

UNIVERSITIES COUNCIL ON WATER RESOURCES
JOURNAL OF CONTEMPORARY WATER RESEARCH & EDUCATION
ISSUE 133, PAGES 5-9, MAY 2006

Overview of Western Water Adjudications: A Judge's Perspective

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Colorado Supreme Court

West of the 100th Meridian, irrigation development in the 19th Century followed by municipal development in the 20th Century has placed its marker on the available water supply in many river basins. Undoubtedly, as the population of the West has continuously increased and the customs and values of the people have widened to include environmental and recreational uses, the 21st Century is the era of limits made applicable to water decision-making. Due to natural western water scarcity, we are no longer developing a resource. Instead, we are learning how to share a developed resource.

In this context, western water adjudications provide a vital function. The term "adjudication" generally refers to the process by which state or federal courts of law decide a case. Typically, the ordinary court case involves only one or several parties. Hearing a civil or criminal matter, the trial court determines what the facts are and then applies the appropriate constitutional, statutory, or case law principles. For example, has one party breached a contract agreed to by both parties; if so, how much money does the breaching party get to collect? What did the defendant do and is she or he guilty of a crime; if so what shall the sentence be?

State and federal courts of appeal and Supreme Courts are ultimately responsible for enunciating the law to be followed by trial courts. But the trial courts resolve disputed issues of fact that the appellate courts must base their legal opinions on, if the evidence in the record supports the trial court's findings of fact. A final judicial opinion that is no longer subject to appeal becomes binding on the parties.

In many cases, individuals, companies, and governmental entities settle disputes among themselves rather than testing the proposition that divides them in court. When parties cannot agree, courts are available to make final enforceable decisions about the rights and duties of citizens, companies, and governmental entities under the law of the community.

So what does water have to do with courts? And what do courts have to do with water? A basic law of nature is that all living beings need water and that water is a scarce resource. Water is a public resource; its ownership always remains with the public.

Of course, the public's business is the business of individuals who have need of water to make a product, grow a crop, turn a turbine, wet a fishing line, play a kayak wave, or brew ice tea for sipping on the back porch of a hot summer's day.

Individuals, companies, and governmental entities may obtain water use rights in accordance with applicable state and federal laws. The adjudication court determines the relative priority of water use rights that depend upon the same river system for their supply. So stream adjudications inevitably involve many parties making many claims. They include Native American tribes, state, local, and federal agencies, farmers and cities, as well as individual persons and businesses.

The tribes and the federal agencies can claim water use rights created under state law. In addition, they may claim federally-created water rights. In contrast, individuals, companies, and non-federal public entities are typically restricted to claiming state-created water use rights only.

Subject to the exercise of previously created water rights, federally-created water rights operate to reserve a portion of the available unappropriated

water for present or future use. For example, when Congress created each Indian reservation, it impliedly reserved a sufficient amount of water as of the date of the reservation's creation to make the reservation productive, regardless of when the tribe might actually use the water.

In contrast, state-created water rights are perfected only by actual beneficial use. Those who perfect their water rights in the public's water resource earlier by actual beneficial use have a preferred right to those who put the water to actual beneficial use later in time.

Under the McCarran Amendment of 1952, Congress permits state courts to exercise jurisdiction over all federal agencies and tribal water claims in stream adjudications involving water rights priorities. Of course, the state court must apply the law of federal reserved water rights when determining those claims.

Once determined, the water officials employ the court-decreed priorities to distribute the available water to the federally-created and state-created water rights. They shut down junior water rights whose exercise would diminish the water that would otherwise be available to the senior water rights.

Water sharing occurs by judicial and administrative decisions that limit all water uses to their actual beneficial need in two ways: by requiring reasonably efficient means of diversion and carriage to the place of use, and by voluntary market mechanisms that allow willing sellers and willing buyers to transfer senior priorities to new points of diversion, new uses, and/or new places of use.

The most valuable water rights in the market place are the senior priorities that will receive water in drought years. Reservoir storage is indispensable because water taken in priority in the good water years can be held and released in the water-short years.

During a drought year, a river system may produce only one-fourth of its average water supply. Truly, the early 21st century multi-year drought in the West teaches once again that smart water conservation in all its forms is a necessity of western life.

Every generation learns this lesson. Our most memorable disagreements are founded on the common goal of extending water benefits to as many useful purposes as customs and recognized cultural values permit.

In the late 19th century, irrigation expert Elwood Mead packed up from Colorado to Wyoming with a derogatory parting salvo about the waste our state's water adjudication system was causing. His telling 1903 book, *Irrigation Institutions*, brims with scorn for water judges who rewarded speculation by issuing decrees that bore no basis in available water. This made these decrees a mandate for outright theft of someone else's water use right.

As we continue to examine our western water law and institutions in the face of incredible population growth since the 1950s, it's worth taking a fresh look at Mead's criticism of a court-based water rights determination system:

In the early adjudications the amounts of appropriations were based on the estimated capacities of ditches and canals. Sometimes the amount was fixed by the measurement of the ditch, and sometimes by what the appropriator claimed. With rare exceptions it does not seem that the acreage of land which had actually been irrigated exercised any influence. The real issue was the amount of water diverted or proposed to be diverted. . . appropriators were encouraged to make extravagant claims. All of the conditions, therefore, contributed to favor the granting of water rights in excess of the actual uses or necessities (Mead 1907).

It drove Mead mad that a public resource could be manipulated for selfish monopolistic and fraudulent practices that included the sale of excess diversions whose use would deprive other appropriators of the stream's supply:

In every instance investigated the real purpose has been to make money out of excess appropriations. The parties who have acquired surplus rights are unable to use the water themselves, and seek to sell to some one who can. . . The usual result is to take as much water away from one user as is supplied to another (Mead 1907).

Mead mostly blamed Colorado water lawyers, judges, and the adjudication system they controlled. In its 1879 Adjudication Act, the Colorado General Assembly assigned the state's judiciary to decree water rights priorities, and the state and division

engineers and the local water commissioners to enforce them (Hobbs, Jr. 1997) This decision was prompted in part by upstream/downstream junior/senior disputes caused by water scarcity (Colorado Constitution article XVI 1876; Act of Feb. 19, 1879) The Union Colony — downstream at the confluence of the Cache la Poudre and South Platte Rivers — built and began to operate their irrigation canals, only to find in 1874 that diversions by a new upstream ditch near present-day Fort Collins had reduced the Cache la Poudre's flow to a trickle (Dunbar 1983). Clearly, the priority system and its enforcement — prior reliance on turning the water to beneficial use and protecting that use — had to be institutionalized within the three branches of Colorado government for the benefit of the citizens.

The “better way” he envisioned (and took to Wyoming as its first State Engineer upon leaving his post with the school we now call Colorado State University) was enlightened expert decision-making through careful investigation of the facts of water supply and water use administered through a permit system:

This situation deserves careful consideration, not only from irrigators in Colorado, but in the other States. It raises the question as to whether the evil of excess decrees is wholly due to lack of experience or is the result of a defective method of establishing rights. The latter is believed to be the truth. It is believed that if the determination of water rights was entrusted to a body of trained irrigation experts, who had a practical knowledge of the subject and who would familiarize themselves by personal investigation with the use of water on every stream where rights are to be established, the results would be far superior to anything which is possible under the present plan (Mead 1907).

Another irrigation expert, F.H. Newell, reported in 1894 the phenomenon of excess ditch-building and land cultivation in the South Platte Basin that had no real hope of realizing water, even in average years:

The earliest large enterprise conducted by English speaking farmers was probably the irrigation system at Greeley built by the Union Colony, work being begun about 1870. As the

population of the state has increased and the demand for agricultural products has become greater, farmers have gradually brought under cultivation strips or patches of arable land wherever water can be diverted to cover it at moderate expense. Thus all the easily available sources of water have been utilized, and with increase in the number of farmers still more land had been cultivated until the area far exceeds that which can be irrigated in ordinary seasons (Newell 1894).

Even as Mead and Newell were leveling their criticisms, Colorado courts were at work leveling the playing field, due to the over-appropriated status of the South Platte and the Arkansas by the 1890s. For example, late 19th and early 20th century Colorado Supreme Court cases consistently reiterated that seepage water from ditches and reservoirs and return flows from field irrigation belonged to the stream to supply other water rights established in reliance on them.

I use Colorado and Wyoming examples because they are the paradigm adjudication and permit states. Many of the other western states followed Wyoming's permit lead for recognizing new water rights, but all of the states have found that some form of court-adjudication is necessary to settle the relative priorities of all users in particular stream systems. The advent of the McCarran Amendment necessitated water adjudications to establish tribal and federal agency priorities to water vis-à-vis state-created water rights.

Some of the states start with state agency determinations leading to judicial adjudication proceedings; other states allow a state agency or private party to initiate the adjudication. All the states have found that they must depend on the expertise of state water officials and private engineers and hydrologists to present the facts of water supply and water use in agency and court proceedings. The fact-finder (an administrative board, master, referee, district court judge, or water judge, depending on the state or federal court forum having jurisdiction) determines the facts and makes the required legal conclusions. A trial court enters the adjudication decree, which is subject to appellate review. The water officials administer the decrees and make the day-to-day water distribution decisions with the sound discretion the law accords to them.

Throughout the West, state courts of appeal and Supreme Courts have defined the parameters of state-created water use rights. Without being exhaustive, I list the dozen most fundamental principles of western state water law as including the following:

1. An appropriation of the public's natural stream water resource is only for actual beneficial use.
2. Actual beneficial use is the basis, measure, and limit of every appropriation.
3. The "natural stream" governed by the doctrine of prior appropriation includes ground water that is tributary to a surface stream (this is recognized by the vast majority but not all of the western states).
4. To be recognized, water rights to use of natural stream supply must be adjudicated to ascertain their priority and extent.
5. Every decree recognizing a water right to waters of the natural stream contains an implied limitation restricting diversions to those needed for actual beneficial use, regardless of the diversion rate stated on the face of the decree.
6. Every appropriator is entitled to maintenance of the stream conditions, subject to natural fluctuations, as they existed at the time of the appropriation.
7. Appropriators must employ an efficient means of diversion and conveyance to the place of use.
8. In times of short supply, the water officials must administer water rights in the order of their decreed priority.
9. Junior water rights, including rights to use ground water that is tributary to a natural stream, must be curtailed to the call of seniors, unless out-of-priority diversions are accompanied by adequate replacement water under a court-approved augmentation plan or state engineer-approved substitute supply plan.
10. New water rights (also called "conditional rights") cannot be decreed in the absence of available

unappropriated water, taking into account the historic exercise of senior water rights.

11. Changes of water rights, whose purpose is to continue an appropriation in effect under its priority date for another type or at place of use, or through a different point of diversion, are limited to their historic beneficial consumptive use measured over a representative period of time and cannot be decreed if they will cause injury to other water rights.
12. A state must comply with the interstate compacts and United States Supreme Court equitable apportionment decrees that define the allocation of interstate-apportioned waters.

Mead would be amazed! Adjudications now operate under a set of procedural and substantive laws intended to optimize the beneficial use of water on a watershed basis.

Mead placed great faith in the integrity and fact-finding ability of state water officials. In the western states, departments of water resources and state engineers are assigned a wide variety of data gathering and regulatory authority. Fair, enlightened, and common sense administration of water rights is important to sharing the water resource while protecting the established water use rights.

Mead would be chagrined to learn that Colorado, the adjudication state he so criticized, now grants its state engineer considerable permit authority that extends to every form of ground water — tributary, designated, non-tributary, and Denver Basin ground water — all of which are recognized as constituting a public resource, though the latter three are allocated and administered differently from waters of the natural stream. The Colorado State Engineer's Office, with adequate conditions to protect against injury to water rights, can approve temporary changes of water rights, substitute supply plans, stored water banks, and loans of water rights by farmers to cities without the need for water court adjudication.

Mead, who resisted the separation of water rights from irrigated land to other uses, would, I think, grudgingly admit that temporary and permanent water transfers to municipalities and other public water supply entities are in the public interest, due to the western population growth he and the other agriculturalists of his day did not foresee.

Finally, Mead would be surprised to learn that all the western permit states, including Wyoming, have resorted to court adjudications to establish the relative priorities of Native American water rights, federal agency express and implied reserved water rights, and state-created water rights, so that they can be administered fairly in times of short supply. The West's population continues to grow. Public officials at all levels have a responsibility to make principled and common sense water decisions for the good of humans and this magnificent western environment we enjoy.

Water lawyers and engineers bear particular responsibility for the integrity of water decisions, whether made by the legislatures, water officials, water judges, city councils, county commissioners, boards of special water districts, or private persons.

Water judges bear particular responsibility to listen carefully to factual, sometimes highly-technical, presentations; then render decisions that are legally sound, intelligible, and consistent with ever-evolving understandings.

We live in community. Water is our common and most valuable resource. Water disputes often seem to divide us. But the Great Divide constantly informs the direction we must take — to the higher ground — so we may see the vistas.

DIVIDE

The mystery of a divide
is this, you can stand on opposites
and not lose your balance.

Draw a straight line from the sky
through the middle of your forehead,
half of you belongs to the other ocean.

Half your mind and half your heart,
you share downstream equally
and never drift apart.

(Justice Greg Hobbs, Colorado Mother of Rivers, Water Poems, pg. 26, published by Colorado Foundation for Water Education 2005)

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