

# General Stream Adjudications Today: An Introduction

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## The Importance of General Stream Adjudications

Americans hear many news stories about large, controversial class action lawsuits for asbestos injuries, defective products, and environmental damages. These cases join many thousands of parties, cost tremendous amounts of money, and take years to complete. Few Americans, however, have ever heard about a set of lawsuits that affects most people living in western states and concerns something very important to these people: their water. In some cases, these lawsuits directly or indirectly impact most if not all of the residents of a state. They take decades to complete; indeed, some cases filed in the 1970s are still pending. The attorneys and consulting fees are daunting. These cases are likely to determine the future of Phoenix, as well as the future of Yellowstone National Park's geysers. These relatively obscure lawsuits are general stream adjudications, and they implicate the rights to use much of the surface water and certain groundwater in twelve western states.

General stream adjudications are comprehensive lawsuits, usually filed in state court, to determine the ownership and characteristics of water rights including priority date, permitted use, flow, and quantity. Because of historically tattered water right records, adjudications are used to determine existing water rights. In the West, much of the land is owned by federal land management agencies, such as the National Park Service and Bureau of Land Management, or in trust for the many federally-recognized Indian tribes. Many of these agencies and tribes have large, senior water rights (recognized under the federal reserved rights doctrine), and these

water rights need to be determined to complete a meaningful adjudication of a river or groundwater basin. However, Congress has authorized federal participation in these cases (a waiver of sovereign immunity) only if federal and Indian water rights are determined in comprehensive adjudications joining all of the water users of a river or source.

Consequently, general stream adjudications are large and complex. Montana's adjudication is the largest, addressing all of the state's water with over 210,000 claims filed. Arizona's two adjudications total 88,000 claims, but a handful of claims might represent the major water providers for the Phoenix metropolitan area. Unlike class action lawsuits where a plaintiff class may be pitted against a defendant, the water users in general stream adjudications often have claims potentially adverse to all other water users.

General stream adjudications are multidisciplinary undertakings with water law, Indian law, hydrology, economics, engineering, soils and agricultural sciences all contributing. The cases, however, can be management nightmares for the federal or state judge who gets assigned. Because of case duration, one generation of judges, attorneys, and experts may be succeeded by another generation before the case is completed.

The large adjudications that are still pending in many western states commenced in the 1970s and 1980s. They were filed in response to rapid western development and competing state, federal, and tribal interests. Most people thought that neat, detailed final decrees would follow within a decade. The adjudications, still not complete, are yielding much different results. The most important development has been the negotiation of major water rights

settlements (often involving tribes) that involve a mixture of water and money to benefit both tribes and surrounding water users. For example, many of the Arizona Indian water right settlements recognize tribal water rights, provide the tribe with money to utilize the water, allocate money for other economic development purposes, and allow the exchange of tribal water to growing urban areas. Thus, rather than tidy final decrees, adjudications often produce a complex weave of new laws, regulations, contracts, and other arrangements that constitute a new form of resource governance in a watershed.

While these cases are no longer the central feature of western water law, they are creating the superstructure for long-term water management. They are providing an opportunity to redress some of the many inequities visited upon tribes in the 19th and 20th centuries. They represent an interesting convergence of law, policy, and science. This type of litigation may be useful to eastern states in the future. These cases certainly will remain a major presence in the West for years to come.

## The Contributions

This issue explores the modern world of general stream adjudications. The authors represent a wide range of experience with adjudications, including college professors, private attorneys, and judicial officials. Colorado Supreme Court Justice Gregory J. Hobbs, Jr. provides a judge's perspective on water adjudications. He examines the role of the judiciary in resolving disputes over water with an elegance and respect for history. Justice Hobbs pays particular attention to Colorado and Wyoming adjudication procedures as they represent two extreme approaches, the judicial and administrative adjudication models, respectively. He employs the wisdom of Elwood Mead, a late-19th century irrigation expert, to study present adjudication practices. He notes that Mead would be surprised by many of the modern changes to Colorado water law.

Sidney Ottem, a judicial official in Washington's Yakima adjudication, provides an overview of the quantification issues of general stream adjudications. He argues that state agencies often commence adjudication proceedings to obtain information to address water supply problems and/or to improve record keeping. Relying on examples from many

western states, including adjudication proceedings along the Yakima River, he illustrates the value in knowing just how much water is used in a stream system and the priority of each right. Ottem outlines water rights based on both federal and state law, and reveals several problematic issues in adjudications, providing a solid foundation of water law related to adjudications.

University of Idaho law professor Barbara Cosens blends her scientific and legal expertise to examine the role of hydrology in the resolution of water disputes. She investigates two case studies to show how the development of a database and model could enhance adjudication proceedings and their implementation. First, she looks at the use of surface water models along Montana's Milk River to test the impacts and water supply available from different proposed solutions to settle tribal water rights there. Next, she examines the use of a groundwater model for Idaho's Eastern Snake River Plain Aquifer for management and enforcement. We learn the value and importance of hydrology to contemporary water rights management, despite the overall absence of such modeling in adjudications.

Just as Professor Cosens finds little attention paid to hydrology in water adjudication proceedings, Professor Robert Glennon finds scant recognition of environmental values. He reminds us that adjudications are not designed to protect rivers by keeping water in them. Glennon, a distinguished law professor at the University of Arizona, argues that two high-profile mechanisms to advance environmental values, the public trust doctrine and the Endangered Species Act, are virtually absent from adjudication proceedings. He studies recent developments on the San Pedro River and concludes that Arizona water law and judicial rulings have failed to protect the San Pedro River. What could save the San Pedro and other western rivers, according to Glennon, is heightened use of the federal reserved rights doctrine.

Roderick Walston demonstrates the power of the federal reserved rights doctrine. While serving as Deputy Solicitor of the U.S. Department of the Interior, he worked on the agreement between Interior and the State of Colorado for the Black Canyon of the Gunnison National Park. A tale of compromise and cooperation, the much applauded 2003 settlement resolved a thirty-year old conflict

between the federal government and the state over water rights in the park. The accord is historic in that it represents the first time the federal government has agreed to acquire rights under both federal and state law, rather than to rely entirely on its federal reserved rights. Walston stresses the innovation of this settlement for meeting the needs of federal reserved lands and also creating closer cooperation between the federal government and the state in managing water resources.

The Gila River Indian Community Settlement provides another example of successful settlement and resolution of water disputes. Two attorneys for the Gila River Indian Community, Rodney Lewis and John Hestand, examine the 2004 settlement that is part of Arizona's Gila River general stream adjudication. The Indian Community followed a two-track process in dealing with its water rights claims — vigorous litigation and resolute negotiation. Lengthy negotiations occurred with many stakeholders, and as part of the process, the Indian Community developed a master plan for water use on the reservation. Resolution of the twenty-year conflict culminated in passage of the settlement by Congress and the Arizona legislature. While some minor issues still require resolution, the settlement represents how an Indian Community's long and painful process of resolving federal reserved rights can end well.

For those east of the 100th meridian, attorney Lauren Caster highlights some of the major water challenges facing eastern states, including population concentration, interstate stream disputes, and enforcement of the Endangered Species Act. He outlines three primary shortcomings of adjudications. These include: (1) difficulties associated with relying on state agencies, (2) the enormity of the proceedings, and (3) the omission of some critical interests from the scope of adjudications. While Caster argues that general stream adjudications may be unavoidable in those stream systems involving substantial federal water right claims, given their limitations and the current water issues facing eastern states, he does not recommend adjudication proceedings for eastern states at this time.

The final paper takes an even broader look at general stream adjudication proceedings. A. Dan Tarlock, a distinguished law professor at the Chicago-Kent College of Law, offers an

overall evaluation of adjudications. He asks a compelling question: are adjudications worth it? He examines whether adjudications have fulfilled their intended objectives and how well they deal with changing social and environmental challenges to modern water management. He concludes that adjudications, with the help of the U.S. Supreme Court, have succeeded in cabinning (constraining as much as possible) the extent of non-Indian federal reserved rights for public lands. They have also allowed Indian tribes to obtain congressional water rights settlements that offer much greater economic and ecological benefits than the tribes would have obtained had they pursued their claims to a final decree. Tarlock finds that while the adjudications may provide some help as states adjust to the end of the Reclamation Era and the new risks of global climate change, the adjudications have not been able to deal effectively with federal regulatory water rights arising under the Clean Water and Endangered Species Acts.

## Complexity as a Common Theme

These papers highlight the multi-layered complexity that characterizes today's general stream adjudications. First, there is governmental complexity. In adjudication proceedings three sovereigns are at play: the federal government, Indian tribes, and states. Federal authority related to public areas (like Interior water rights in Gunnison National Park) and tribal water rights (illustrated by the Gila Indian Community's claims in *Arizona*) shape state water law and adjudication proceedings.

Second, legal complexity is inherent in adjudication proceedings. Federal environmental regulations (as illustrated by the Endangered Species Act and Clean Water Act) overlay state water law creating conflict between federal and state authorities. The end of the Reclamation Era, coupled with new restoration goals and global climate challenges outlined by Professor Tarlock, reveal further uncertainty and complexity.

Third, adjudications are hydrologically complex. Professor Glennon recounts management of the San Pedro River and the State of Arizona's failure to adequately address the hydrologic connection between surface water and groundwater that is so critical to the river's health. The general absence of hydrological modeling and mechanisms for

incorporating hydrologic knowledge, as outlined by Professor Cosens, is a severe limitation of today's adjudication proceedings.

Fourth, cultural and historic complexity are also at work here. Tribal water right claims permeate most adjudications. Historic patterns of development and reclamation greatly shaped state procedures and practices. So too did particular individuals, like irrigation specialist Elwood Mead, who shaped both Colorado and Wyoming's early water statutes. Ultimately, these states would serve as models for adjudication proceedings in many other western states.

## Author Bios and Contact Information

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