back. The amendments promote efficiency by removing the unnecessary duplication of submitting the claims to the court in two different forms, and removing the opportunity for dispute as to whether the summary is substantively different from the claim.

The amendments further require each claimant of a water right established under federal law to go forward with evidence to establish a prima facie case for the water right claimed, even where the water right is uncontested.<sup>107</sup> The statute expressly states the reason for this requirement: “no independent review of the claim has occurred as provided for water rights acquired under state law.”<sup>108</sup>

#### F. Final judicial determination

In all of the integrated states, objections to an agency report identify the disputed issues to be determined by the court.<sup>109</sup> This procedure promotes efficiency by providing an effective mechanism for identification of disputed issues and by reserving the highest level of examination for those disputed issues. Determination of disputed issues by the court also ensures due process by making the full panoply of judicial procedures available in contested cases.

In all of the western states, the agency is a participant in the judicial phase of the adjudication.<sup>110</sup> In most, the agency, either through its own counsel or through the state attorney general, is a party to the proceedings.<sup>111</sup> Participation by the state as a party allows the state to make its specialized expertise available not only in judicial decision-making, but also in efforts to negotiate resolution of disputes (thus achieving a final determination that is consistent with relevant facts as well as applicable laws and policies of the state). In addition, participation as a party allows this assistance to be made utilizing a traditional “party” model that defines the procedures for the state’s participation.

The Arizona procedure is distinguishable from most western states, in that the Arizona Department of Water Resources is not a party to the adjudication.<sup>112</sup> Judicial practice in Arizona has nonetheless been for the

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107. *Id.*

108. *Id.*

109. *See supra* notes 73-80 and accompanying text.

110. *See supra* notes 43-45, 49-55, 73-80 and accompanying text.

111. *See supra* notes 43-45, 49-55, 75-80 and accompanying text.

112. ARIZ. REV. STAT. ANN. §§ 45-104, -252 (1994).

agency to participate by offering relevant information through agency witnesses who are examined by agency counsel and can be cross-examined by the parties. The Arizona Attorney General represents the state agencies that claim water rights in the adjudication.<sup>113</sup>

Similarly, the Idaho legislature recently amended the adjudication statute to allocate the adjudication functions of the executive branch among the executive agencies. First, the amendments continued IDWR's limited involvement in claims to water rights established under federal law, by continuing to provide for examination and recommendation by IDWR only of claims to water rights appropriated under state law.<sup>114</sup> Second, as to water rights acquired under state law, the statute specifically provides that IDWR may file supplemental reports to objections to the director's report, and that the court may request IDWR to conduct further investigation and submit supplemental reports as to contested water rights.<sup>115</sup> Third, the statutes now define the role of IDWR as follows:

- (1) The director's role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported . . . .
- (2) The director shall not be a claimant on behalf of the state or any subdivision of the state in an adjudication.
- (3) The director shall not be a party to an adjudication.<sup>116</sup>

Fourth, the amendments define the duties of other state agencies as follows:

- (1) Each state agency, and the Idaho water resource board may file a claim and appear separately in any adjudication through the attorney general. This section shall not apply to the Idaho department of water resources.
- (2) The attorney general may appear in any adjudication and shall represent the position of the state of Idaho.<sup>117</sup>

The purpose of the amendments was to resolve pending issues in the SRBA by clarifying the roles of the various state agencies in adjudications generally.<sup>118</sup> Although nominally a party in water rights adjudications, IDWR has historically functioned more as an independent expert and

113. *Id.*

114. IDAHO CODE §§ 42-1410 to -1411 (Supp. 1994).

115. *Id.* § 42-1412.

116. *Id.* § 42-1401B.

117. *Id.* § 42-1401C.

118. STATEMENT OF PURPOSE, H.B. No. 969, Idaho Legis., 2d Sess. (1994).

technical assistant for the purposes of ensuring a complete, accurate, fair and efficient adjudication of water rights, than as a traditional adversarial litigant.<sup>119</sup> As a nominal party in the SRBA, however, IDWR became the target of litigation as to preliminary procedural and jurisdictional issues that diverted agency resources from its primary function of examining and reporting claims to state law water rights. The amendments addressed this problem by further emphasizing IDWR's primary function, and distinguishing between IDWR's role as an independent expert and technical advisor and the Attorney General's role as the representative of the state's interest regarding claims to water rights established under federal law and water right claims by state agencies. The separation of roles is, however, not complete. Both agencies have an interest in the accurate and complete determination of water rights. IDWR addresses this interest through the filing of supplemental reports and other technical assistance; the Attorney General through filing of objections or responses to objections and participation as a party in proceedings on objections.

#### G. Administration of water rights

The Idaho adjudication statute expressly provides for determination of matters necessary for administration of water rights.<sup>120</sup> "Administration" in this context refers to matters necessary for distribution of water in accordance with water rights, in addition to the statutorily specified elements of a water right.<sup>121</sup>

Inclusion of matters regarding the administration of water rights in a general adjudication of water rights serves a number of purposes. First, a McCarran Amendment general adjudication is an action in which the state can join the United States for purposes of determining matters regarding administration of federal and Indian water rights.<sup>122</sup> Second, resolution of

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119. See *Idaho Dept. of Water Resources v. United States*, 832 P.2d 289 (Idaho 1992), *rev'd on other grounds*, *United States v. Idaho Dept. of Water Resources*, — U.S. —, 113 S.Ct. 1893 (1993). The Idaho court stated:

The position of the director of the Department of Water Resources is analogous to the 'stakeholder' in an interpleader action. The director is really a disinterested party. The only interest the director has is to see that all rights are accurately adjudicated. The director does not oppose a claim, trying to subvert a valid claim. Nor does the director stand to gain if a claim is invalidated.

832 P.2d at 295-96.

120. See IDAHO CODE § 42-1409 (notices of claims), § 42-1410 (director's reports), and § 42-1412 (decrees) (Supp. 1994).

121. See IDAHO CODE Tit. 42, ch. 6 (1990 & Supp. 1994) ("Distribution of Water Among Appropriators").

122. 43 U.S.C. § 666 (1993). The United States and some Indian tribes have taken the position that federal and Indian water rights may be administered *only* in "suits" pursuant to the McCarran

administrative matters addresses the criticism that adjudications do not achieve the desired finality because litigation over administration often follows litigation over the determination of water rights. Third, it is necessary to address administrative provisions in prior decrees and licenses that will be superseded by the decree in a general adjudication.<sup>123</sup>

There is a legitimate concern that judicial determination of matters necessary for administration could result in judicial intrusion in matters appropriately addressed by administrative action. As noted above, however, there is also a legitimate need. Such matters are within the jurisdiction of the courts, since courts have historically addressed such matters as part of their equitable powers,<sup>124</sup> and in appeals of agency decisions as to administration of water rights. Flexibility is necessary in determining what matters are necessary for administration, because no hard and fast rule can be established that will address all possible circumstances that may arise. This flexibility can be maintained and inappropriate judicial intrusion into the administrative arena can be avoided by appropriate recognition of agency discretion and expertise.<sup>125</sup>

In addition, the Idaho adjudication statute, like those in several western states, provides a procedure for administration of water rights pending a final determination by the court.<sup>126</sup> A procedure to authorize interim administration avoids piecemeal motions for preliminary injunctions. It further benefits claimants because administration after review and recommendation of claims by IDWR minimizes the burden the claimant would otherwise bear to make a preliminary showing of the validity of the right to obtain a preliminary injunction.<sup>127</sup>

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Amendment; the western states generally disagree. *See, e.g., In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273 (Wyo. 1992).

123. For example, in *Utah Construction Co. v. Abbott*, Equity No. 222 (D. Idaho 1923), the decree contains general provisions providing that certain tributaries will be administered as separate from the mainstem of the Big Lost River, and that portions of the mainstem will be administered as separate from each other during certain times of the year. Although clearly a provision for the administration of water rights, it is also a provision for the determination of water rights, since it also serves to define the source of water rights. As this example illustrates, it is often difficult to draw a clear distinction between matters of administration and matters of determination, since matters of determination are themselves necessary for administration.

124. *See, e.g., Silkey v. Tiegs*, 5 P.2d 1049, 1054-55 (Idaho 1931).

125. The Idaho adjudication statute expressly provides that the director may include remarks in individual rights or general provisions as to all rights or certain classes of rights that the director deems necessary for administration of water rights. IDAHO CODE § 42-1411 (Supp. 1994).

126. *Id.* § 42-1417; *supra* notes 55, 73-78 and accompanying text.

127. The Idaho procedure differs from some other integrated states, such as Utah, in that Idaho provides for interim administration in accordance with the agency report upon order of the court, while Utah provides for interim administration in accordance with the report until otherwise ordered or decreed by the court. IDAHO CODE § 42-1417 (Supp. 1994); UTAH CODE ANN. § 73-4-11 (1989).

## H. Amnesty

In most western states, approval of the state water resource agency is required for new appropriations and changes in use of existing appropriations.<sup>128</sup> In addition, most western states have forfeiture statutes and/or common law abandonment doctrines, pursuant to which a water right can be lost through nonuse.<sup>129</sup> In most western states, however, claimants have initiated new uses or made changes in use of existing rights without the required approval, or have failed to make use of all or part of their water rights in a manner that raises issues as to the validity of all or part of the right.<sup>130</sup> Some states have responded by enacting amnesty statutes, such as the Idaho provisions discussed below.<sup>131</sup>

Idaho's "accomplished transfer" provision allows persons who have made unauthorized changes in use prior to commencement of the adjudication to claim the water right as changed in the adjudication.<sup>132</sup> IDWR's recommendation of the right includes such conditions or limitations as are necessary to prevent enlargement of the right or injury to other rights.<sup>133</sup> If the change is contested and disallowed, the claimant can resume the original use, so long as resumption will not result in injury to other rights, or the right can be conditioned to prevent injury to other rights.<sup>134</sup>

Idaho's "enlargement" provision allows holders of valid rights who made expansions in use in violation of the mandatory permit statute to claim the expansion, if the expansion occurred prior to com-

128. 2 WATERS AND WATER RIGHTS, *supra* note 20 at §§ 14.01, 14.04, 16.01(c); *see also supra* note 8.

129. *See, e.g.*, IDAHO CODE § 42-222 (Supp. 1994); *Jenkins v. State Department of Water Resources*, 647 P.2d 1256 (Idaho 1982); *Sears v. Berryman*, 623 P.2d 455 (Idaho 1981); *Gilbert v. Smith*, 552 P.2d 1220 (Idaho 1976). *See also* 2 WELLS A. HUTCHINS, *supra* note 68 at 256-328; 2 WATERS AND WATER RIGHTS, *supra* note 20 at §§ 17.03(a), (b).

130. *See, e.g.*, Michael V. McIntire, *The Disparity Between State Water Right Records and Actual Water Use Patterns: I Wonder Where the Water Went?*, 5 LAND & WATER L. REV. 23 (1970).

131. Enactment of legislation to address the following substantive issues is currently under consideration in Arizona: what constitutes sufficient cause for nonuse to avoid forfeiture of a water right, the effect of changes in use for which required approval of the water resource agency was not obtained, and the extent to which groundwater tributary to a surface source is "appropriable water" and therefore within the scope of an adjudication. MEMORANDUM and REPORT, *supra* note 5.

132. IDAHO CODE § 42-1425 (Supp. 1994). A previous version of the accomplished transfer statute was held to be unconstitutionally vague by the district court in the SRBA, and a new accomplished transfer statute was adopted in the 1994 amendments to the adjudication statute. Memorandum Decision and Order on Basin Wide Issue No. 1, Constitutionality of I.C. § 42-1416 and I.C. § 42-1416A, As Written; In re SRBA, Twin Falls County Civ. No. 39576 (Feb. 4, 1994).

133. IDAHO CODE § 42-1425 (Supp. 1994).

134. *Id.*



mencement of the adjudication.<sup>135</sup> The expansion is claimed as a right based on beneficial use with a priority date as of the date the expansion occurred.<sup>136</sup> Enlargements may include, for example, expansions in irrigated acreage or additional purposes of use, but the original right and the enlargement right together may not exceed the diversion rate of the original right.<sup>137</sup>

Finally, the 1994 amendments include a “missing elements” provision, that allows current beneficial use to be considered in determining elements of a water right that are missing from old decrees and licenses.<sup>138</sup>

### I. Proposals to minimize burden on claimants

A matter of general and continuing concern in water rights adjudications is the identification of options for increasing claimant participation by reducing the burden water right adjudications impose on individual claimants. Of particular concern are the many claimants who are not represented by counsel and have limited resources, as well as claimants in test cases. Recent proposals include the following.

- **Settlement:** Recent amendments to the Idaho adjudication statute provide for mandatory settlement conferences.<sup>139</sup> In addition, the use of settlement judges is currently under consideration in both Arizona<sup>140</sup> and Idaho. In Montana, the water court has adopted the practice of holding “status conferences” that are administrative-style mini-trials with a water master present who hears facts and argument in an informal setting without a record of the proceedings. The parties are urged to settle and are often sent to work with staff from the Montana Department of Natural Resources and Conservation to resolve issues as to the claims.

135. IDAHO CODE § 42-1426 (Supp. 1994). The adjudication statute previously included “presumption” provisions to address expansions, which were held to be unconstitutionally vague by the district court in the SRBA; the new enlargement statute was adopted in the 1994 amendments to the adjudication statute. Memorandum Decision and Order on Basin Wide Issue No. 1, Constitutionality of I.C. § 42-1416 and I.C. § 42-1416A, As Written; In re SRBA, Twin Falls County Civ. No. 39576 (Feb. 4, 1994).

136. IDAHO CODE § 42-1426 (Supp. 1994).

137. *Id.* Another section allows expansions in use in critical ground water areas to be claimed in the adjudication, but the priority date for such rights is June 30, 1985, and water is deemed unavailable to fill the right unless IDWR finds that a suitable management program is in place to prevent ground water mining. IDAHO CODE § 42-1416B (1990).

138. *Id.* § 42-1427 (Supp. 1994).

139. *Id.* § 42-1412 (Supp. 1994).

140. MEMORANDUM and REPORT, *supra* note 5.

- **Test cases:** Claimants in test cases often feel like “guinea pigs”, bearing the burden of resolving issues not only on their own behalf but also on behalf of other similarly situated claimants. Some claimants in Idaho have sought to address this problem by using the private attorney general doctrine to shift their litigation costs to the state, thereby imposing unanticipated and unpredictable costs on agency budgets. Recent amendments to the Idaho adjudication statute provide that no judgment for costs and attorneys fees against the state, an agency, or its staff will be allowed in water rights adjudications.<sup>141</sup> The legislature is currently considering other options to address this problem, including an Arizona proposal for the appointment of a state funded ombudsman to represent claimants in test cases.<sup>142</sup>
- **Non-Lawyer Representatives:** Many claimants in adjudications are small corporations, typically family farming operations, who seek to appear through their corporate officers. In many states, laws governing the practice of law prohibit corporate officers from representing corporations in judicial proceedings.<sup>143</sup> The requirement to obtain counsel can appear unnecessary and unfair to some claimants,<sup>144</sup> and changes to these laws have been suggested in Arizona<sup>145</sup> and Idaho.
- **De minimus uses:** Determination of the many claims to small water rights (particularly domestic and stockwater) is extremely burdensome when compared to the small total amount and minimal potential impact of such claims. Legislation adopting a summary procedure for the determination of such rights is currently under consideration in Arizona.<sup>146</sup>

### CONSTITUTIONAL CHALLENGES

In most of the western states, constitutional challenges to the water right adjudication statutes followed shortly after the enactment of the statutes. The constitutional challenges have focused primarily on issues of separation of

141. IDAHO CODE § 42-1423 (Supp. 1994).

142. MEMORANDUM and REPORT, *supra* note 5.

143. *See, e.g.,* Weston v. Gritman Memorial Hospital, 587 P.2d 1252, 1255 (Idaho 1978).

144. For example, neighboring farmers recently appeared in a consolidated scheduling conference in the SRBA as to their objections to IDWR's recommendations of their rights. Both farmers filed objections in which both the factual and legal issues were substantially similar. Both operated family farming operations, one owned by the farmer outright, the other owned by a family corporation. One farmer was required to retain counsel before the matter could proceed, the other was not. Although members of the bar are well familiar with all the reasons a claimant should seek legal advice, an unavoidable fact of water right adjudications is that many claimants, for financial and other reasons, simply will not.

145. MEMORANDUM and REPORT, *supra* note 5.

146. MEMORANDUM and REPORT, *supra* note 5.

powers, due process, and special laws.<sup>147</sup> Although the law appears to be well settled, similar constitutional challenges have recently arisen and are likely to continue to arise in response to continuing efforts to revise and improve the adjudication process.<sup>148</sup> The following discussion summarizes decisions addressing the constitutionality of state court decisions, and includes decisions addressing the relative roles of the legislative, executive, and judicial branches of government in water right adjudications.

### I. *Primarily Administrative*

The constitutionality of the primarily administrative systems in Wyoming, Kansas, and Nebraska have all been upheld against separation of powers and due process challenges.<sup>149</sup> Generally, the courts noted the plenary power of the legislature to enact laws for the regulation of water rights and the specialized expertise of the agency with regard to the issues involved. The courts held that (a) adjudications were primarily administrative in nature, or at most quasi-judicial, and (b) that provisions for notice by and hearing before the agency, followed by opportunity for judicial review, met the requirements of due process.<sup>150</sup>

### II. *Integrated*

#### A. Oregon

The Oregon Supreme Court upheld an Oregon statute, which set forth a process substantially similar to Oregon's current procedure,<sup>151</sup>

147. Other challenges have generally been limited to constitutional provisions governing titles of legislation.

148. Issues as to the constitutionality of the recent amendments to Idaho's adjudication statute are currently pending in the SRBA.

149. *Farm Investment Co. v. Carpenter*, 61 P. 258 (Wyo. 1900); *Williams v. City of Wichita*, 374 P.2d 578 (Kan. 1962); *State ex rel. Emery v. Knapp*, 207 P.2d 440 (Kan. 1949); *Enterprise Irrig. Dist. v. Tri-State Land Co.*, 138 N.W. 171 (Neb. 1912), *appeal dismissed*, *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157 (1917). *See also* *Frontier Ditch Co. v. Chief Eng'r of Div. of Water Resources*, 704 P.2d 12 (Kan. 1985); *Baumann v. Smrha*, 145 F. Supp. 617 (D. Kan. 1956), *aff'd* 352 U.S. 863 (1956); *Artesian Valley Water Conservation Ass'n v. Division of Water Resources*, 255 P.2d 1015 (Kan. 1953); *Crawford Co. v. Hathaway*, 93 N.W. 781 (Neb. 1903).

150. *Farm Investment*, 61 P. at 267, 270; *Williams*, 374 P.2d at 595; *Emery*, 207 P.2d at 448; *Enterprise*, 138 N.W. at 178-79. *See also* *Frontier Ditch*, 704 P.2d at 15-16; *Baumann*, 145 F. Supp. at 624-25; *Artesian Valley*, 255 P.2d at 1017-18; *Crawford*, 93 N.W. at 794-96. The Nebraska Supreme Court subsequently held that the Nebraska Department of Water Resources has *exclusive* original jurisdiction to hear and adjudicate all matters pertaining to water rights, appropriations, and priorities for use of the public waters of the state. *Ainsworth Irrig. Dist. v. Harms*, 102 N.W.2d 429, 434-35 (Neb. 1960).

151. *Supra* note 77 and accompanying text.

against due process and separation of powers challenges.<sup>152</sup> The court noted the power of the legislature to enact laws to regulate water rights and the technical difficulties intrinsic to water right adjudications.<sup>153</sup> The court recognized that the “practical necessities of efficient government prevent a complete defined division” of the three branches of government.<sup>154</sup> The court characterized the activities of the state water agency in determining facts and applying the law to the facts as quasi-judicial in character.<sup>155</sup> The court held that the agency’s decisions were not final, stating, “[i]t is only when the courts of the state have obtained jurisdiction of the subject-matter and of the persons interested and rendered a decree in the matter determining such rights that, strictly speaking, an adjudication or final determination is made.”<sup>156</sup> The court quickly disposed of the due process challenge on the basis that the procedures established by statute were not arbitrary, unreasonable, or unduly burdensome.<sup>157</sup>

The United States Supreme Court also upheld the Oregon statute against due process challenges in the landmark *Pacific Live Stock* case.<sup>158</sup> The Court held that the proceedings before the agency were preliminary only and merely paved the way for an adjudication by the court. The court noted that the purposes of the proceedings were to: (1) provide an impartial examination of the claims, (2) gather essential data for later hearing, and (3) facilitate a proper understanding of the rights of interested parties.<sup>159</sup> The Court specifically upheld the requirement that claimants file claims, submit evidence in support of the claims, and pay a filing fee. The Court noted that it was the usual practice for claimants to bear their own costs, and that the fee was not extortionate and was for services that benefit the claimants.<sup>160</sup> The Court further upheld the portions of the statute allowing the state water agency to consider sworn statements taken *ex parte* without opportunity for cross-examination, allowing the agency report to be accepted in evidence, and allowing administration of water rights in accordance with the agency determination prior to final decree.<sup>161</sup> The Court held that the procedures for objection and the availability of a stay upon filing of a bond afforded due process.<sup>162</sup>

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152. *In re Willow Creek*, 144 P. 505 (Or. 1914), *modified*, 146 P. 475 (Or. 1915).

153. 144 P. at 512-14.

154. *Id.* at 513.

155. *Id.* at 512.

156. *Id.*

157. *Id.* at 514.

158. *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440 (1916).

159. *Id.* at 453-54 (citing *In re Willow Creek*, 144 P. at 513).

160. *Id.* at 451-53.

161. *Id.* at 453-55.

162. *Id.*

The United States and the Klamath Indian Tribe recently sued the Oregon Water Resources Department in federal court, seeking to enjoin the adjudication of their water right claims in a state court adjudication of the Klamath River.<sup>163</sup> The United States asserted that the sovereign immunity of the United States to joinder in the state court action had not been waived pursuant to the McCarran Amendment because the adjudication utilizes procedures that are administrative in nature.<sup>164</sup> The Klamath Tribe intervened, asserting that the Oregon procedure violates due process because representation of the agency by the state attorney general violates claimants' rights to an impartial decision maker.<sup>165</sup> Citing *Pacific Live Stock*, the court ruled that the state court proceedings were a "suit" within the meaning of the McCarran Amendment.<sup>166</sup> As to the due process argument, the court acknowledged the fundamental right to a fair trial by a fair tribunal, but found that the challengers had not shown the state officials to be biased.<sup>167</sup> The court noted that the state officials had no personal or financial outcome in the proceedings, and that the actions of individuals who represented the state in earlier litigation were advocates who took a legal position on the laws they were charged with enforcing and applying.<sup>168</sup> The court further noted that no evidence had been produced to show that adjudication officials had prejudged the law or the facts or that the "officials would be so psychologically wedded to their previous positions that they would consciously or unconsciously avoid the appearance of having erred or changed [their] positions."<sup>169</sup>

Other decisions of the Oregon Supreme Court further addressed the relative roles of the state water agency and the court in water right adjudications. Two cases involved appeals of actions to determine water rights brought pursuant to the court's equity jurisdiction, rather than pursuant to

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163. *United States v. Oregon Water Resources Dept.*, 774 F. Supp. 1568 (D. Or. 1991). The federal district court for Oregon subsequently granted the United States' and Klamath Tribe's motion for reconsideration based on the United States Supreme Court decision in *United States v. Nordic Village, Inc.*, — U.S. —, 112 S. Ct. 1011 (1992). The court reconsidered its earlier opinion in light of *Nordic Village*, and adhered to its earlier opinion. *See United States v. Oregon Water Resources Dept.*, Civ. No. 90-1329-FR, 1992 WL 176154 (D. Or. July 10, 1992).

164. *Id.* at 1571.

165. *Id.* at 1572.

166. *Id.* at 1576.

167. *Id.* at 1579 (citing *Withrow v. Larkin*, 421 U.S. 35 (1976)).

168. 774 F. Supp. at 1579.

169. *Id.* The court further held that the United States could be required to pay filing fees required by the Oregon statute, but that the Tribe could not; that the United States and Indian Tribes could not be required to file "registration statements" that predate the inception of the adjudication process; and that the adjudication was sufficiently comprehensive even though it did not include groundwater, previously adjudicated tributaries, or water rights perfected under the statutory procedure for agency approval of new appropriations. *Id.* at 1576-81.

the adjudication statute. In each, after reviewing a voluminous record, the court held that an accurate determination of water rights could not be made upon the record and reversed with directions to proceed with a new trial pursuant to the adjudication statute.<sup>170</sup> Two later cases addressed the burden of proof in proceedings before the court and the weight to be accorded the agency findings, neither of which are expressly addressed by the statute. In one, the court ruled that the claimant bears the burden of proof;<sup>171</sup> in another, the court noted that the agency findings are "entitled to great weight."<sup>172</sup>

### B. Nevada

The Nevada Supreme Court upheld a Nevada statute, which set forth a process substantially similar to Nevada's current procedure,<sup>173</sup> against due process and separation of powers challenges.<sup>174</sup> The court specifically upheld the statutory summons procedure and designation of pleadings, noting that claimants do not have a vested right in the traditional civil procedures.<sup>175</sup> The court upheld the role of the state water agency, and the provision that the court decree uncontested portions of the agency's report, holding that the agency's determinations were quasi-judicial and preliminary only, paving the way for a final determination by the court.<sup>176</sup> The court cited earlier decisions in Oregon, Wyoming, and Nebraska, rejecting the argument that those state's constitutions were sufficiently distinguishable from the Nevada constitution to warrant a different result.<sup>177</sup>

Later decisions further addressed the relative roles of the agency and the court in water right adjudications. Although the statute leaves the option to the court to take evidence on uncontested water rights, the court held that hearing is limited to issues raised by objections.<sup>178</sup> The court has

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170. *Oregon Lumber Co. v. East Fork Irrig. Dist.*, 157 P. 963, 964-65 (Or. 1916); *Pacific Live Stock Co. v. Balcombe*, 199 P. 587, 588-89 (Or. 1921).

171. *In re Water Rights in Silvies River*, 237 P. 322, 351 (Or. 1925).

172. *In re Waters of the Tualatin River and its Tributaries*, 366 P.2d 174, 179 (Or. 1961).

173. See *supra* note 78 and accompanying text.

174. See *Vineyard Land & Stock Co. v. District Court*, 171 P. 166, 168-74 (Nev. 1918) (citing *Bergman v. Kearney*, 241 F. 884 (D. Nev. 1917)). See also *Humboldt Land & Cattle Co. v. District Court*, 224 P. 612, 613-14 (Nev. 1924); *Humboldt Land & Cattle Co. v. Allen*, 14 F.2d 650 (D. Nev. 1926), *aff'd*, 274 U.S. 711 (Nev. 1927).

175. *Vineyard*, 171 P. at 171-74.

176. *Id.* at 172-73.

177. *Id.* at 169-71 (citing *In re Willow Creek*, 144 P. 505 (Or. 1914); *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440 (1916); *Farm Investment Co. v. Carpenter*, 61 P. 258 (Wyo. 1900); and *Enterprise Irrig. Dist. v. Tri-State Land Co.*, 138 N.W. 171 (Neb. 1912)).

178. *Carpenter v. Sixth Judicial Dist. Court*, 84 P.2d 489, 491 (Nev. 1938).

further held that the findings of the agency are entitled to great respect, as expert opinions on matters within the agency's special expertise.<sup>179</sup>

### C. Utah

The Utah Supreme Court upheld a Utah statute, which set forth a process substantially similar to Utah's current procedure,<sup>180</sup> against due process and separation of powers challenges.<sup>181</sup> The court noted the comprehensive nature of the laws regulating the waters of the state and the legislative purpose to simplify and expedite those laws. The court acknowledged the legislative authority to direct the courts how to proceed in those matters so long as the laws applied the same in all courts and to all claimants.<sup>182</sup> As to the due process challenge, the court briefly summarized the statutory procedures and concluded that the requirements of due process were met.<sup>183</sup> As to the separation of powers challenge, the court found nothing to add to the previous decisions in Wyoming, Nebraska, Oregon and Nevada.<sup>184</sup>

In a subsequent case, plaintiffs sought injunctive relief pursuant to the court's equitable powers, without proceeding under the Utah adjudication statute.<sup>185</sup> Defendants sought an order from the supreme court directing the lower court to proceed in accordance with the adjudication statute, contending that the statutory procedure was exclusive.<sup>186</sup> Plaintiffs asserted that an exclusive statutory procedure would unconstitutionally deprive the court of its equitable jurisdiction.<sup>187</sup> The supreme court found it unnecessary to address the constitutional issue. After reviewing the history and purposes of the statute, the supreme court held that failure to utilize the statutory process would be an abuse of discretion.<sup>188</sup>

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179. *In re Bassett Creek and its Tributaries in White Pine County*, 155 P.2d 324, 325 (Nev. 1945). See also *Humboldt Land & Cattle Co. v. Allen*, 14 F.2d 650 (D. Nev. 1926): Upon a complaint to a federal district court to enjoin the agency from administering water rights in accordance with the report pending resolution of objections by state court, the court held that there is a rebuttable presumption that the agency has performed its duty under the law, the effect of which is to put the burden of proof on persons objecting to the agency's report. 14 F.2d at 655.

180. See *supra* note 75 and accompanying text.

181. *Eden Irrig. Co. v. District Court*, 211 P. 957 (Utah 1922).

182. 211 P. at 962.

183. *Id.* at 959.

184. *Id.* at 961 (citing *Farm Investment Co. v. Carpenter*, 61 P. 258 (Wyo. 1900); *Enterprise Irrig. Dist. v. Tri-State Land Co.*, 138 N.W. 171 (Neb. 1912); *In re Willow Creek*, 144 P. 505 (Or. 1914); *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440 (1916); and *Vineyard Land & Stock Co. v. District Court*, 171 P. 166 (Nev. 1918)).

185. *Salt Lake City v. Anderson*, 148 P.2d 346, 349-50 (Utah 1944).

186. *Id.* at 348.

187. *Id.*

188. *Id.* at 350.

The court has also addressed the issue of whether applying amendments to the adjudication statute to pending adjudications violated the state constitution.<sup>189</sup> The Utah Supreme Court answered in the negative, holding that there are no vested rights in procedure.<sup>190</sup>

#### D. California

The California Supreme Court upheld a California statute, which set forth a process substantially similar to Oregon's current procedure,<sup>191</sup> against due process and separation of powers challenges.<sup>192</sup> The court noted that the agency determinations were not final, since they were subject to objection, and that contested matters were to be determined by the court under civil rules governing the admissibility of evidence and allowing for amendment of pleadings.<sup>193</sup> The court specifically upheld the statutory provisions for filing of objections to the agency determination, hearings by the court "as nearly as may be" in accordance with judicial rules of civil procedure, joinder by means other than issuance of process, and reference of contested matters to the agency.<sup>194</sup>

A later decision further addressed the relative roles of the agency and the court.<sup>195</sup> The court held that water rights may be determined either by initiating proceedings before the board pursuant to the adjudication statute, or by initiating an action with the court.<sup>196</sup> The court nonetheless strongly encouraged the lower courts to refer cases to the agency for an initial determination.<sup>197</sup>

#### E. Texas

The Texas Supreme Court upheld a Texas statute, which set forth a process substantially similar to Texas' current statute,<sup>198</sup> against separation of

189. *Spanish Fork Westfield Irrig. Co. v. District Court*, 104 P.2d 353, 364-65 (Utah 1940).

190. *Id.* at 364-65.

191. *See supra* note 77 and accompanying text.

192. *Bray v. Superior Court*, 268 P. 374 (Cal. 1928). *See also* *Wood v. Pendola*, 35 P.2d 526 (Cal. 1934); *Fleming v. Bennett*, 116 P.2d 442 (Cal. 1941); *City of Pasadena v. City of Alhambra*, 207 P.2d 17 (Cal. 1949).

193. *Bray*, 268 P. at 376-79.

194. *Id.*

195. *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

196. *Id.* at 730-32.

197. *Id.* A current issue in California is whether the "substantial evidence" standard or the "independent judgment" standard applies to the court's determination of objections in water rights adjudications. In non-water right cases, see *Fred H. Bixby Ranch Co. v. Pierno*, 481 P.2d 242 (Cal. 1971); *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 595 P.2d 579 (Cal. 1979); *Drummev v. State Bd. of Funeral Directors & Embalmers*, 87 P.2d 848 (Cal. 1939).

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



powers challenges.<sup>199</sup> The court held that the statute could be sustained either as a legislative exercise of the state's power to promote the public welfare, or under the 1917 Conservation Amendment, which provides that the conservation and preservation of the state's natural resources is a public duty and directs the legislature to pass laws appropriate thereto.<sup>200</sup> The court upheld the statutory procedure on the basis that the agency does not make a final determination of water rights because all agency determinations are subject to objection, and upon objection, the court makes an independent review.<sup>201</sup>

The statute was further challenged on the basis that "by virtue of the fact that it is the exceptions that are being heard, rather than the [agency's] final determination, there exists a presumption that the determination of the [agency] is valid."<sup>202</sup> The Texas Court of Appeals, citing a California case, found that there was indeed a presumption in favor of the validity of agency actions, the effect of which was to put the burden of proof on the objector.<sup>203</sup> The court further elaborated on the "independent judgment" standard of review. Under this standard, the court has the right to conduct new evidentiary hearings, but for the most part the review is confined to the record developed before the agency.<sup>204</sup> In addition, the court is required to independently pass on all issues of fact and law, but the court indulges a presumption that the agency has acted properly.<sup>205</sup> As to the weight to be given the agency's findings, the court held the inescapable conclusion to be that the court must weigh the evidence and exercise its independent judgment as to the facts.<sup>206</sup> The court reasoned that this did not make the agency's findings a wasted effort, because the agency's findings came to the court with a strong presumption of correctness, leaving the burden with the objector to convince the court that the agency findings are contrary to the weight of the evidence.<sup>207</sup>

## F. Arizona

Arizona's first adjudication statute was patterned after the Oregon adjudication statute, which set forth a process substantially similar to

199. *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 442-43 (Tex. 1982).

200. TEX. CONST. art. XVI, § 59a.

201. 642 S.W.2d at 442-43.

202. *In re Adjudication of the Water Rights of the Upper Guadalupe River Segment of the Guadalupe River Basin*, 625 S.W.2d 353, 363 (Tex. Civ. App. 1981), *aff'd*, 642 S.W.2d 438 (Tex. 1982).

203. 625 S.W.2d at 363-64 (citing *Drummev v. State Bd. of Funeral Directors & Embalmers*, 87 P.2d 848 (Cal. 1939)).

204. 625 S.W.2d at 363.

205. *Id.*

206. *Id.* (citing *Drummev*, 87 P.2d 848).

207. *Id.* (citing *Drummev*, 87 P.2d 848).

Oregon's current procedure.<sup>208</sup> In a very brief opinion, the Arizona Supreme Court upheld the constitutionality of the Arizona statute against due process and separation of powers challenges.<sup>209</sup> The court analogized the role of the agency to that of a referee, and cited previous cases in Oregon, Nevada, Nebraska and Wyoming that the actions of the state agency were preliminary only and merely paved the way for a final determination by the court.<sup>210</sup> The court further held that the due process challenges needed no further response than that already provided by the U.S. Supreme Court regarding the Oregon statute.<sup>211</sup>

The Arizona Supreme Court recently issued two decisions regarding constitutional issues in two adjudications currently underway. In *Maricopa County*, the United States and two Indian tribes sought an order dismissing the adjudications, challenging the constitutionality of the statutory adjudication procedures under both state and federal constitutions.<sup>212</sup> The court upheld the statute against a due process challenge based on an asserted institutional bias on the part of the agency resulting from the agency's other statutory duties.<sup>213</sup> The court held that even if it assumed that the agency was so related to the state and other agencies that it could not fairly serve in an adjudicatory capacity, the agency did not in fact serve in an adjudicatory capacity because (1) the agency does not make recommendations ranking and quantifying particular claims, (2) the agency's factual determinations have neither validity nor presumed validity if objected to, and (3) contested portions of the report are not admitted into evidence until the objectors have had a fair opportunity to contest their admissibility.<sup>214</sup>

In the same case, the court held that statutory provisions regarding appointment of special masters, application of rules of evidence, and effect of prior judgments do not violate the separation of powers provisions of the state constitution.<sup>215</sup> The court held that the court's express rule-making authority did not prevent the legislature from enacting sup-

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208. See *supra* note 77 and accompanying text.

209. *Stuart v. Norviel*, 226 P. 908 (Ariz. 1924). See also *Stewart v. Verde River Irrig. & Power Dist.*, 68 P.2d 329 (Ariz. 1937); *Salt River Valley Water Users' Ass'n. v. Norviel*, 242 P. 1013 (Ariz. 1926).

210. *Stuart*, 226 P. at 911 (citing *In re Willow Creek*, 144 P. 505 (Or. 1914); *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440 (1916); *Vineyard Land & Stock Co. v. District Court*, 171 P. 166 (Nev. 1918); *Enterprise Irrig. Dist. v. Tri-State Land Co.*, 138 N.W. 171 (Neb. 1912); and *Farm Investment Co. v. Carpenter*, 61 P. 258 (Wyo. 1900)).

211. *Id.* (citing *Pacific Live Stock Co.*).

212. *United States v. Superior Court in and for Maricopa County*, 697 P.2d 658 (Ariz. 1985).

213. 697 P.2d at 672-74.

214. *Id.*

215. *Id.* at 671.

plementary provisions, and that the statutory provisions do not unreasonably limit or hamper the judiciary in performing its duties.<sup>216</sup>

In a later case, the court rejected due process challenges to the statutory procedure for joinder of claimants and the court-ordered procedure for service of documents.<sup>217</sup>

### G. Idaho

The Idaho Supreme Court upheld the constitutionality of a previous version of the adjudication statute against separation of powers and due process challenges, as well as a challenge that the statute violated a constitutional prohibition against local or special laws.<sup>218</sup> The court noted generally that the state has the right to prescribe reasonable rules and regulations for the determination of water rights and that the act applies to all members of a class consisting of appropriators of water rights.<sup>219</sup> The court specifically upheld the authority of the state to: (a) require the parties to pay for the agency's costs of investigation, mapping, and preparation of a statement as to the condition and capacity of diversion works and amount of land irrigated, and (b) provide that the maps and statements shall be prima facie evidence of the matters they contain.<sup>220</sup> In response to the argument that the statute could not be retroactively applied to an action commenced prior to its enactment, the court held that the provisions of the act were procedural and that there is no vested right in procedure.<sup>221</sup>

## III. Primarily Judicial

### A. Montana

The Montana Supreme Court recently issued a decision regarding the relative roles of the agency and the court in adjudications.<sup>222</sup> The Montana Department of Natural Resources and Conservation had prepared proposed claim examination instructions for its staff, and distributed the

216. *Id.*

217. *In re Rights to the Use of the Gila River*, 830 P.2d 442, 452-53 (Ariz. 1992).

218. *Boise City Irrig. & Land Co. v. Stewart*, 77 P. 25 (Idaho 1904).

219. 77 P. at 28.

220. *Id.* at 30-32.

221. *Id.* at 31.

222. *In re the Department of Natural Resources & Conservation*, 740 P.2d 1096 (Mont. 1987). The Montana Supreme court has also upheld the constitutionality of the portion of the adjudication statute requiring determination of both diversion rate and diversion volume for natural flow (as opposed to storage) rights for irrigation historically decreed only in terms of diversion rate. *McDonald v. State*, 722 P.2d 598, 599 (Mont. 1985).

instructions for public review and comment.<sup>223</sup> The water court entered an order prohibiting the agency from adopting the examination instructions as rules, and the agency appealed.<sup>224</sup> The supreme court held that the water court order was not an improper intrusion by the judiciary on the executive.<sup>225</sup> The court held that, because the adjudication was a judicial proceeding, the agency had no authority to promulgate such rules.<sup>226</sup> The court noted: (a) the limited role of the agency under the adjudication statute, (b) the statutory provision for the Montana Supreme Court to adopt rules of practice and procedure for the Montana courts, which specifically includes authority to adopt rules for adjudications in consultation with the water court and the agency, and (c) the statutory provision for the agency to adopt rules, which is expressly made subject to the powers and duties of the Montana Supreme Court.<sup>227</sup>

### B. Colorado

The Colorado Supreme Court has also addressed the role of the state water agency in its judicial proceedings.<sup>228</sup> The water court dismissed the State Engineer's protest to a ruling of the referee, holding that the agency lacked standing.<sup>229</sup> Reversing the decision of the water court, the court noted the value of the information the agency sought to provide in accurately resolving the issue before the referee.<sup>230</sup> The court stated that the public's vital interest in the allotment and administration of water is recognized by the state constitution and many judicial decisions. The court held that the agency had standing "in order that the people may have their day in court."<sup>231</sup>

### C. South Dakota

South Dakota is the only state in which a decision holding portions of a state adjudication statute unconstitutional has not been subsequently

223. 740 P.2d at 1097.

224. *Id.* at 1096-97.

225. *Id.* at 1104-05.

226. *Id.* at 1102.

227. *Id.* Among the states with integrated systems, the Arizona, Oregon, and Nevada adjudication statutes expressly authorize the agency to adopt rules. See *supra* notes 73, 77, 78 and accompanying text. California, Idaho, and Texas have adopted rules pursuant to general rule-making authority. CAL. CODE REGS tit. 23 §§ 945-951 (1987); I.D.A.P.A. 37.03.01 (1993); TEX. ADMIN. CODE tit. 30 §§ 275.11 -.18 (1991).

228. *Wadsworth v. Kuiper*, 562 P.2d 1114, 1116 (Colo. 1977).

229. *Id.* at 1115.

230. *Id.*

231. *Id.* at 1116. The statute was subsequently amended to expressly provide for filing of protests by the agency. See COLO. REV. STAT. § 37-92-304 (1990).

overturned. The South Dakota Supreme Court held that a statute requiring a hydrographic survey by the state engineer and apportionment of the costs of the survey among the claimants violated due process, by imposing burdensome costs on claimants who had used no more water than that to which they were entitled.<sup>232</sup> The statute was subsequently amended to delete the agency examination and reporting function as well as the apportionment of costs provision.<sup>233</sup>

## LESSONS FOR THE FUTURE

### I. Common Themes

A detailed comparison of the water right adjudication procedures in the western states yields a seemingly infinite variety of law and practice. Yet many similarities can be discerned. All seek to promote a more accurate determination of water rights, in a fair and efficient manner. All promote the accuracy of decrees by utilizing the specialized knowledge and expertise of state water resource agencies. All promote fairness by mandating or permitting the agency to undertake costs otherwise borne by the claimants. All promote efficiency by providing procedures to accommodate the large number of parties in water rights adjudications. All demonstrate the necessity for legislative, executive, and judicial action to address the unique needs of general water right adjudications in the context of the laws and politics of the particular state.

The coordinated efforts of legislative, executive, and judicial branches in the various western states have resulted in overall processes that are much more similar than a review of the statutes alone would indicate. The development of adjudication processes in the western states further demonstrates that development of water right determination procedures is an ongoing process. The purpose of this process is to learn from experience, and to make use of advances in technology and expertise, to improve the procedure for obtaining the ultimate result—the determination of water rights and distribution of water in accordance with those rights.<sup>234</sup>

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232. *St. Germain Irrigating Co. v. Hawthorn Ditch Co.*, 143 N.W. 124, 126-27 (S.D. 1913).

233. 1980 S.D. Laws ch. 305.

234. For further commentary as to procedures for the determination of water rights in the various western states, see Stuart T. Waldrip, *Water Rights—Finality of General Adjudication Proceedings in the Seventeen Western States*, 1966 UTAH L. REV. 152; Albert W. Stone, *Montana Water Rights—A New Opportunity*, 34 MONT. L. REV. 57 (1973); Donald D. MacIntyre, *The Adjudication of Montana's Waters—A Blueprint for Improving the Judicial Structure*, 49 MONT. L. REV. 210 (1988); Margaretta Eakin, *Adjudication Provisions Under the 1909 Water Code—Survey of Case Law and Proposals for Legislative Amendment*, 50 OR. L. REV. 664 (1971); Corwin W. Johnson, *Adjudi-*

Many similarities can also be discerned in the decisions regarding the constitutionality of state adjudication statutes. The decisions recognize that all three branches play an essential role in the development and implementation of procedures for the determination of water rights, despite differences in the western states' constitutions regarding distribution of powers. The decisions recognize legislative authority to regulate the waters of the state, even though some of the state constitutions do not contain a provision like Idaho Constitution article V, section 13 expressly recognizing this authority.<sup>235</sup> The decisions recognize the necessity and legislative authority to establish and to change mechanisms to utilize the expertise of the state water resource agency, although the statutes vary considerably in the means chosen to utilize that expertise. In some states, the courts have gone beyond the express language of the statute, recognizing the necessity for agency expertise in adjudications on the basis of judicial policy. Finally, the decisions recognize the necessity and legislative authority to establish the procedural framework for judicial action, even though: (1) the statutes vary considerably in the details of that procedure, (2) some of the state constitutions do not contain a provision like Idaho Constitution article XV, section 1 expressly recognizing the authority of the legislature to regulate the procedures of the district courts,<sup>236</sup> and (3) some state constitutions expressly vest authority for promulgation of rules of judicial procedure in the state supreme court.<sup>237</sup>

## II. Common Problems

As noted above, the analysis of both western state adjudication statutes and western state constitutional law demonstrates the need for legislative, executive, and judicial action to accomplish the purposes of water right adjudications. The fundamental basis for the separation of powers among the three branches of government is, however, a system of checks

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*cation of Water Rights*, 42 TEX. L. REV. 121 (1963); Hugh W. Ferrier, *Administration of Water Rights in California*, 44 CALIF. L. REV. 833 (1956); A. Dan Tarlock, *The Illusion of Finality in General Water Rights Adjudications*, 25 IDAHO L. REV. 271 (1988-89); A. Lynne Krogh-Hampe, *The 1986 Water Rights Adjudication Statute*, 23 IDAHO L. REV. 1 (1986-1987); 2 WELLS A. HUTCHINS, *supra* note 68 at 444-518; 2 WATERS AND WATER RIGHTS, *supra* note 20 at §§ 15.01, 15.02.

235. The following states have constitutional provisions regarding water rights: ARIZ. CONST. art. XVII, §§ 1-2; CAL. CONST. art. X, §§ 2-5; COLO. CONST. art. XVI, §§ 5-8; MONT. CONST. art. IX, § 3; NEB. CONST. art. XV, §§ 4-7; N.M. CONST. art. XVI, §§ 1-5; UTAH CONST. art. XVII, § 1; WASH. CONST. art. XXI, § 1; WYO. CONST. art. I, § 31, art. VIII, §§ 1-5.

236. Texas has a constitutional provision expressly recognizing legislative authority over judicial procedures. TEX. CONST. art. V, § 31.

237. The following states have constitutions with express provision as to the rule-making authority of the state supreme court: COLO. CONST. art. VI, § 21; MONT. CONST. art. VII, § 2; CAL. CONST. art. VI, § 6; NEB. CONST. art. V, § 25; N.D. CONST. art. VI, § 3; S.D. CONST. art. V, § 12; UTAH CONST. art. VIII, § 4.

and balances that institutionalizes a certain amount of friction between the three branches of government. The complexity of a large water rights adjudication presents practical problems that offer endless opportunities for protracted litigation, as well as the potential for constitutional confrontation among the three branches of government as each branch struggles independently to respond to the pressures of increasing dissatisfaction with the adjudication process.

The various participants come to the process with different goals and interests, which introduces a further source of friction in the adjudication process. Most parties want finality and certainty, including a piece of paper that clearly documents their entitlement and actual wet water in satisfaction of that entitlement. Some parties, however, want to prevent determination or redetermination of their rights, either to leave their options open to assert claims at a later date or to avoid examination of wasteful practices or other uses of doubtful validity. Some simply want to generate enough controversy to promote more advantageous negotiated or legislative settlement of water right conflicts. Water resource agencies want to be able to effectively carry out their statutory responsibilities without undue interference and within the limits of legislatively established budget constraints; agencies also want water rights to be decreed in a manner that enhances rather than frustrates their ability to distribute water in accordance with those rights. The legislature, which must allocate limited state resources through the annual budget process, wants to reduce costs; the parties also want to reduce costs, at least their own if not the costs of others. The court wants a successful conclusion, and given the size and complexity of water right adjudications, "successful" conclusion may mean simply conclusion; it also wants legal and factual foundations for its decisions that will survive appeal.

### *III. Common Solutions*

Given the myriad issues and interests involved in water rights adjudications, it is no surprise that adjudication efforts face some very real problems. There are, however, some real solutions to these problems. These solutions may include enactment of laws to address substantive issues, or adoption of procedures to make adjudications more effective, whether by statute, formal judicial orders or agency rules, or informal judicial or agency practices. But, given the many issues and interests involved in water rights adjudications, complexity is a fact that no amount of substantive revision or procedural tinkering can make disappear. The real solution thus becomes the collective efforts of all participants to promote an effective adjudication.

This includes the cooperative efforts of the three branches of government to achieve the purposes of the adjudication. Each of the three branches has substantial decision-making roles in the adjudication process. In fulfilling these roles, each branch should focus its attention on the tasks it is best suited to perform, while maintaining an awareness of and respect for the tasks best performed by the others.

By constitutional design, the legislature is the law-making, policy-making, and budget-setting branch of government. It is also the most political of the three branches, and therefore the most sensitive and responsive to the needs and concerns of the public. It has both the authority and responsibility to establish, modify, and refine the laws and policies of the state regarding the state's water resources. This encompasses not only the substantive law to be applied in determining individual water rights, but also fundamental policy decisions as to the general framework for the adjudication process, including the extent to which the state's resources will be made available in the adjudication process. In addition, it has the authority and the responsibility to fund the programs it has mandated, which includes monitoring the progress of adjudications and making mid-course corrections as the need arises, in a manner that is responsive to public needs and concerns.

By constitutional design, executive agencies are responsible for implementing the laws and policies established by the legislature. The state water resource agency, in particular, is the agency statutorily vested with various duties to implement the laws and policies of the state with regard to the state's water resources, including those arising under state water right adjudication statutes. To carry out these duties, the state water resource agency has developed specialized expertise—including scientific, policy, and legal expertise—which is not only relevant but necessary to a successful adjudication. The state water resource agency has both the authority and the responsibility to make these resources available to all participants in the adjudication process to promote the purposes of the adjudication, within the limits of its statutorily created authority and its legislatively established budget.

By constitutional design, the essence of judicial function is to apply the laws to the controversies brought before it. The court has both the authority and the responsibility for effective judicial decision-making, and also effective judicial administration. Effective judicial decision-making requires the determination to make difficult decisions, and also to make decisions with a sound legal and factual basis, which in turn requires a willingness to utilize the expertise of state water resource agency. Effective judicial administration requires a great deal more, including judicial



control of proceedings, particularly to prevent use of legal processes to harass and delay. It also includes active involvement to promote negotiated resolution where possible, to narrowly define issues that really do require litigation, and to set procedures for expeditious hearing and determination of those issues.

The responsibility for a successful adjudication does not, however, rest only on state governments. Claimants, and particularly their legal counsel, also bear substantial responsibilities. Claimants are justifiably anxious that the water rights upon which they depend will be protected, but the protection they desire requires their active participation in the process. Their counsel have the duty to zealously represent their clients' interests, but also have the duty to avoid the pitfalls of excessive zeal that results in excessive litigation and unnecessary costs to their clients and others. The federal government, in particular, has substantial responsibilities, not only as a major claimant in the adjudication, but as a servant of a public that has a strong interest in the successful completion of water right adjudications.

The experiences of the western states, gleaned from decades of water right adjudications, demonstrate that there are two essential ingredients to any recipe for the successful completion of a water right adjudication: (1) a conscious, continuing commitment to open and effective communication between all participants, and (2) a dedicated problem-solving approach to the many issues to be addressed in water rights adjudications. Lack of communication breeds misunderstanding, frustration, and anger that can cause an adjudication to bog down in a procedural morass generating tremendous litigation but little progress toward successful completion. Yet all participants in the process have legitimate interests and concerns; all participants have valuable knowledge, insights, and expertise to offer to the process. Effective communication is the foundation for problem-solving, because it is the sharing of the participants' knowledge, insights, and expertise that enables the participants to produce creative solutions that address the participants' divergent but legitimate interests and concerns.