Minutes of the Nevada Supreme Court Commission to Study the Adjudication of Water Law Cases

April 16, 2021

Members Present:

Chief Justice Hardesty
Justice Ron Parraguirre
Micheline Fairbank
Jason King
Rick Felling
John Entsminger
John Zimmerman
Laura A. Schroeder
Bevin Lister
Tom Baker
Rusty Jardine
Bert Bryan
Kyle Roerink
Allen Biaggi
Karen Peterson
Oscar (Oz) Wichman
Chris Mixon
Paul Taggart
Gordon H. Depaoli
Ross de Lipkau
Judge John P. Schlegelmilch
Judge Gary Fairman
Judge Elizabeth Gonzalez

Attendees Absent: Judge Dracolitch

Chief Justice James Hardesty is designated by the Supreme Court of Nevada to service the chair of the Commission to Study the Adjudication of Water law Cases, Administrative Docket No. 0576.

Ms. Fairbank conducted the roll call, with all members present except Judge Drakulich

Chief Justice Hardesty provide introductory comments to the Commission and noted that the John McMaster, as a representative of the Walker River Paiute Tribe was appointed as a tribal representative and John Fontaine was appointed to represent

both the Central Nevada Regional Water Authority as well as the Humboldt Basin Water Authority.

1. **Public Comment**

Amber Torres thanked Justice Hardesty for appointing John McMasters to the commission and remarked that he will be a great asset to the Commission.

2. **Introduction of Commission Members**

The members of the Commission provided brief introductions of themselves and their backgrounds.

Justice Parraguirre stated that he has served the Supreme Court for 17 years it's been an honor to serve on this court and that he is excited about this project nice to see all of you.

Ms. Fairbank stated that she is a Deputy Administrator at DWR, and was formerly an Attorney in private practice, who then went to work for the AG's office and represented the Division of Water Resources and Environmental Protection before coming on board as a Deputy for DWR.

Mr. King stated that he retired a little over 2 years ago after working at DWR for 28 years the better part of 10 years I served at the State Engineer. Since retirement he has been trying to do little as possible however, he is now doing some consulting and feels honored to be on the Commission.

Mr. Felling state that he most recently served as Chief Hydrologist at DWR and as a Deputy Administrator and is semi-retired now.

Mr. Enstsminger stated that he is the General Manager of the Southern Nevada Water Authority prior to assuming this role he practiced Water Rights and Environmental Compliance Law, that he is Nevada's lead negotiator on issues pertaining to the Colorado River between the other 6 states that share the river and Federal Government and the country of Mexico.

Mr. Zimmerman is the Water Resources Manager for the Truckee River Water Authority, and prior to that he was in private practice for about 10 years where he was involved in quite a few State Engineer appeals and river adjudications.

Ms. Schroeder thanked Justice Hardesty for asking her to participate in today's conference. Ms. Schroeder has been practicing Water Law primarily for 38 years, has been before tribunals in Water Law in administratively and in courts in WA, ID, OR and in NV and participated in international Law working with the government's in Armenia and in Afghanistan. Ms. Schroeder express her excitement to be a part of the Commission as she has approached the Oregon Supreme Court on a similar matter so it's exciting to be apart of the group as well.

Mr. Lister introduced himself as a farmer in the group with a whole bunch of Lawyers and Judges look like. Mr. Lister is an Alfalfa grower in Pioche who has old water rights in Patterson basin and in the Smith Valley basin and in Lander county. He is also the President of the Nevada Farm Bureau and stated that he was glad to be here to represent Nevada's farmers and ranchers.

Mr. Baker introduced himself as another farmer/rancher in the group. Mr. Baker farms and ranches in Baker Nevada and deal with Water Rights issues were right on the Utah/NV state line, so he deals with both Utah and NV on different Water Rights issues.

Mr. Jardine is the General Manager and General Counsel for the Truckee-Carson Irrigation District, which is headquartered in Fallon. Mr. Jardine has been with TCID for about 11 years and prior to that he served as a Chief Civil Deputy for Churchill county District Attorney's office.

Mr. Bryan is the General Manager for Walker River Irrigation District, which is located in Yerington, Nevada. The District serves an area of about 235,000 acres, of which the District has over 80,000 water righted acres, so the District is pretty large in regard to irrigation in state of Nevada. The Irrigation District deals with two different states, four different counties and a bunch of other different things while operating under a Federal Decree, state certified rights within the District as well. Mr. Bryan has been the General Manager since 2014 and with the irrigation district since 2011.

Mr. de Lipkau started out as an Engineer in the Engineers office many years ago. Mr. de Lipkau went to Law School and there after became a Deputy Attorney General with the State Engineer, left the State Engineer many years ago and been in private practice ever since.

Mr. Biaggi stated that he is representing mining. Mr. Biaggi retired from the State of Nevada, where he served as the Director of DCNR for about 6 years and before that he served as the Administrator for the Division of Environmental Protection.

Mr. Roerink serves as the Executive Director of the Great Basin Water Network, an organization that represents a variety of interests Ranchers, Tribal Members, Conservation interests. The Great Basin Water Network engages in public policy matters related to water and engaged in complex litigation and in the regulatory arena.

Ms. Peterson is a private practice water lawyer who has been with Allison McKenzie Law firm. Ms. Peterson has been practicing water Law for a few years and has appeared before numerous State Engineer on behalf of various clients and has appeared in District Courts and State Courts regarding Water Rights matters.

Mr. Wichman is the General Manager Nye County water district and going back 20-21 years was doing either doing either all of the filings for Nye county for Water Rights except the town of Pahrump, the last 10 years doing the heavy lifting of the Pahrump ground water management fell to him.

Mr. Mixon introduced himself as a private practice attorney in Nevada for 15 years where he represents the Pyramid Lake Paiute Tribe also represented Conservation Organizations and farmers and ranchers. Prior to Law School, Mr. Mixon was in Natural Resources Management for National Parks services and the US Naval Academy.

Mr. Taggart is a private practicing lawyer who has his own firm where he has been practicing water law since he left the AG's office.

Mr. DePaoli grew up on a family ranch on the Truckee River in Wadsworth. Mr. DePaoli went to law school in Colorado since that time he has been with Law Firm Woodburn and Wedge working on water matters on the Truckee/Carson and Walker Rivers.

Judge Schlegelmilch introduced himself as a District Court Judge in Yerington and Lyon Counties where over the past 6 years he has dealt with a variety of Water Rights issues. Prior to becoming a judge, Judge Schlegelmilch was a private practitioner and Deputy District Attorney worked with Water Rights in both realms.

Judge Fairman has resided in Nevada for 43 years, with 33 of those years he worked in private practice doing just about everything out there, including water rights. Judge Fairman been on the bench now for about 8 years and with water rights matters being a significant part of his docket.

Chief Justice Hardesty made comments to the commission including offering a couple of reminders to the Commission. The Supreme Court in it's order creating the Commission based it on the Petition that I filed and set as a general scope of reference that we would study the Adjudicated Water Law Cases in an effort to improve the education-training-specialization-timeliness and efficiency of the Nevada's District Courts in the judicial review process. Justice Hardesty reminded the Commission of that because the Commission is not designed to re-write Nevada's water law or it's statutes. Justice Hardesty noted that during the progression of the Commission, the group may work toward identifying areas where recommendations might be made either to the court or perhaps transmitted or forwarded to the legislature in a future point in time. The principle objective of this Commission is to focus on the process by which we adjudicate water rights and how we can do that through Adjudicator's, Judge's or Administrative Agency people to do so on an effective timely and efficient basis. Justice Hardesty noted that he received a one letter to throw in the public comments on our website. And based upon his recent review, it made an excellent

suggestion that we consider evaluating cases across the state to determine various issues surrounding those cases. The time it took to adjudicate the case, the underlying decision coming out of the State Engineers office perhaps the ultimate outcome. In future meetings I do want to solicit from some of the members of this commission a presentation on Nevada's Judicial process. So that we are all the same page and familiar of how that process works and make sure everyone is fully familiar with the statutes and parameters out of the State Engineers office. In that process have discussions about gaps or wholes or areas that could be filled in either by court rule or other processes that we might consider and/or recommend to the Supreme Court.

3. **Presentation by Acting State Engineer Adam Sullivan**

Acting State Engineer Adam Sullivan, P.E. provided an overview of water resource management challenges in Nevada. In his presentation, attached as Appendix A, Mr. Sullivan addressed the following: the Division of Water Resource's mission statement; an overview of the Division's responsibilities; where and how Nevada's water resources are being used; information regarding groundwater appropriations and commitments in relation to the perennial yield of those groundwater basins; issues relating to the challenges in managing Nevada's water resources, including climate change, increased development and competing demands, conflict management; issues surrounding the implementation of statutory tools and the protection of non-permitted uses; judicial review, and; identifying key resources for future planning.

Chief Justice Hardesty requested that Mr. Sullivan address issues that are currently included in Nevada's jurist prudence, for e.g., as noted in one slide where Mr. Sullivan expressed the view, at least that courts struggle to make decisions affect cancellations, forfeitures and abandonment and those decisions run in conflict with statutory mandates for those outcomes. Justice Hardesty suggested that it would be useful to talk specifically about some of those discussions and whether that jurist prudence should be revisited including the use and extent and parameters surrounding equitable remedies that have been afforded in certain decisions by the courts.

4. **Overview of Water Dispute Adjudications in the Western United States by Micheline Fairbank, Esq.**

Ms. Fairbank provided the Commission with a summary of a Memorandum, attached as Appendix B, prepared for Chief Justice Hardesty providing a summary of the existence of water courts throughout the other western states. Ms. Fairbank provided summaries of her findings for the states of Alaska, Arizona, California, Idaho, Kansas, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

Chief Justice Hardesty stated that he will be generating some materials from studies from other states to discuss in future meetings.

5. **Review and discussion relating to the article by John E. Thorson, *A Permanent Water Court Proposal for a Post-General Stream Adjudication World*, by Chief Justice James Hardesty.**

Chief Justice Hardesty addressed the paper by John E. Thorson, *A Permanent Water Court Proposal for a Post-General Stream Adjudication World*, attached as Attachment C. Justice Hardesty stated that he wished to address a couple of points from this article, those specifically being:

- That it is important especially in this area of law that we find ways to develop quality decision making, efficient and timely outcomes and consider the use of specialization by judges who would be involved in these decisions. One of the things I will ask this commission to address is that precise point.
- Presenting the question of whether the commission supports specialized judicial review of State Engineers decisions and water law questions? Or does the Commission prefer that these cases be heard on a generalized basis by judges who might not have seen a water law case before that are deciding one for the first time.
- Another question that Justice Hardesty will be asking is if the Commission feels it is critical, or even vital to such a specialization, that the judge secure appropriate education? And, if so, what should that education consist of?
- Justice Hardesty also expressed his thought that it was interesting to read from the article a summary of the kinds of educational experiences now demanded from adjudicators in water law questions, not only engineering and hydrological issues, but issues involving the environment but a broad number of topics.
- Justice Hardesty also expressed concerned that judges, because of the lack of information knowledge in these areas, would find it necessary to retain experts at the cost of the parties to guide the Judge in what those decisions should look like, as what was described in the article. Justice Hardesty expressed that it seemed that such would would create additional expense in the process.
- Another issue is more of a fundamental in the judicial review, what are the Judges reviewing?
- In a direct context that the Commission is talking about reviewing the State Engineer's decisions, but as this article points out a number of jurisdictions have altered the component or the make up of the State Engineers office, such as creating, for example, instead of one individual who makes a decision on a water right case, it is instead a panel that does so through an administrative process and it is that panel that's reviewed by the court system.

- Justice Hardesty stated that he will be asking the Commission what the membes think about the administrative process.

Additionally, Justice Hardesty identified suggestions that were made in the article, including:

- Fast tracking some of the decisions that are being reviewed
- Many of our cases are first impressions cases
- The current judicial system that case goes to the District Court for review, then that case is appealed to the Supreme Court for further review.

To that end, Justice Hardesty stated that he will be asking all the Commission members to examine and catalog where they perceived to be problems within the judicial review process or whether it be topics that you have independently identified.

The intent of the Commission over the next weeks/months is to vet those and see how that flushes out for recommendations for consideration by the Supreme Court.

6. **Discussion of individual goals and objections of the Commissioners.**

In framing this agenda item, Chief Justice Hardesty asked the Commission members what it was that they thought coming into the commission that would be a successful outcome or an objective they would consider a successful outcome?

Mr. Depaoli stated that he likes how Judge Hardesty outlined what the specific problems are and that are created by the manor in which rights are adjudicated and how our State Engineer reviews them (the process). Very much interested in hearing from the Division on specific examples and hearing from both the justices.

Mr. Taggart expressed that a goal of his is to shorten the time period and cost of getting water matters through the process and the judicial process. There are a few areas he believes could benefit from to help the Commission also provide a summary of areas where he has expertise in. Mr. Taggart stated that he think the process of adjudications also needs to be put on our list of areas to think about. Understanding the State Engineers process is critical. The educational process not sure how we would do this. Identifying the problem, you talked about using data.

Chief Justice Hardesty remarked that he was glad Mr. Taggart raised the issue about options within the Judicial system. Justice Hardesty stated that he does intend to get to that very point and will solicit some information from the court to talk about that. Those of you who are not familiar, Justice Hardesty was who put it into the petition in the first place. The Chief Justice of the Supreme Court has the authority to assign the District Court Judges and any other district which opens the options available to Nevada that exist in Idaho. Justice Hardesty was intrigued by the Idaho process because what they are doing in Idaho is close to authority already exists to what we are doing in Judiciary Nevada in either designating certain judges for this

work or qualifying certain judges to handle matters in other districts those options are already available within the authority of the Chief Justice.

Mr. Mixon stated that he has have the same goal in mind with Mr. Depaoli and Mr. Taggart. Mr. Mixon expressed that the Commission would be well served of clear articulation of what the perceived problems would be currently with Judicial review of water cases and he thinks it would also be very helpful to have formed some sort of data based on history. One very important goal of his is to ensure the Commission is fully informed of the particular nature of the Federal Reserved Indian Water Rights and how those are treated under State Law.

Mr. Wichman stated that he would like this Commission to consider creating a specialized court system that is broken up into 5 to 7 districts for the State of Nevada and follow for example; Humboldt River Water Shed, South Nevada that would be a district the Eastern side of Nevada Lincoln and White Pine all the way up through South Nevada water filings would be a district. Central Nevada would be a district and so on. The Judges would be appointed by the Supreme Court it would be (life or live) time appointments and the Judges must reside in the districts geographic and have a connection. Mr. Wichman expressed that he thinks it is very important and he has found from discussing with people in rural Nevada that there is not a lot appetite to creating a specialized court that is based out of Carson or Reno. So, Mr. Wichman believes that the geographic connections would be important. Mr. Wichman also stated that the decision that come out of the court would be structured exactly like how the Supreme Court where, such that all of the Justices would sign off (yah or nay) to the decision and also the decisions would be appealable to the Supreme Court.

Ms. Peterson stated that she agreed with a lot the comments that have been stated previously. She specifically agreed that one of the goals of outcome from the Commission should be to shorten the time frame and the cost for getting water law matters through the court system. Ms. Peterson asked whether the Commission has the opportunity to ask for specific information like what the case load is from the State Engineers office in terms of judicial review and adjudications and what the State Engineer thinks the case load will be going forward for adjudications because of the December 2027 requirement to file vested claims? Additionally, Ms. Peterson stated that she did not realize that there are issues coming out that impact the State Engineer Office with regard to inconsistent case load. Ms. Peterson asked many matters the State Engineer handles for judicial review by people who are not represented by Attorneys because the review process now is supposed to be formal? Ms. Peterson stated that she thinks it's important that that be retained.

Chief Justice Hardesty responded that such requests between now and in the future any data requests or any requests direct them to me and Ms. Fairbank we will

organize those and determine there are no confidentiality issues then we will set up a structured for getting those prepared and circulated to all the Commissioners.

Mr. Roerink stated that he wished to echo what has been said, that it is necessary to define what a problem is what is the root cause and how the Commission can substantiate that through empirical clerical data like case loads in order to best understand what it is we're trying to achieve. Next, there is a system that's not perfect guarantees local representation. Mr. Roerink thinks that's inherent in current Judicial review process that we have under law right now and he believes it's extremely important to maintain and always be a part of the discussion making to ensure that there is always representation in such a massive State. How can the education requirements be created in a way that would guarantee legitimacy and being impartial?

Mr. Biaggi stated that he first wants to ensure that the water quantity decisions are consistent that they are based on science and sound public policy and, of course, in accordance with Nevada Water Law. Second, provide water decisions in a timely manor and ensure the efficiency and responsible expenditure of both public and private resources and funds. Third, see the reduction of case load and burden on the Nevada judicial system. Fourth, Mr. Biaggi stated that the Commission should look at both the admirative and judicial solution to the challenges were evaluating. Mr. Biaggi stated that he agrees with Mr. Taggart on educating of the judges with the outstanding resources available within the State of Nevada that can serve those purposes.

Mr. de Lipkau stated that he would like to start with his conclusion – and that is the Water Law for Adjudications was enacted in 1913, there have been 115 Statutory Adjudications sent from my office to the State Engineers Office, and he doesn't believe the Commission has to change the law. Mr. de Lipkau stated that he thinks the Commission must look at a couple of major Supreme Court decisions. Number One the water law not being founded on common law must be strictly interpreted. The problem Mr. de Lipkau stated is that he believes we're running into on district court appeals through rulings of State Engineer or on Hearings on Objections through the Order of Determination is the courts have never handled them before they are strictly off the record. What Mr. de Lipkau suggests is that the Supreme Court appoint 1 maybe 2 or 3 District Court Judges and as others have said educate the Judges send them to seminary school send them to the State Engineers Office have them talk to members of the public, lawyers & Judges whatever and these people will be appointed to hear all Water Right Cases. Mr. de Lipkau thinks the Supreme Court could enter a two-page instruction and take care of the whole problem that way. Mr. de Lipkau's bottom-line was that there wasn't a need to change the law, but enforce it make sure lawyers and Judges are educated and follow it directly.

Mr. Bryan stated the he was pretty much inline with the other Commissions. He stated that he thinks that knowledge and education is a huge thing, and he agrees with adjudicated process and that with the complexity it takes a lot longer then it should. Mr. Bryan stated that he works with the Division of Water Resources at the Irrigation District and that they can/will do anything to assist them and help them and guide the Division. Mr. Bryan expressed that he believes that the Division is one of the only agencies within the State that is actually significantly overburdened in regard to their lack of resources at times. Another one of Mr. Bryan's goals is to get a better understanding and a better feel from both down to the local level all the way up to the Judicial level.

Chief Justice Hardesty commented that Mr. Bryan makes a great point, and requested that Mr. Sullivan or alternatively, Ms. Fairbank, provide information on the past three biennials for a future discussion, including a summary of the State Engineer's budget and an evaluation of the request as what was provided. Justice Hardesty stated that he through Mr. Bryan made a very good point that we demand much of our State agencies but we don't always secure the appropriate funding to produce those outcomes and Justice Hardesty expressed his thought that it would be helpful for all of us to have a better understanding where you have a resource with this kind of a priority that may lack necessary resources to be able to manage it.

Mr. Jardine stated that he believes that the Commission owes a deep vote of gratitude to the State Engineers Office, who he works closely with every day. Mr. Jardine stated that TCID has 2,500 Water Right holders in the federal project and that they expect and demand a lot of our State Engineer with transfers, change applications and all of those things that they have to take a look at on a regular basis. Mr. Jardine expressed thanks to Mr. Sullivan in that regard. Mr. Jardine stated that Mr. Bryan said it well by identifying those things that can help the State Engineers Office. Mr. Jardine also joined with Ms. Peterson when she suggested that we got to make this process accessible we do a lot in helping our Water Rights holders. Identifying issues and we provide some assistance with mapping all of that is quintessential to the process associated with going through the State Engineers Office making this whole process easier. One of the things Mr. Jardine stated that he would hope the Commission could accomplish is to look at the fact that it is a tremendous area of law and it requires a certain level of specialization. He agreed with Mr. de Lipkau in that and so many others.

Mr. Baker stated that most of the others had hit his points so he would be quick. Mr. Baker stated that he is eager to learn what the current system needs to change in order to meet those problems or fix the problems. He agreed with one of the Commissions that water law has served this state for a long time and has provided some flexibility. Most of the water right holders that have made decisions in the past based on the current water law and by appropriation. One of Mr. Baker's goals would

be to make sure if the Commission changes anything the Commission creates and maintains a system where water rights holders have a good idea where they're standing and what they may be facing in the future.

Mr. Lister stated that the Nevada Farm Bureau held a Water Town Hall in Winnemucca and during that meeting unanimously in the group they felt that the most significant water issues facing the State of Nevada was getting the Division of Water Resources to follow the laws that are written. Mr. Lister's goal would be to evaluate to learn the perspectives and issues that we are facing in our water law and judicial system that are more and more makes the decisions and ensure our water right users/holders have a just in an equitable place for them to bring their grievances and petitions for request.

Chief Justice Hardesty requested that Mr. Lister, perhaps Mr. Baker, and to the extent the Farm Bureau or others of their colleges believe that decisions by the State Engineer are not in conformance with what they perceive the law to get their prospective and catalog those topics. Justice Hardesty asked that as members of the Commission to reach out to their colleges, fellow farmers and ranchers and get their take on topic areas where that concern has been identified back in the same way you request information from the State Engineer. Justice Hardesty stated that part of the reason the members are on the Commission is to share their perspective and those that they work with or come-in contact with or have a professional relationship with so the members can share those perspectives with the Commission.

Ms. Schroeder stated that like Ms. Peterson, she likes having the idea of embracing an adjudication court like in Idaho. Ms. Schroder shared that, as the Commission knew from Ms. Fairbank's memorandum and the paper by Mr. Thorson, the Snake River Adjudication Court has continued to be the court for not only the adjudication of matters that relate to the Snake River Adjudication but also taking on the northern Adjudication as well. Because Judge Wildman has developed that expertise, Ms. Schroeder is currently appearing in front of him on a matter and it is nice to have that background of experience. As the Commission looks forward to these Adjudications ahead, she thinks looking at an Adjudication court or design a court for that would be a good one. Ms. Schroeder also stated that she wanted to address Mr. Wichman's point on having a geographic options, stating that she thinks local judges are aware in a better way of their own water issues however, but that they have to balance that between their constituencies who vote about for their election and to allow them to sit there that sometimes mitigates against it. Perhaps having a special court added on to that would hear water issues as an option would fit very nicely into that. She does not want to take away the administrative law option because she thinks that falls nicely into Mr. Taggart's point that we do have to be cognoscente of the cost and speed and she thinks think the State Engineer for the most part is very good at that. Ms. Schroeder stated that with respect to the budget

issues, that in Oregon the state has similar contested cases proceeding but they go to a series of administrative law judges and they do not necessary have any experience like the State Engineers Office does, they have a panel that does not work well and because of budgetary concerns that over the last 4 years had none of her contested cases referred to an administrative hearing. Her clients have not gotten their matters resolved and they are sitting there waiting some have applications some on transfers and they have not been heard and will not be heard because the State of Oregon Department of Water Resources claims not to have the budget to do that because she believes that they are consumed with the Klamath Adjudication. Ms. Schroeder also wanted to address Mr. de Lipkau's point about the difference that the judges in Nevada handle judicial review, it's very true it's very difficult because in the administration law the State Engineer when they receive a protest and make a final order with out a record and that can be appealed on Judicial review so whether you have record developed in the State Engineers Office or in front of the District Court can be an issue for us and each District Judge decides differently that might be something that we could also address. Finally, Ms. Schroeder addressed education, stating that there are lots of resources, and she believes that if one is interested in these issues you tend to get the education you need. She stated that she believes Nevada is very good about sharing knowledge.

Mr. Zimmerman state that he agrees with most of my colleges. He thinks the State Engineers Office serves us well in administering the water law and helping out people as Mr. Jardine stated, as he is talking to the State Engineers Office very frequently on different issues. Mr. Zimmerman stated that he thinks that there is a need to understand what the issues are, where are the problems that the State Engineers Office and the courts having and adjudicating and solving these issues. The one other thing he added goes to the educational component – Nevada has the National Judicial College and there is the "Dividing the Waters" program, and he thinks this Commission would be well served to invite "Dividing the Waters" to come and present how they educate Judges in Nevada we've not had as much participation we could have with District Court Judges Dividing the Waters doesn't just educate on Water Law the also do Scientific education. As a Practitioner that was one of the most difficult topics to educate Judges on because it's very specialized and highly complex and it's hard to present to a District Court Judge.

Chief Justice Hardesty stated that he has spoken with the President Aldana about the Dividing the Waters program up at the National Judicial College and he has two resources, one of which he will ask to present to the Commission. One is from California and the other is a sitting Justice on the Washington Supreme Court. Justice Hardesty stated that he thinks the Commission will get some really good insight from that program and what they have accomplished and what they have done.

Mr. Entsminger stated that in a word if he could hope this Commission would achieve anything is certainty of outcomes because he agrees with Mr. Sullivan that if you look around the State, and this isn't specific to Southern Nevada, the level of deference into the State Engineers Office he believes is significantly lower than what you would see of the judiciary and other expert administrative agencies. He stated that in some ways that can be addressed through the education and specialization that others are talking about. Mr. Entsminger also wanted to point out that in defense of the district court judges, there are foundational part to water law that do not appear anywhere in the NRS and NAC. He stated that there needs to be additions to the administrative code to simply nail down some of these definitions. He stated that he is not suggesting we need to rewrite Water Law or change anything in the existing law, but when it does not exist in a statue or administrative code, that in part leads to the courts overruling the State Engineer more often then would be normal. Another thing this he stated is that this does not need to be a one size fits all approach, you may have some curtailment situation and you have some very big areas in the same state very complex multi-party, multi-counties and multi-basin things going on where maybe a special master approach would be beneficial in those situations. The last thing Mr. Entsminger wished to mention, is that he deals with directly with the Wyoming State Engineer frequently, and there they manage by curtailment – where there is a drought there is a shortage and the State Engineer curtails the water users by priority the courts do not overrule. So, when you talk about enforcing the law as Mr. de Lipkau mentioned we have that law in the books, but it has not worked the way it works in other states.

Chief Justice Hardesty remarked that he did a speech for Western Nevada Water Conference a few years ago and preparing for that speech on of the things I was interested in knowing was the issue about policies and practices within the State Engineers Office publish regulation that you would normally expect to see or another Administrate Agency. His takeaway was that there was a lot (at lease at that time) a lot of policies and practices which if you're a Water Rights Lawyer you probably know about or if you practiced in the State Engineers Office you would know about. But if your new to the process you may not know about and it does play a role in the outcome of some of those decisions so one of my questions of course is going to be; is the extent to which the NAC's can fill in gaps or should fill in the gaps? Justice Hardety stated that he thinks that it is an important issue when we talk about district courts being asked to review the State Engineer's decisions. And to Mr. Entsminger's point about differences is well taken, but deference to something that is not written down or published to the subject of regulation is problematic.

Mr. Felling simply stated that he would reiterate something that from his perspective is very important. He stated that we have all seen that these water cases increasingly are becoming complex like thousands of pages of technical documents decisions of the

State Engineer rulings and orders are often 60-80 pages or more. Mr. Felling stated that he believes that we can expect more cases and complexity going forward into a large part of surface water conflicts. The senior and junior surface water rights that eventually may conflict with those senior water rights particularly as ground progresses into the futures. Mr. Felling wanted to reiterate those suggestions by others regarding continued education and perhaps given thought for the court to retain some in-house expertise wither it by hydrology it's way beyond that it's biology, environmental and climate change that are really difficult for Justices to really grasp when they only see 1 or 2 cases per decade.

Mr. King stated that he would pick two issues. He stated that the Chief Justice asked the question earlier – does the Commission support specialized judicial review? On that topic, Mr. King replied that his response is "absolutely yes." What does that look like? Mr. King stated that we have heard from Ms. Fairbank where on one end of the spectrum we have water courts, like what Colorado has, and that's a huge lift and maybe it's not right for Nevada. At the other end of the spectrum we should do something like what New Mexico is doing at least establishing Water Judges in District Court. These Judges have an interest in the topic many of them have technical backgrounds and they are willing to put in the time to go to continuing education and learn about the water law to have at least a basic understanding. Mr. King expressed that he thought it would go far in-front of these water cases.

Ms. Fairbank stated that for her, what was most exciting, interesting and important to her is the dialogue and the conversation that the Commission is having, because there are different perspectives and there's different points of view with regard to the appropriate approach. There are also different perceptions of the problems. That is something that Ms. Fairbank stated that she is grateful for in that the Supreme Court and that Chief Justice Hardesty have undertaken this process to allow that dialog to take place. Ms. Fairbank stated that she thinks that there are two parallel conversations when we talk about future water law cases. One being that statutory adjudication process and pre-statutory water rights, those being distinct and separate issues, just as Ms. Peterson and Ms. Schroeder have raised. Ms. Fairbank stated that in Nevada there are 256 Hydrographic Basins, and all but one have not been adjudicated. Most of the surface water rights all our major stream systems have been adjudicated. Nevada has 255 groundwater basins yet to be fully adjudicated with the one adjudication before the district court at this time. Ms. Fairbank stated that it takes a lot of time on an administrative and court level, and we have pending adjudications in front of district courts, some that have been ongoing for more than 40 years. As the State continues to grow with availability and respect to water is present, we need finality and certainty in adjudication is a significant part of that so that is one process that Ms. Fairbank expressed being happy to be a part of the dialogue. In terms with other goals and objectives with regards to the Commission,

she absolutely echoed the need for a more expeditious and inexpensive resolution. The Division serve the public, and the office was built upon being open and accessible to the people. The administrative hearing process is intended to be available, accessible, and inviting to a general water right holder. One of the challenges that is facing water adjudication resolution of water it has become very complex with more involvement of lawyers. Sometimes lawyers get in the way of good productivity and efficiency. It's become more challenging for the lay person to be able to make a case if they feel as though they have to retain counsel because the other party or the protestant or the applicant is going to have to have counsel. Those are some hard conversations that we need to have is how to make that system and process more accessible and inexpensive and I think it'll help with expediting things. The other piece of the conversation raised by Justice Hardesty are some of these administrative fixes' verses judicial fixes. Ms. Fairbank agreed that it is part of the dialogue and that it is important for the agency agency to hear and for everyone to contemplate. One of the pieces that has been the topic of conversation internally is there value a need and is it warranted to consider an ADR process, an alternative dispute resolution process within our water adjudication system. Whether that is at the administrative level or someplace else remains to be seen. But there are many conflicts that could be more expeditiously resolved if we could get people just to sit around the table and just talk out some of their differences. Ms. Fairbank also expressed that some of the constraints can be resolved by finding ways to work through the issues in a more efficient process. Ms. Fairbank stated that she believes that many people raised good points and that she valued the different points of view

Chief Justice Hardesty stated that he was glad that Ms. Fairbank raised the ADR issue, as it is a resource that the Judiciary depends on in a variety of areas so it's an excellent suggestion and something we need to think about.

Judge Schlegelmilch stated that he heard all of the comments, and that he had one overriding concen, a timely just judicial system that provides good due process to everyone involved. Judge Schlegelmilch stated that the other comments dealt with the law and that his interpretation of the law is what it is. He expressed that to streamline the process itself it has to begin at the administrative end and then to the court system. His perspective with regarding many of the delays is that it is not the result of the court system, but rather the attorneys, stating that a lot of the time when attorneys get involved their requests and practices lead to delay. Judge Schlegelmilch emphasized that from his perspective, it is a matter of showing due process. He also stated that he has been a participant in the "Dividing the Water" program and as a member has participated in their programs. So the resources on developing your water expertise as a judge are available. He doesn't believe you have to understand the totality of the state's hydrology when dealing with a localized issue. Judge Schlegelmilch stated that he sees that there is a question about what the issue

is and what is being looked at for a specialty court, because many of the issues are in fact legal issues, not necessary judicial issues. Judge Schlegelmilch stated that his priority is to have a just an equitable process that is timely.

Judge Fairman stated that he believes that the creation of a specialty court and specialized Judges would enhance the process, and as Judge Schlegelmilch stated, would address the efficiency in the system. Judge Fairman stated that water disputes are not going to go away, but rather there is going to be increased number of cases before the courts. Water cases are complex and require a large amount of judicial time to appropriately address the cases in a timely fashion. He stated that judges have duties to decide cases in a timely fashion regardless of who the litigant. Judge Fairman expressed that if it is at all possible, he believe that the appointment of specialized judges with training and experience will help streamline the system and timely get through the adjudication process. He also agreed Judge Schlegelmilch that in many instances it is the litigant themselves and their attorneys that create the lengthy judicial process going through the courts. He stated that once the case gets to the courts, he believes that almost every Judge is anxious to do their job and to decide the case before them as promptly as they can. With the complexity of these cases and the volume of exhibits and doc's that timeliness takes longer and with potentially Specialized Judges or Specialized water court these matters could be adjudicated a little bit quicker, training that adjudicate these cases is essential it would be great for these Judges to have some background but that's not going to happen training in the sciences would be helpful.

Chief Justice Hardesty state that he was glad Judge Fairman raised his own experience both you and Judge Schelgelmilch, because one of the things Justice Hardesty would like all of the non-Judge members of the Commission to think about is this: Our Judges especially the Judges in rural counties hear every case type that's brought to them and all of the sudden here is a Water Law case with a 70 page decision a 1,000 pages in the record and this judge by him or herself and their one law clerk to evaluate this situation where both sides have multiple lawyers and multiple paralegals and all of the resources in the world (generally speaking) to dump all of this stuff onto one individual and their law clerk, so one of the areas that's troublesome about this process is resources to be able to handle work load. Perhaps we can provide additional law clerks for those Judges to help evaluate the records and do research there may be some other areas. Justice Hardesty stated that he is hoping that Judge Schelgelmilch and Judge Fairman and the other two judges that are on the commission will think about because as you consider specialization one of the areas that you look at is increasing support systems that help the judges meet those demands and get those decisions out timely but put yourself in the position of Judge Fairman and Judge Schelgelmilch and your sitting there and concerned about an upcoming divorce case or murder trial. You have a 70-page 1,000 w/ exhibits to

review/read which all of the parties expect the Judge (rightfully to do so and understand) and incorporate into their decisions.

Judge Gonzales stated that she was pleased to be at the meeting and she has only handled a couple of water rights case,s so I am interested in finding out what the historic volume among these types of cases among the various Judicial District and what the projective volume of cases are in the future. She stated that she would also like to encourage the group the statewide procedural rather than trying to do them be the Judicial District, which is what we ended up doing with business courts which gives us a slightly different procedures among the district courts in the North and South. Judge Gonzalez stated that she is very interested in a specialized group of Judges hearing this type of case because when she was Chief the Judgesshe supervised had stressed in trying to find the resources to handle these types of cases, they take so much time, dedication and knowledge. Judge Gonzales stated that we don't always have the ability to a general jurisdiction judge to provide that outside education for them that I think is probably very important to handle these types of cases.

Justice Parraguirre stated that Nevada has been front and center nationally with the development courts for the 30 years. Justice Parraguirre has had an opportunity to see a multitude of specialty courts my experience has been positive. So with this one he stated that he thinks that there is the opportunity here and the need to identify those problems and challenges and in inefficiency's. Justice Parraguirre stated that Mr. King hit it right on the head looking for predictability, consistency, and efficiency. He stated that he looks forward to working with the Commission.

7. **Schedule subsequent meetings.**

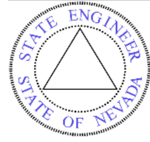
Subsequent meetings were scheduled for June 25, 2021 at 1:00 p.m. and August 27, 2021 at 1:00 p.m. Justice Hardesty stated that a doodle poll would be conducted for meetings after August 27th.

8. **Public Comment:**

Patrick Donnelly, the Nevada State Director at the Center for Biological Diversity, provided comment. Mr. Donnelly stated that there was much said about how much can be done without the involvement of the Legislature, and in many ways thee Commission represents a broad swath of interests particularly for the rural parts of the state. This Commission really looks nothing like the Stat of Nevada demographically, social economically and geographically many other ways this Commission represents a very small slice of Nevada. Mr. Donnelly stated that Nevada has a dually selected Legislature, which is intended to represent the will of the people. And that the Commission should be actively seeking involvement of the legislature and confer the legitimacy of the representation of the people of Nevada on

the actions that result from this Commission. Mr. Donnelly stated that there may be skepticism if legislature was actively cut out of the process that results in the significant changes of Adjudication of water. Secondly, Mr. Donnelly stated that he would also like to point out that there are no environmental community representatives on this Commission, I'm a board member of the Great Basin Water Network, I have the up most faith in Mr. Roerink but the Water Network represents as Mr. Roerink said Ranchers, Farmers and rural communities and also Conservationist as such there is no group on this Commission right now that represents generally environmental interests. And Mr. Donnelley stated that he would not mind being added because his environmental group is the only environmental group with history of water litigation there are several that could be chosen from to ensure environmental interest could be properly represented.

APPENDIX A



NEVADA DIVISION OF
WATER RESOURCES

Water Resource Management Challenges

Commission to Study the Adjudication of Water Law Cases

April 16, 2021

Presented by:
Adam Sullivan, P.E.
Acting State Engineer

Nevada Division of Water Resources

Mission Statement

To conserve, protect, manage and enhance the State's water resources for Nevada's citizens through the appropriation and reallocation of the public waters.

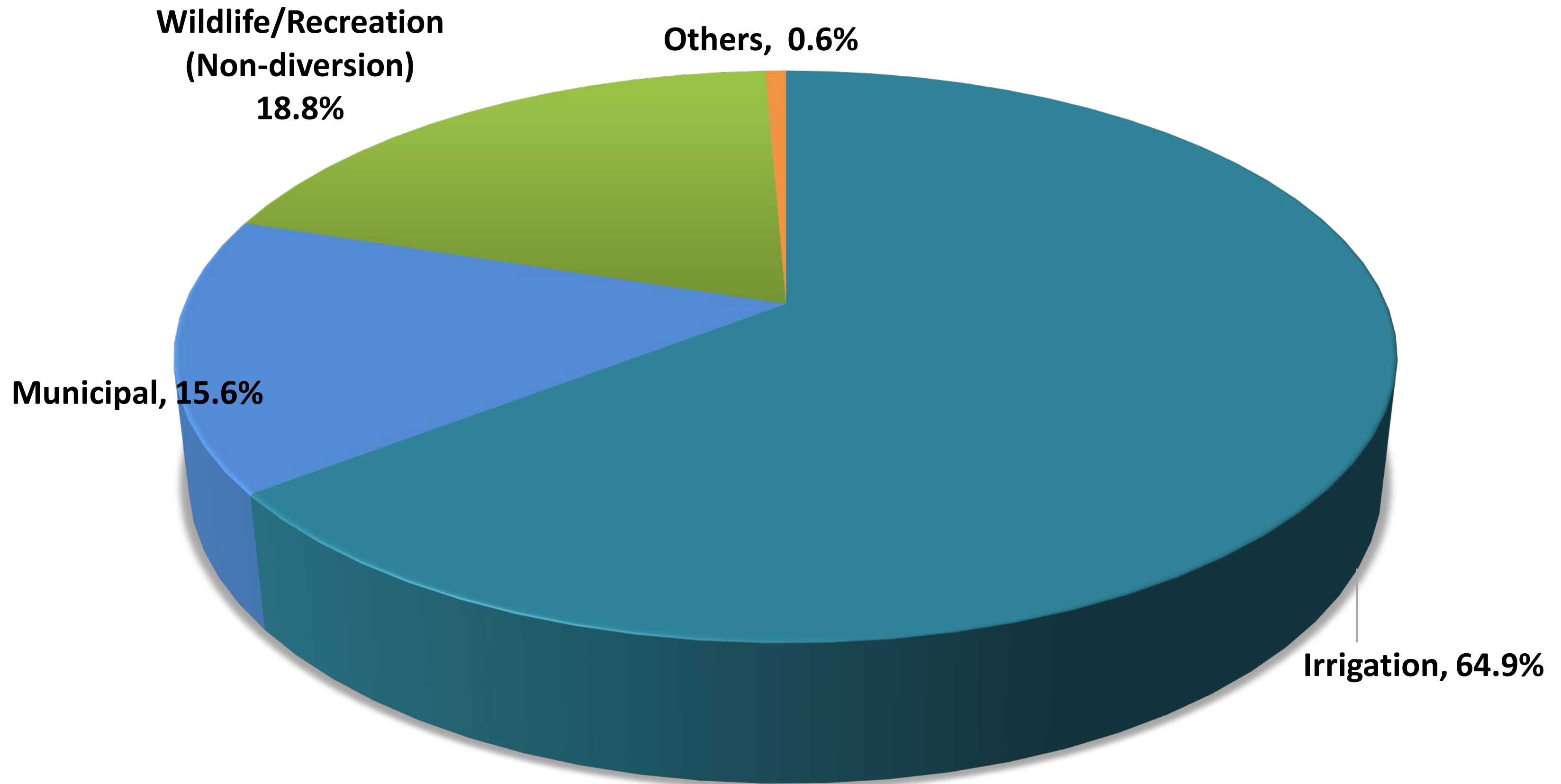
Overview of the Division

What we do:

- Appropriate and manage use of Nevada's waters (except Colorado River)
- Adjudicate pre-statutory and federal reserved water right claims
- Manage distribution and regulation of state decreed water rights
- Update state water plan and drought response plan
- Regulate well drilling, licensing of drillers
- Administer Nevada's dam safety and floodplain management programs
- Regulate aquifer storage and recovery; effluent reuse
- Compile water level and water use data statewide
- Review subdivision plans; water conservation plans

Overview of Statewide Water Use

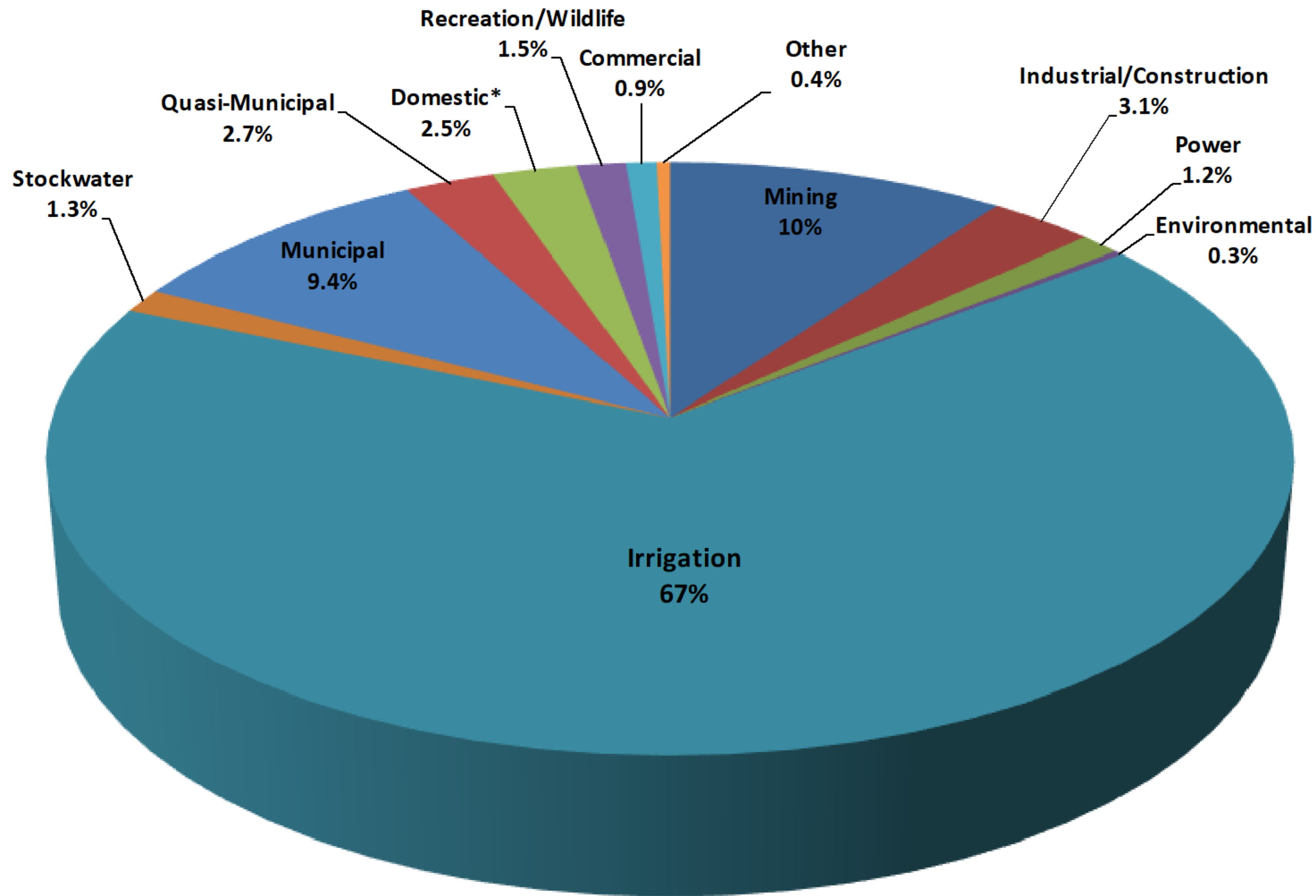
Surface Water Use



Average annual surface water usage is approximately 4-5 million acre-feet annually

Overview of Statewide Water Use

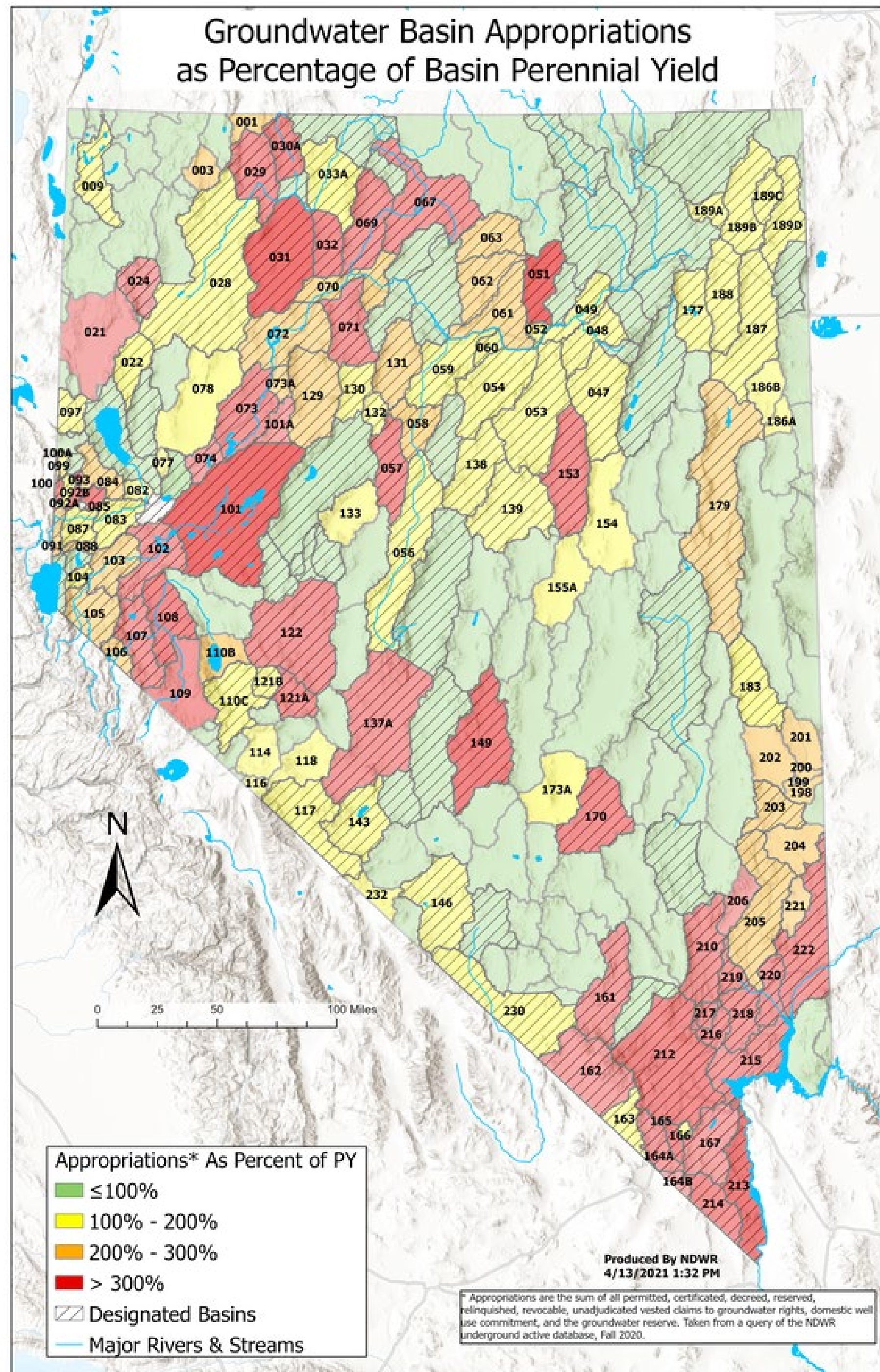
Groundwater Use



Statewide groundwater use is approximately 1.5 million acre-feet annually

Groundwater Appropriations & Commitments

Comparison between Groundwater commitments and Perennial Yield



Water Resource Management Challenges

Impacts of a Changing Climate

- Nevada is experiencing more extreme weather patterns with prolonged drought cycles and intense wet periods

- Impacts to water availability locally, regionally, and statewide depending on the conditions

- Changes to timing of surface water availability

- Greatest impacts felt by our agricultural users

- Risk and consequences are significant for the driest state in the nation

WATER RESOURCE MANAGEMENT CHALLENGES

Increased Development and Competing Demands

Water is the lifeblood of Nevada's economy – Urban and Rural

Increased development and demands on Nevada's limited water resources inherently creates conflicts

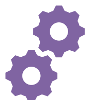
Nevada's water laws are founded on the doctrine of prior-appropriation → not much flexibility in balancing interests, needs, and uses

Water Resource Management Challenges

Managing Conflict

With Nevada's limited water supply, conflict between uses arise

Managing conflict is complex due to varying nature of conflict – no well-established management strategies



Conjunctive management of surface water and groundwater sources

Balancing is challenging given the historic reliance on uses of water and complexity in resolving conflict

Current statutory structure creates only winners and losers - no middle ground

WATER RESOURCE MANAGEMENT CHALLENGES

Successful Implementation of Statutory Tools

- Courts are reluctant to uphold cancellation, forfeitures and findings of abandonment of water rights
- Equity or compassion for circumstances seem to often override statutory requirements
- Creates compounded challenges, particularly in over-appropriated systems

Protection of Non-Permitted Uses

- Water for the environment
- Proliferation of domestic wells in certain areas creates major challenges in balancing water use w/unpermitted uses and appropriative rights

Water Resource Management Challenges

Judicial Review

Disparate and inconsistent decisions impose administrative and regulatory challenges in statewide administration of water rights

Judicial decisions understandably tend to be focused on interests of challenging party

NDWR is required to consider hydrographic basin, system, and statewide implications for ***every decision*** – can be disrupted by single judicial determination

Key Resources for Future Planning

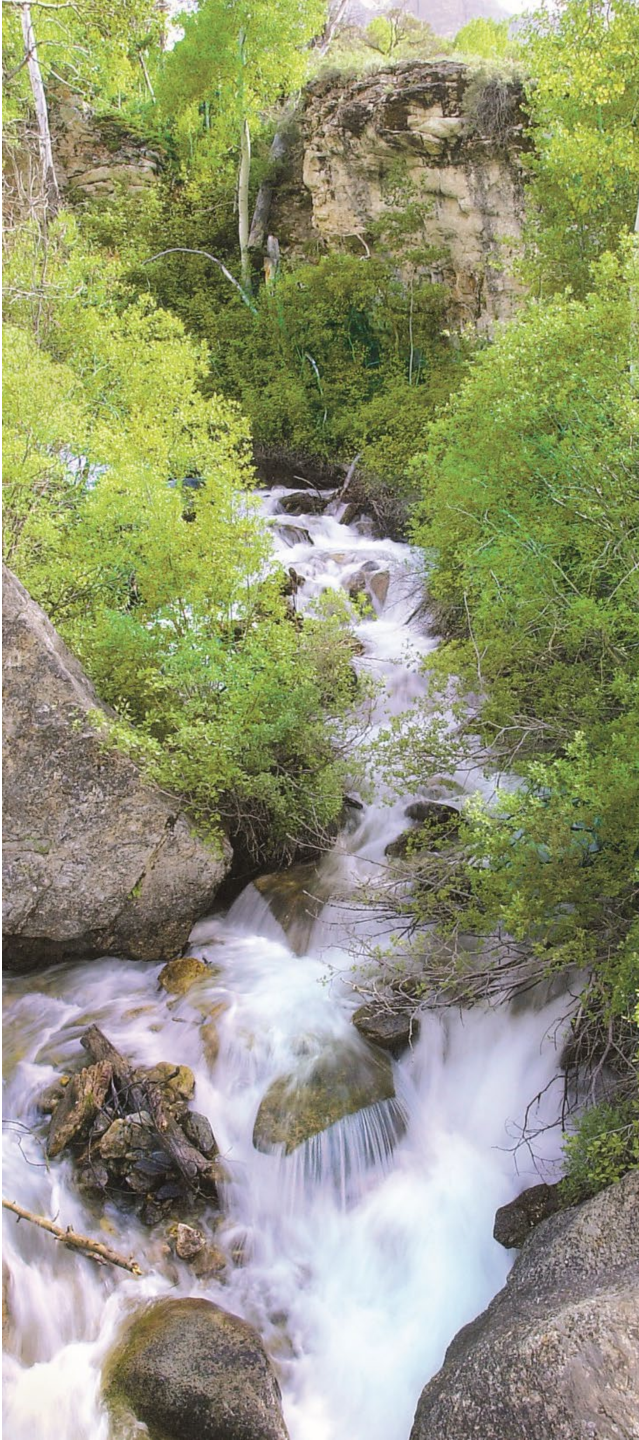
Update Science: Water Resource Availability

- Baseline USGS studies of water budgets → 50 - 70 years old
- Better/modern scientific methods exist to assure accuracy of information
- Will take years and substantial financial investment to completely update and modernize data relied upon by NDWR

Modernize through Digitization:

- NDWR's digital presence has not kept up w/ contemporary technological access and needs
- Majority of information is not digitally accessible
- Need to increase record access for greater public accessibility

Questions?



Contact

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APPENDIX B

STEVE SISOLAK
Governor

STATE OF NEVADA

BRADLEY CROWELL
Director

ADAM SULLIVAN, P.E.
Acting State Engineer

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
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Carson City, Nevada 89701-5250
(775) 684-2800 • Fax (775) 684-2811
http://water.nv.gov

TO: Chief Justice James Hardesty
Nevada Supreme Court

FROM: Micheline N. Fairbank, Esq.
Deputy Administrator

DATE: January 28, 2021

RE: Summary of Water Courts in the western United States

Per your request, the Division of Water Resources has conducted preliminary research relating to water courts throughout the western United States and how various states resolve disputes over the administration of water. Each of the identified states apply either the prior appropriation doctrine or some adaptation of the prior appropriation doctrine in the management of the respective state's water resources.

State	Judicial Review Procedures & Process
Alaska	Alaska has not established a specialized water court. Judicial review of challenges to decisions by the Alaska Department of Natural Resources are performed by the state Superior Courts.
Arizona	Arizona has not established a specialized water court. Judicial review of challenges to decisions by the Arizona Department of Water Resources and adjudications of water rights are performed by the state Superior Courts.
California	California has not established a specialized water court. Judicial review of challenges to decisions of the Water Resources Control Board and adjudication of water rights in California are performed by the state Superior Courts.

Colorado	"The Water Right Determination and Administration Act of 1969 (the "1969 Act") created seven water divisions based upon the drainage patterns of various rivers in Colorado. Each water division is staffed with a division engineer appointed by the state engineer, a water judge appointed by the Supreme Court, a water referee appointed by the water judge, and a water clerk assigned by the district court. Water judges are district judges appointed by the Supreme Court and have jurisdiction in the determination of water rights, the use and administration of water, and all other water matters within the water division. Water matters are generally commenced in a water court by the filing of an application with the water clerk. The water clerk publishes a summary of each application that is filed in the monthly water court "resume" and in a legal notice in one or more newspapers. Interested persons may then file statements of opposition to an application within the time allowed by statute. Because claims in water rights adjudications may affect, in priority or otherwise, any water right claimed or previously adjudicated within each division, owners of affected rights must appear to object and protest as provided in the 1969 Act or be barred from claiming injury to their water rights as a result of claims made in an application. The monthly resume published by each water court can be viewed on that court's website. All water courts operate under a standard case definition approved by the Supreme Court in 1981. This made possible the establishment of water court filings standards, which have been reported annually by water division since July 1, 1981." *Source:* Colorado Judicial Branch website, https://www.courts.state.co.us/Courts/Water/Index.cfm
Idaho	With the initiating of Idaho's Snake River Basin Adjudication in 1987, a specialty district court was established to preside over the more than 150,000 claims which included approximately two-thirds of Idaho's irrigated agricultural lands as well as thousands of reserved water right claims by tribal nations and the federal government. With the conclusion of the Snake River Basin Adjudication in 2014, the water court continues to hear water

	related appeals from the State Engineer and Water Board and is addressing smaller adjudications throughout Idaho. *Source*: John E. Thorson, *A Permanent Water Court Proposal for a Post-general Stream Adjudication World*, 52 Idaho L. Rev. 17 (2016), accessible at https://www.uidaho.edu/-/media/UIdaho-Responsive/Files/law/law-review/articles/volume-52/52-1-thorson-john-e.pdf?la=en&hash=5D10FECDFF62BAB0B14A0856FAC47549DDF8FB3B. The Adjudication Court is comprised of a presiding judge and two special masters. While the court was established for a limited basis, the court is seemingly ongoing. Additionally, there does not appear to be any formal legislative or other act that has established the court as a permeant, rather than temporary, court.
Kansas	Kansas has not established a specialized water court. Judicial review of challenges to decisions by the Kansas Division of Water resources are performed by the state District Courts.
Montana	The 1979 Legislature created the Montana Water Court to expedite and facilitate the statewide adjudication of over 219,000 state law-based water rights and Indian and Federal reserved water rights claims. The Water Court has exclusive jurisdiction over the adjudication of water rights claims. The Chief Justice of the Montana Supreme Court appoints a Chief Water Judge and Associate Water Judge from a list of nominees submitted by the Judicial Nomination Commission. A division water judge is also designated for each of Montana's four major water divisions. The Chief Water Judge appoints Special Masters, referred to as Water Masters, to assist the water judges. *Source*: https://courts.mt.gov/courts/water In 2017, the Montana Legislature passed Senate Bill 28 (SB 28) that expanded the jurisdiction of the Montana Water Court to allow persons aggrieved by a Department of Natural Resources and Conservation's decision relating to new water right permits and changes to existing water right permits. SB 28 now allows for a litigant to choose between either bringing their dispute before the district court (the proper venue prior to the adoption of SB 28) or

	the Water Court, which was historically limited to addressing the statewide adjudication.
Nebraska	Nebraska has not established a specialized water court Judicial review of challenges to decisions by the Nebraska Department of Natural Resources are performed by the state District Courts.
New Mexico	New Mexico has not established a specific or specialized state water court. Several years ago, the New Mexico Supreme Court initiated a study committee to review how adjudications were being conducted in other states. As a result of that process, the New Mexico Supreme Court, through court rule, established a single judge to handle state adjudications. It appears that through that study committee, it was also recommended that each of the state district courts appoint a sitting judge to serve as a "water judge" to handle all administrative appeals from the State Engineer. These judges have their standard court docket in addition to serving as the district's water judge. Each of the water judges in New Mexico are required to participate in annual training specific to their water dockets. Unfortunately, the New Mexico court rules relating to the creation of the adjudication judge and water judge positions is not available online; however, the Division is working to obtain copies of the relevant order(s).
North Dakota	North Dakota has not established a specialized water court. Judicial review of challenges to decisions by the North Dakota State Water Commission are performed by the state District Courts.
Oklahoma	Oklahoma has not established a specialized water court. Judicial review of challenges to decisions by the Oklahoma Water Resources Board are performed by the state District Courts.
Oregon	Oregon has not established a specialized water court. Judicial review of challenges to decisions by the Oregon Water Resources Department are performed by the County Circuit Courts.
South Dakota	South Dakota has not established a specialized water court. Judicial review of challenges to decisions by the South Dakota Department of Environment and Natural Resources are performed by the state Circuit Courts.

Texas	Texas has not established a specialized water court. Judicial review of challenges to decisions by Texas Groundwater Conservation Districts or the Texas Water Development Board are performed by the state District Courts.
Utah	Utah has not established a specialized water court. Judicial review of challenges to decisions by the Utah Division of Water Rights are performed by the state District Courts.
Washington	There have been various efforts in Washington to establish a water court. However, this effort has been focused on the creation of a specialty water court for the purpose of performing the many adjudications of water rights within Washington. Currently, Washington Superior Courts hear disputes relating to water rights, decisions from the Washington Department of Ecology relating to the administration of water rights, and adjudications. However, in 2002 a multi-branch Water Disputes Task Force was created and later recommended the creation of a separate, specialized statewide water court to handle more water right adjudications. This resulted in the creation of a substantial amount of legislation, though it does not appear any of those legislative proposals were successful. Then in 2004 the Board for Judicial Administration (BJA) worked to develop a judicial policy statement regarding water courts and made certain proposals for advancing adjudications in a timelier manner. This included the creation of a Water Court Work Group to develop a report that included background information as well as recommendations for a judicial response to certain proposals. "The report included background information on: Washington's water laws; general adjudication processes; the differences between general adjudications and other cases heard in superior court; and, the need for specialized expertise in judges, commissioners, clerks, and other court personnel hearing and processing these cases. The report recommended a set of criteria for evaluating proposals for reforming the general adjudication process and posited advantages and disadvantages for several different proposals. The report recommended that, if the other branches of government decide to increase the pace for adjudicating water right claims around the state, a specialized water court should be created to hear the increased number of general adjudications. The report also made

	several recommendations for how such a court might be implemented. The report also set forth recommendations for changing general adjudication procedures, including a recommendation about affidavits of prejudice. Several appendices to the report present additional background information on water law and general adjudications." Upon review of the report, the BJA adopted a judicial policy statement making certain recommendations regarding the adjudications of water right cases, including certain elements relating to judicial terms of office and other criteria. *Source:* Washington Courts, https://www.courts.wa.gov/committee/?fa=committee.display&item_id=425&committee_id=109. It does not appear that any of these proposals were adopted modifying the judicial process for adjudicating water rights in Washington.
Wyoming	Wyoming has not established a specialized water court. Judicial review of challenges to decisions by the Wyoming State Engineer's Office are performed by the state District Courts.

APPENDIX C

A PERMANENT WATER COURT PROPOSAL FOR A POST-GENERAL STREAM ADJUDICATION WORLD

JOHN E. THORSON*

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* John E. Thorson is the Federal Water Master for the Lummi Decree (W.D. Wash. U.S.D.C.). The views in this article are his own.

I. INTRODUCTION

This article is prepared in celebration of Idaho's completion of the Snake River Basin Adjudication and the entry of the final decree on August 26, 2014.[1] The decree should probably be known as the "Hurlbutt, Wood, Burdick, Melanson, Wildman Decree." More likely, this hard-earned document will be known simply as the "Wildman Decree"—a great name for a major water rights decree, a decree ready for active management, and a decree destined for the history books.

But what about the Snake River Basin Adjudication Court itself? This is a court that has been in existence since 1987.[2] It has a highly trained professional staff, extensive experience, painfully developed customs and procedures, and its own courthouse in Twin Falls.[3] Surely, the State of Idaho will not "sunset" an institution that has played such an important, positive role in charting the state's cultural and economic future.

Fortunately, the court does have a new mission for several years, principally the completion of adjudications in northern Idaho.[4] Also, as the result of an Idaho Supreme Court order in 2010, the adjudication court now has exclusive jurisdiction over appeals from the Idaho Department of Water Resources—decisions previously heard by other district courts around the state.[5] This undertaking, however, is not a permanent mission. What happens when the northern Idaho adjudications are done? Will the court then cease, or will it evolve into something more permanent?

II. ARE PERMANENT WATER COURTS IN OUR FUTURE?

Idaho is not alone in facing this question. Montana also has a specialized water court[6] and, eventually, state decision makers must decide the future of the court and its expert staff. Even in states without specialized water adjudication courts, general jurisdiction courts in California, Washington, Wyo-

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1. Final Unified Decree, *In re* SRBA, No. 39576 (Idaho 5th Dist. Aug. 26, 2014), http://srba.idaho.gov/Images/2014-08/0039576XX09020.pdf.

2. The Snake River Basin Adjudication petition was filed in the Fifth Judicial District on June 17, 1987, pursuant to the 1984 Swan Falls Agreement between the State of Idaho and Idaho Power Company. *See* David B. Shaw, *Snake River Basin Water Right Adjudication,* IDAHO DEP'T OF WATER RES., 1 (Aug. 1988), https://www.idwr.idaho.gov/WaterManagement/AdjudicationBureau/SRBA_Court/PDFs/history.pdf. The Snake River Basin Adjudication was commenced on November 19, 1987. *Id.*

3. *Id.* at 2.

4. IDAHO CODE ANN. § 42-1406B (2015).

5. Order Appointing the SRBA to Hear All Petitions for Judicial Review from the Dep't of Water Resources Involving Administration of Water Rights (Idaho Dec. 9, 2009), http://idwr.idaho.gov/files/legal/CV-2015-1450/CV-2015-1450_20150414_Procedural_Order.pdf. [hereinafter Appointment of the SRBA].

6. MONT. CODE ANN. § 85-2-214 (2014).

ming, and other states have decades of experience and infrastructure dedicated to similar water adjudications.[7] As these adjudications are also completed, hard-earned dispute resolution assets face dissipation, and procedures for post-decree administration and conflict resolution without these specialized forums remain untested. Western water law professionals are debating the possible utility of permanent water law courts in handling a range of water-related conflicts.

While these institutional questions are presented in a modern context, they reflect a longstanding debate that originated in the late 1800s. In his concise, excellent history of western water law, historian Robert Dunbar chronicles the development of the dichotomy between Colorado's and Wyoming's differing approaches to water management and water-related dispute resolution.[8] Dunbar revisits Colorado's initial and continuing reliance on specialized water courts, which reside in the judicial branch, to address these issues. Colorado remains the only western state with a permanent water court.[9] By contrast, Wyoming, in advancing a California innovation, furthered the development of an administrative structure with a state engineer as its central character.[10]

Several other contemporary trends have converged to renew this debate in contemporary policy discussions, and the potential benefits of permanent water courts are once again being debated. In California, the interest in a specialized water court arises from the concern about over-drafted groundwater basins.[11] Predominantly in the southern part of the state, this "tragedy of the commons"[12] results from the failure to determine water rights and the lack of overall limits on groundwater pumping. Superior courts have historically presided over these groundwater adjudications,[13] but several proposals have been advanced to shift this responsibility to a permanent water court structure.[14]

Another source of interest in water courts is the McCarran Amendment, passed by Congress in 1952 as a waiver of federal sovereign immunity to allow the adjudication of federal and tribal water rights, usually in state courts.[15] The provision is mostly known for its requirement of a comprehensive adjudication (i.e., "a suit (1) for the adjudication of rights to the use of

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7. *See, e.g.*, Quantification Settlement Agreement (QSA) Cases, Judicial Council Coordination Proceeding No. 4353 (Sacramento Super. Ct. 2004).

8. ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS (1983).

9. COLO. REV. STAT. § 37-92-203 (2014).

10. WYO. CONST. art. 8, § 5.

11. DUNBAR, *supra* note 8.

12. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

13. *See* Gary Pitzer, *Does California Need a Water Court?,* WESTERN WATER 6 (July/Aug. 2014); James L. Markham, *The California Legislature Should Establish Water Courts,* CAL. WATER L. & POL'Y REP. 123 (Feb. 2005) ("Controlling decision making relative to groundwater . . . must emanate from the court system.").

14. *See infra* text accompanying notes 171-223.

15. The amendment was enacted as section 208(a)-(c) of the Department of Justice Appropriation Act of July 10, 1952, Pub. L. No. 945, 66 Stat. 560 (current version at 43 U.S.C. § 666 (2015)).

water of a river system or other source") as a condition for the sovereign immunity waiver.[16] What is frequently overlooked is the next language in the amendment (i.e., the requirement of a "suit . . . (2) for the administration of such rights . . . when the United States is a necessary party to such suit").[17] What this second provision appears to require is a meaningful judicial role in water administration disputes where federal rights are likely to be affected.[18] A permanent state water court would provide a qualifying forum for such post-decree, water right administration proceedings.

This article also addresses some of the arguments made by Professor Larry MacDonnell in a recent, excellent article in the *Wyoming Law Review*, prepared in celebration of the completion of the Big Horn River adjudication.[19] MacDonnell advances the appealing argument that general stream adjudications, and presumably other water law issues, should be heard and resolved by expert administrative agencies.[20] This argument, once again, reflects the nineteenth century debate between Wyoming and Colorado. In this article, however, I hope to demonstrate that permanent water courts should be considered as a viable alternative to an administrative agency-based approach to water conflict resolution.

Finally, a more straightforward rationale for a permanent water court is based on the argument that, because so many water law disputes end up in court even after administrative procedures have been followed, would it not be more expedient to have these matters heard in their entirety before the court?

This article begins at the wellspring of the water court concept, that is, by describing the historic water tribunals of Spain. The article then turns to a description of the Colorado and Wyoming debate over appropriate water law institutions, overlaid by broader developments associated with the Scientific Management Movement and the Progressive Conservation Era of the last years of the nineteenth century. The article then explores several contemporary examples of specialized water courts and similar entities throughout the world. The article concludes by suggesting the possible characteristics

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16. *Id.*

17. *Id.*

18. The conflict precipitating Senator McCarran's introduction of the bill that became the amendment of his name was Nevada's Quinn River Adjudication. The United States had purchased land with previously decreed water rights, but the government invoked sovereign immunity to defeat state court proceedings to administer the decree. As one writer concluded, "it seems probable that the words 'or for the administration of such rights' were inserted in the bill largely to correct such situations." James W. Dilworth & Frederic L. Kirgis, Jr., *Adjudication of Water Rights Claimed by the United States—Application of Common-Law Remedies and the McCarran Amendment of 1952*, 48 CAL. L. REV. 94, 104 (1960), http://www.heinonline.org/HOL/Page?page=94&handle=hein.journals%2Fcalr48&collection=journals.

19. Lawrence J. MacDonnell, *Rethinking the Use of General Stream Adjudications*, 15 WYO. L. REV. 347 (2015).

20. MacDonnell "argues that general stream adjudications have little if any utility at this stage of water decision-making in the West." *Id.* at 378. The work of establishing titles to valid water uses established prior to the institution of state procedures for this purpose can be accomplished by those state procedures.

of a model water court proposal and evaluates this proposal against fundamental criteria for evaluating conflict resolution institutions.

III. SPANISH WATER TRIBUNALS

The Spanish Iberian Peninsula is the setting for a variety of water tribunals dating from medieval times.[21] The irrigation systems were built during the Andalusian Era (ninth to thirteenth centuries) and they divert water from the Segura and Turia rivers for small-farm irrigation in this fertile area near the Mediterranean coast.[22] The water control institutions that developed along with the physical structures are based on Arab and Maghreb traditions brought from North Africa.[23] The Council of Good Men and the Tribunal of Waters are the two leading examples of these institutions. Both of these courts, and a few others of lesser notoriety, decide irrigation-related disputes among water users.

A. Council of Good Men (*Consejo de Hombres Buenos*)

The first of these water tribunals is known as the Council of Good Men (*Consejo de Hombres Buenos)*, serving the irrigation community of the Huerta de Murcia (irrigated, crop-growing region of Murcia).[24] This is a community of 13,302 farmers irrigating 16,000 hectares of land (frequently small farms and fruit orchards) from the river Segura.[25] A governing board of 509 members annually elects an administrative entity (the Landowners' Board) along with five Speaking Procurers representing irrigators from the major canal regions: two from the estates of the Aljufia Major Canal, two from the estates of the Alquibla Major Canal, and one from the estates of the Churra la Nueva Canal.[26] These five Speaking Procurers, along with the president and secretary of the governing board, comprise the Council of Good Men.[27] The Council meets on Thursdays in the Murcia City Hall.[28] Decisions may be appealed to the city council, which may remand disputes back to the Council augmented for rehearing by the seven Good Men who recently served on the Council.[29] Upon rehearing, the Council's decision is final.[30]

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21. *See generally* Intergovernmental Comm. for the Safeguarding of the Intangible Cultural Heritage, U.N. Educ., Scientific & Cultural Org., Nomination for inscription on the Representative List in 2009, Ref. No. 00171 (2009), http://www.unesco.org/culture/ich/doc/src/ITH-09-4.COM-CONF.209-13-Rev.2-EN.pdf#Decision1370 [hereinafter U.N. Educ.]; ARTHUR MAASS & RAYMOND L. ANDERSON, . . . AND THE DESERT SHALL REJOICE: CONFLICT, GROWTH, AND JUSTICE IN ARID ENVIRONMENTS 11–145 (1978) [hereinafter MAASS].
22. MAASS, *supra* note 21, at 11–145.
23. U.N. Educ., *supra* note 21, at 4.
24. MAASS, *supra* note 21, at 82–83.
25. *Id.*
26. U.N. Educ., *supra* note 21 at 2.
27. *Id.*
28. MAASS, *supra* note 21, at 82.
29. *Id.* at 83.
30. *Id.*

B. Tribunal of Waters (*Tribunal de las Aquas*)

The Tribunal of Waters covers the irrigation communities of Quart, Benager-Faitanar, Tormos, Mislata, Mestalla, Favara, Rascanya, Rovella, and Xirivella—all diverting their water from the river Turia.[31] The irrigated area is almost 3500 hectares.[32] Farmers frequently reside on these small farms growing potatoes, onions, corn, and a variety of other produce.[33]

The eight canals taking water from the Turia elect representatives (syndics) who meet and elect a president and vice president from among their numbers to serve two-year terms.[34] A ninth canal (Xirivella) becomes involved in some cases.[35] The tribunal meets Thursdays at Apostles' Gate of Valencia Cathedral.[36]

C. Similar Characteristics

The jurisdiction and processes of these water tribunals are similar. The jurisdiction is generally described by the ordinances adopted for irrigation communities (e.g., prohibitions against out-of-order diversions).[37] The parties are usually irrigators within the community; non-resident third parties are rarely involved.[38] Frequently, ditch riders or other irrigation community officials lodge complaints against farmers. Parties appear *in propria persona*, lawyers are not involved, and court costs are modest.[39] The courts, however, are steeped in tradition, from the weekly schedule and historic meeting locations to the traditional, black, loose blouses worn by the farmer-judges.[40]

As one commentator has described:

> Both courts decide on irrigation disputes orally, promptly, economically, publicly, and impartially. Their verdicts are generally conformed to by reason of the authority and respect credited to either court, based on the transparent equity or their procedures and on the farmer-judges being acknowledged by their peers as equitable persons with expert knowledge of usage and custom in traditional irrigating agriculture and of its underlying natural milieu.[41]

While the courts' decision making is transparent, their processes are not necessarily understandable to the public. As one commentator discussing the

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31. U.N. Educ., *supra* note 21, at 3.
32. *Id.*
33. MAASS, *supra* note 21, at 11.
34. *Id.*
35. U.N. Educ., *supra* note 21, at 3.
36. MAASS, *supra* note 21, at 24.
37. "The jurisdiction of the water court is defined by the ordinances of the several canals, which specify precisely the categories of actions to be judged as violations (for example, taking water out of turn, flooding a neighbor's field, or installing an unauthorized canal check) and the penalties to be imposed." *Id.* at 23.
38. *Id.*
39. *Id.* at 24.
40. U.N. Educ., *supra* note 21, at 4.
41. *Id.* at 1.

Tribunal de las Aguas indicated, "[a]lthough the decision process takes place in full public view, we have never met an observer who has heard and understood what the syndics say to each other when they confer."[42]

Informal settlements are encouraged in these processes.[43] An observer noted with reference to one of the courts, "[a] good magistrate is a master at coaxing settlements from farmer adversaries even when, as is frequently the case, their accusations against each other are voiced so raucously that they can be heard some distance down the street from the courtroom."[44]

The tribunals have substantial enforcement powers including the ability to suspend water deliveries or seize property for sale.[45] These remedies are rarely imposed.[46] More often, the unsuccessful litigant pays a small fine although substantial actual damages and restoration costs also can be awarded.[47] These courts are considered an integral part of the Spanish judicial system.[48] Their decisions, however, are final and unappealable.[49]

Operating for centuries, the Spanish water tribunals continue as functioning dispute resolution forums in their unique geographic and cultural context. These tribunals demonstrate the utility of a knowledgeable court of arbitrators drawn from the local community; informal, prompt procedures; modest transaction costs; and full integration into the country's judicial system. Most importantly, the courts sustain the cultural importance of water in the region: "[T]he trial performing ritual conveys the respect that farmers feel toward either institutions and their members as credited recipients of the tradition and reaffirms cohesion within the communities of water users."[50]

The Spanish water tribunals cannot be transplanted in their entirety to the American West. While those tribunals primarily adjudicate disputes among consumptive users within an irrigation community, western water disputes involve large municipal and industrial users, nonconsumptive users, parties without water rights, and regulatory government agencies. Some water tribunal features, nevertheless, are worthy of replication, such as the informal, inexpensive, and prompt dispute resolution processes.[51]

IV. INSTITUTIONAL CHOICES FACING THE NINETEENTH CENTURY AMERICAN WEST

Although the New World setting in the American West was different, many of the Iberian dispute resolution procedures did make their way to the

42. MAASS, *supra* note 21, at 24.
43. *Id.* at 83.
44. *Id.*
45. *Id.* at 24–25.
46. *Id.* at 25.
47. *Id.* at 24.
48. U.N. Educ., *supra* note 21, at 6.
49. MAASS, *supra* note 21, at 23–24.
50. U.N. Educ., *supra* note 21, at 4.
51. A permanent water court, as proposed herein, might have a "rapid action" alternative dispute resolution (ADR) unit dedicated to prompt mediation of disputes before they become enmeshed in litigation.

American West.[52] In the Rio Grande Valley, rural irrigators formed associations (*acequias*) to build, maintain, and administer ditches.[53] They often elected a *mayordomo* to adjudicate ditch disputes. When disputes arose between different *acequias* within the same watershed, the *mayordomos* from these associations, like the Good Men of Iberia, would sit together in an effort to mediate the dispute.[54]

These traditional approaches, however, had their limits in the rapidly developing West. William Hammond Hall, an eminent civil engineer, described the complexity that faced California in the post-Civil War years:

> There was rivalry and conflict in taking out waters; there was contention between those who took them out and distributed them and those who wanted to use them; and there was an ever present contest between both these classes and those who wanted the water to remain in the streams for the maintenance or betterment of their personal interests.[55]

California, with its immense land base, extensive river system, variable climate, and competing legal regimes, could not look to seemingly quaint Spanish traditions to resolve these complex disputes. As one historian notes, "most Californians would have agreed with Nevada irrigation booster R. L. Fulton's observation in 1889: 'We believe the Anglo-Saxon needs no example from Spain, Mexico or Lombardy, but will find in itself [*sic*] the intelligence, virtue, and grit to conquer this land . . . .'"[56]

Accordingly, California, followed by other western states, looked to science and rationality for solutions, principally to the tenets of the Progressive Conservationism[57] and the Scientific Management Movement.[58] Administrative agencies emerged in response to water problems that legislatures and courts could not, or would not, address. To develop a "scientific" understanding of California's water problems, the state legislature established the na-

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52. *See generally* MICHAEL C. MEYER, WATER IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY 1550-1850 (Univ. of Ariz. Press 1984).

53. *See generally* PHIL LOVATO, LAS ACEQUIAS DEL NORTE (technical report #1, 1974).

54. *See generally id.*; STANLEY G. CRAWFORD, MAYORDOMO: CHRONICLE OF AN ACEQUIA IN NEW MEXICO (Univ. of N.M. Press 1988); Charlotte Benson Crossland, *Acequia Rights in Law and Tradition,* 32 J. SW. 278 (1990).

55. WM. HAM. HALL, IRRIGATION DEVELOPMENT 6 (1886).

56. DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY 1848-1902, 43 (1992).

57. For a history of the Progressive Conservation Movement, *see* SAMUEL HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1980) (1959). "In Hays's telling, experts, particularly engineers and foresters, were the heroes of the conservation movement, applying science to natural resource exploitation, bringing order and permanence to consumption." DAVID STRADLING, CONSERVATION IN THE PROGRESSIVE ERA: CLASSIC TEXTS 12 (2004).

58. Scientific management was a theory of management, pioneered by Frederick Winslow Taylor in the 1880s and 1890s, to apply rationality and engineering techniques to industrial processes. *See* FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911).

tion's first state engineer position in March 1878, with Hall as the first incumbent.[59] The function of the position was entirely exploratory: "[T]o investigate the problems of irrigation of the plains, the condition and capacity of the great drainage lines of the State, and the improvement of the navigation of rivers."[60]

The agency was created in response to a growing set of problems including flooding in Central Valley, concerns about sufficient water supply for irrigation, and pollution caused by hydraulic mining.[61] The position anticipated taking a comprehensive look at these problems and, in the view of one observer, "was a bold step, not only because California was the first state in the Union to turn its water problems over to experts . . . but also because it anticipated the doctrine of 'multiple use,' which did not come into its own until . . . half a century later."[62]

In later developments, California enacted other measures (discussed in Section V(B)(6), below) to expand and enhance these administrative processes, culminating in the State Water Resources Control Board (SWRCB) in 1967,[63] and resulting in a comprehensive administrative system unparalleled in the West.

During these same years, Colorado was wrestling with the issue of determining and supervising water rights. Borrowing from California, the legislature considered appointing a state hydraulic engineer who would have had an active role in water rights adjudication and supervision. The legislature, however, passed legislation establishing a state engineer's position with considerably less authority.[64]

In place of a powerful state engineer, the Colorado legislature passed legislation in 1879 affirming that the determination of water rights was the proper domain of the courts.[65] The legislature fine-tuned the judicial approach in 1881, thereby firmly establishing the state's commitment to judicial adjudication of water rights.[66] The legislature in 1969 undertook major updating of the judicial approach.[67] Colorado now has seven water divisions based on the state's major drainages, with a district judge, assisted by a referee, serving as the water judge in each division.[68] The referee and water judge consider applications for new appropriations and changes in appropriations.

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59. PISANI, *supra* note 56, at 176.
60. HALL, *supra* note 55, at 9.
61. PISANI, *supra* note 56, at 175.
62. *Id.* at 176.
63. CAL. WATER CODE § 175 (2015).
64. DUNBAR, *supra* note 8, at 97.
65. Act of Feb. 19, 1879, 1879 Colo. Sess. Laws 99-100, §19.
66. Act of Feb. 2, 1881, 1881 Colo. Sess. Laws 142-3, § 1; *See also* DUNBAR, *supra* note 8, at 95–98.
67. Water Right Determination and Administration Act of 1969, ch. 373, §§ 148-21-1-6 (codified as amended at COLO. REV. STAT. §§ 37-92-101-602 (2014)); *See generally* Gregory J. Hobbs, Jr., *Colorado's 1969 Adjudication and Administration Act: Settling In*, 3 U. DENV. WATER L. REV. 1 (1999).
68. COLO. REV. STAT. §§ 37-92-201, -203 (2015).

Although a professor at Colorado State, Elwood Mead influenced a similar debate in the Wyoming legislature. Mead was appointed as the territorial state engineer in 1888.[69] As a result of Mead's prodding, Wyoming adopted an amendment to its constitution in 1889 providing, in an important part, for a state engineer "who shall be appointed by the governor . . . and confirmed by the Senate . . . and he will have general supervision of the waters of the state . . . ."[70] The Wyoming state engineer has developed as one of the most important positions in that state's government and the leading western state's example of the administrative approach to water management.

In the eleven western states today, two states (Wyoming and New Mexico) have relatively freestanding state engineer offices.[71] In two other states (Nevada and Colorado), the state engineer is a position within a more broadly constituted natural resources agency.[72] Instead of a state engineer, four states (Arizona, California, Idaho, and Oregon) have a director of a water resources department or other arrangement.[73] Three states (Montana, Utah, and Washington) have a director of a division of water resources within a more broadly based natural resources agency. Colorado remains the only state vesting considerable permitting and transfer authority in the judiciary.

V. SPECIALIZED AMERICAN TRIBUNALS

A. Nonwater Tribunals

America is no stranger to specialized tribunals for conflict resolution, whether in the executive or judicial branch.[74] At the federal level, the Social Security Administration has administrative law judges who hear disability claims.[75] Closer to the natural resource field, the Department of Interior's Board of Land Appeals hears appeals of bureau decisions relating to the use, disposal, and mining of federal public lands.[76] The Environmental Protection

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69. DUNBAR, *supra* note 8, at 105.
70. WYO. CONST. art. VIII, § 5.
71. *Id.*; N.M. STAT. ANN. § 72-2-1 (2012-2015).
72. Nevada State Engineer heading the Division of Water Resources, a unit of the Nevada Department of Conservation & Natural Resources, NEV. REV. STAT. § 232.100 (2008); Colorado State Engineer heading the Division of Water Resources, a unit of the Colorado Department of Natural Resources, COLO. REV. STAT. § 24-1-124 (2015).
73. Arizona Department of Water Resources, ARIZ. REV. STAT. ANN. § 45-102 (2007); California Department of Resources (located within the Resources Agency but with water rights handed by the State Water Resources Control Board, see discussion at notes 117-134, *infra*), CAL. WATER CODE § 120 (2009); Idaho Department of Water Resources, IDAHO CODE ANN. § 42-1701 (2015); Oregon Water Resources Director (working under policy direction of Water Resources Commission), OR. REV. STAT. §§ 536.032, .037, .039 (2003).
74. *See generally* LAWRENCE BAUM, SPECIALIZING THE COURTS (2011).
75. 20 C.F.R. § 405.301 (2015).
76. 43 C.F.R. § 4.1(b)(2) (2014). Hearing matters concerning "(i) The use and disposition of public lands and their resources, including land selections arising under the Alaska Native Claims Settlement Act, as amended; (ii) the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf; and (iii) the conduct of surface coal mining under the Surface Mining Control and Reclamation Act of 1977." *Id.*

Agency's Environmental Appeals Board has as many as four (currently two) judges who are the final agency decision makers on administrative appeals under all major environmental statutes administered by EPA.[77]

The federal judiciary also has specialized courts. Article III judges (e.g., federal district court judges) may be summoned by the chief justice to serve on the U.S. Foreign Intelligence Surveillance Court.[78] Article I judges (positions created under Congress' enumerated powers) include bankruptcy judges,[79] tax court judges,[80] judges on the Court of Federal Claims,[81] and others.

This dual structure of specialized administrative and judicial tribunals has its parallels at the state level. For example, the administrative law judges at the California Public Utilities Commission, an independent administrative agency, hear rate setting cases and certain consumer complaints against utilities.[82] General jurisdiction court judges may, by comparison, serve long periods on domestic relations or criminal calendars or preside over drug courts. Delaware has its specialized business court (the Court of Chancery).[83] Arizona has just launched a commercial court, established by the state supreme court on a three-year trial basis.[84]

Oregon's Tax Court is particularly instructive.[85] The court is "the sole, exclusive and final judicial authority for the hearing and determination of all questions of law and fact arising under the tax laws of the state."[86] This includes personal income tax, property tax, corporate excise tax, timber tax, cigarette tax, local budget law, and property tax limitations.[87] The court hears appeals from local taxing authorities, the state department of revenue, and other government agencies.[88] The tax judge is elected in a nonpartisan, statewide election for a six-year term.[89] The judge appoints magistrate judges (currently three) to assist in the caseload.[90] Appeals are first taken to the magistrate judges and further de novo appeals may be taken to the tax

77. 40 C.F.R. § 1.25(e) (2014).

78. 50 U.S.C. § 1803(a) (2012).

79. 28 U.S.C. § 151 (2012).

80. 26 U.S.C. § 7441 (2012).

81. 28 U.S.C. § 171 (2012).

82. CAL. CONST. art. XII, § 6.

83. DEL. CONST. art. IV, § 10; *Welcome to the Court of Chancery of the State of Delaware*, DEL. ST. CTS., http://courts.delaware.gov/Chancery/. "The Delaware Court of Chancery is widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world's commercial affairs is conducted. Its unique competence in and exposure to issues of business law are unmatched." *Id.*

84. Order Authorizing a Commercial Court Pilot Program in the Superior Court in Maricopa County, No. 2015-15 (Feb. 18, 2015).

85. OR. REV. STAT. § 305.405 (2003).

86. *Id.* § 305.410(1).

87. *Tax Appeals*, OR. TAX CT., 3, http://courts.oregon.gov/Tax/docs/CourtHandbook.pdf (last visited Oct. 6, 2015).

88. *Id.* at 1.

89. OR. REV. STAT. § 305.452(1) (2003).

90. *Id.* § 305.404.

judge.[91] Appeals from the tax judge's decisions are taken directly to the Oregon Supreme Court.[92] As of 2012, the *Chicago Tribune* reported: "Eighteen . . . states have well-established tax courts, and another nine states and the District of Columbia offer independent tax courts or forums that do not have to be staffed by tax experts."[93]

The foregoing discussion indicates that Americans have vested a variety of specialized tribunals with considerable conflict resolution authority concerning many aspects of their property and lives. Whether these forums are located in the executive or judicial branches, they represent a public judgment as to the need and desirability for adjudicators to have substantial expertise and experience over the relevant subject matter.

B. Western Water Tribunals

Western states have a variety of administrative and judicial entities that may be considered examples of water tribunals, although for limited purposes.

1. Administrative Tribunals

Some states have adopted administrative approaches to dispute resolution concerning water. As we have seen with reference to Wyoming, one common approach, also represented by New Mexico, provides for a state engineer who issues permits, approves transfers, and completes preparatory work for judicial adjudications.[94] Another New Mexico state agency, the Environment Department (including its Water Quality Control Commission),[95] administers water quality and drinking water programs. In other states, such as Oregon, the Director of the Water Resources Department performs many of the functions of a state engineer.[96]

2. Colorado Water Court

On the judicial side of the ledger, we have already discussed Colorado's permanent water court division of its district court.[97] Because the state has practiced ongoing adjudications for over a century, the process is essentially complete for state law rights. Both new rights and transfers are reflected in updated judicial decrees. Federal rights are also integrated into the state system. Colorado reached settlements with the state's two Indian tribes, the Ute Mountain and Southern Ute Tribes, in the late 1980s with their rights now

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91. *Id.* § 305.425(1).
92. *Id.* § 305.445.
93. Nanette Byrnes, *Heard in more states: See you in tax court!*, CHI. TRIBUNE (May 25, 2012), http://articles.chicagotribune.com/2012-05-25/news/sns-rt-us-usa-tax-state-courtsbre84o0bw-20120525_1_tax-courts-tax-appeals-tax-authorities.
94. N.M. STAT. ANN. § 72-2-1 (2012-2015).
95. *Id.* §§ 74-1-6, 74-6-3.
96. OR. REV. STAT. §§ 536.032, .037 (2003).
97. *See supra* notes 66-68 and accompanying text.

folded into the ongoing water division decrees.[98] The water court also recognized federal agency claims for the Black Canyon of the Gunnison National Park in December 2008.[99] The decree was the result of multiyear negotiations and mediation among more than thirty parties.[100]

3. Montana Water Court

Montana is one of two states (the other being Idaho) with long-term water courts established for purposes of conducting large general stream adjudications. Montana established its water court in 1979, as part of the judicial branch, for the exclusive purpose of conducting the statewide general stream adjudication.[101] The court consists of a chief water judge at a permanent facility in Bozeman with general jurisdiction district court judges denominated as divisional water court judges.[102] In reality, most of the adjudication takes place before the chief water judge and the judge's team of special masters.

4. Idaho's Snake River Basin Adjudication Court

Idaho commenced its now completed Snake River Basin Adjudication in 1987 to determine water rights throughout the entire Snake River system, including rights to groundwater.[103] The case involved two-thirds of the state's irrigated agriculture and over 150,000 claims, including extensive filings by tribes and federal agencies.[104] Using a hybrid system, the state department of water resources reviewed claims and submitted reports to the specialized water court presided over by a district judge assigned essentially full-time to the case. Special masters and the judge resolved objections.[105] The court remains part of the judicial branch.

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98. Consent Decree In The Matter of the Application for Water Rights in the United States of America, at 1, No. W-1603-76F, (Colo. Water Ct., Div. 7, Dec. 19, 1991), http://www.sjwc.org/ALP/Support_Document/19911219%20Consent%20Decree%20in%20Case%20No.%20W-1603-76F.pdf; Consent Decree In The Matter of the Application for Water Rights in the United States of America, at 1, No. W-1603-76J (Colo. Water Ct., Div. 7, Dec. 19, 1991), http://www.sjwc.org/ALP/Support_Document/19911219%20Consent%20Decree%20in%20Case%20No.%20W-1603-76J.pdf.

99. *Water Right Quantification Decreed for Black Canyon of the Gunnison National Park*, NAT'L PARKS SERV. (Jan. 24, 2012), http://www.nature.nps.gov/water/Homepage/Black_canyon.cfm (last visited Oct. 6, 2015).

100. *Id.*

101. MONT. CODE ANN. §§ 3-7-221, 85-2-214 (2009).

102. *Id.* § 3-7-201, -221.

103. Commencement Order, *In re* Snake River Basin Adjudication, No. 39576 (D. Idaho Nov. 19, 1987).

104. *Id.*

105. *Informational Brochure*, SNAKE RIVER BASIN ADJUDICATION, http://srba.idaho.gov/doc/broch1.htm.

While the court made numerous rulings on federal agency claims, the adjudication was somewhat simplified by major settlements with the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation[106] and the Nez Perce Tribe.[107]

Idaho essentially completed the Snake River Basin Adjudication with the signing of the final decree by Judge Eric Wildman at an elaborate ceremony in Boise on August 25, 2014.[108] The water court will continue to hear water-related appeals from state administrative agencies[109] and now also turns its attention to smaller adjudications in northern Idaho.[110]

5. Washington's Pollution Control Hearings Board

The Washington Pollution Control Hearings Board (PCHB) is a legislatively created, substantively broad, quasi-judicial agency standing independent of other state and local government agencies.[111] The PCHB is administratively housed in the Environmental Land and Use Hearings Office, itself an independent, quasi-judicial state agency.[112]

The PCHB hears appeals from orders and decisions made by:

1. Local and regional air pollution control agencies or authorities.

2. The State Department of Ecology (the agency managing water permitting, water quality, and many other regulatory programs).

3. The Department of Fish and Wildlife pertaining to hydraulic project approval decisions.

4. The Department of Natural Resources pertaining to forest practices.

5. Other agencies as provided by law.[113]

The PCHB consists of three full-time members (one of whom must be an attorney), appointed by the governor and confirmed by the state senate for staggered six-year terms.[114] The members also constitute the Shorelines Hearings Board.[115] The PCHB may also appoint administrative law judges (currently three) who may be assigned by the board to serve as the presiding officer in prehearing conferences or hearings.[116]

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106. Fort Hall Indian Water Rights Agreement of 1990, Shoshone-Bannock Tribes—U.S., Nov. 6, 1990.
107. Snake River Water Rights Agreement of 2004, Nez Perce Tribe—U.S., Dec. 8, 2004.
108. Final Unified Decree, *In re* SRBA, No. 39576 (D. Idaho Aug. 25, 2014).
109. *See* Appointment of the SRBA, *supra* note 5.
110. IDAHO CODE § 1406B (2015).
111. WASH. REV. CODE § 43.21B.010 (2014).
112. *Id.* § 43.21B.005.
113. *Id.* § 43.21B.110.
114. *Id.* § 43.21B.020–.030.
115. ABOUT THE PCHB, http://www.eluho.wa.gov/Board/PCHB (last visited Oct. 6, 2015).
116. *Id.*

The board's final decisions are appealable to superior court.

6. California's State Water Resources Control Board

Another quasi-judicial agency is the California State Water Resources Control Board (SWRCB).[117] The SWRCB is the culmination of a merger of water rights and water quality regulatory programs that serves as a national model of how these traditionally separate fields can be integrated. Like many other states, California began by regulating water rights and quality separately. The state's first water rights permitting program was put in place by the Water Commission Act of 1913[118] and pertained only to the permitting of post-1913 appropriative rights. The Water Commission eventually became the State Water Rights Board in 1956 when a separate Department of Water Resources was established, primarily to manage the construction and operation of the State Water Project (the diversion of water from the northern Bay-Delta estuary for transport to southern California).[119]

On a separate track, the legislature passed the Dickey Water Pollution Act in 1949 to establish a statewide policy for pollution control and to coordinate state and local agency actions in addressing water pollution.[120] The act created a State Water Pollution Control Board and nine Regional Water Pollution Control Boards for the state's major watersheds.

Legislation in 1967 brought about the merger of the State Water Rights Board and the State Pollution Control Board to create the State Water Resources Control Board that is in existence today.[121] The regional board structure was retained but brought under the umbrella of the state board.[122] In 1969, the legislature passed the pioneering Porter-Cologne Water Quality Control Act,[123] (which inspired the Federal Water Pollution Control Act Amendments of 1972, the Clean Water Act[124]) and expanded the mission and enhanced the authority of the state and local boards.

The SWRCB consists of five full-time members, with each member filling a certain occupational category (e.g., engineer, lawyer).[125] They are appointed by the governor and approved by the state senate.[126] The board protects water quality by setting statewide policy, coordinating and supporting the regional boards, and reviewing petitions appealing regional board decisions.[127] The regional boards are semi-autonomous and each consists of seven

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117. CAL. WATER CODE § 175 (2015).

118. 1913 Cal. Stat. 1012.

119. *History of the Water Boards: The Early Years of Water Rights*, SWCRB.CA.GOV, http://www.swrcb.ca.gov/about_us/water_boards_structure/history_water_rights.shtml, (last visited Sept. 20, 2011).

120. 1949 Cal. Stat. 2782, 2789.

121. ARTHUR L. LITTLEWORTH & ERIC L. GARNER, CALIFORNIA WATER 113 (1995).

122. *History of the Water Boards*, *supra* note 119.

123. CAL. WATER CODE § 13000 (2015).

124. Pub. L. 92-500, 86 Stat. 816 (1972).

125. CAL. WATER CODE § 175 (2015).

126. *Id.*

127. *Id.* §§ 174, 179, 183; *See also* LITTLEWORTH & GARNER, *supra* note 121, at 113–39.

part-time board members, also appointed by the governor and confirmed by the senate.[128]

The state board has responsibility for three major program areas: water rights (permitting and enforcement), water quality, and a loan and grant program supporting water quality infrastructure.[129] Together with the state boards, the regional boards implement the state and federal water quality laws; but the regional boards have no role in water right permitting.[130]

Contested cases before the SWRCB usually proceed as follows:

> Most Board hearings are quasi-judicial proceedings used to develop an adequate record upon which the Board can rely to make a sound decision. A quorum of the Board is not required in order to conduct a hearing; however, a Board member designated as Hearing Officer will direct the hearing. Hearings are formal proceedings in the sense that due process standards must be afforded the participating parties. However, they are generally not conducted according to technical rules relating to evidence and witnesses, but include an opportunity for the public to make comments on a proposed action of the Water Boards.[131]

Adjudicatory matters are subject to an ex parte communication ban.[132] Rulemaking or policymaking proposals provide opportunity for public comment.[133] Appeals or writs may be taken under the administrative procedure act to superior court.[134]

California has accomplished a meritorious integration of usually separate functions. It has combined both water rights and water quality regulatory matters into one agency. The state board has ability to undertake policy and rulemaking, as well as adjudicatory matters. The state board can monitor statewide trends and undertake statewide programs. The local boards can mediate federal and state policies and priorities at the local level.

VI. SPECIALIZED TRIBUNALS WORLDWIDE

Many international examples of specialized water tribunals can be found; however, most of them are dedicated to the adjudication of multinational water disputes. The broader trend is the creation of so-called "environmental courts and tribunals" (ECTs), a movement recently surveyed in *Greening Justice*, a comprehensive study by University of Denver professors George

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128. CAL. WATER CODE § 13201 (2015).
129. *Id.*
130. LITTLEWORTH & GARNER, *supra* note 121, at 122.
131. *Citizen's Guide to Working with the California Water Boards*, STATE WATER BOARD 8 (Jan. 2013), http://www.waterboards.ca.gov/publications_forms/publications/general/docs/citizenguide2011.pdf.
132. *Id.* at 10.
133. *Id.* at 26.
134. CAL. GOV'T CODE § 11350 (2015).

Pring and Catherine Pring,[135] The study was commissioned by The Access Initiative to advance the access to justice goal set forth in Principle 10 of the 1992 Rio Declaration: "Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[136]

According to the authors, numerous developments have converged to increase worldwide interest in such specialized tribunals:

> Over time national, state/provincial, local, and international environmental laws have become increasingly complex, rule-laden, and reliant on technical and economic considerations. A myriad of separate laws have developed dealing with [environmental and resource] issues . . . . Added to this, environmental principles have emerged or strengthened, including the [public] access rights . . . ; sustainable development; intergenerational equity; and the precautionary, prevention, and polluter-pays principles . . . . These principles also need to be thoughtfully integrated and balanced with more traditional socio-economic rights, including personal property use, employment, and economic development .
>
> . . .
>
> ECTs are looked to as one solution for fairly and transparently balancing the conflicts between protecting the environment and promoting development; for managing cases more efficiently and effectively; for supporting greater public information, participation, and access to justice; and for achieving more informed and equitable decisions.[137]

In research extending over two years, the authors documented 354 ECTs in 41 counties, with half of them established since 2004.[138] Roughly 40 of all ECTs are agencies of federal, state, and local governments in the United States.[139] The functions of ECTs are diverse and depend on local laws and circumstances.

Predicting "the increase in ECTs and their on-going reform and improvement will continue,"[140] the authors identify twelve "building blocks" or "design decisions" lawmakers should address in fashioning an environmental court or tribunal in their jurisdiction—regardless of the functions it is destined to undertake.[141] These design decisions are also relevant to the creation of a permanent water court. They are summarized in Table 1.

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135. George Pring & Catherine Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (2009).
136. *Id.* at 7–8.
137. *Id.* at 10–11.
138. *Id.* at xiii.
139. *Id.* at 108–09.
140. *Id.* at 91.
141. *Id.* at xiv & 20.

TABLE 1. The 12 Building Blocks or Design Decisions for Creating ECTs [142]

BUILDING BLOCK DECISION		DEFINITION	INTERESTING EXAMPLES
1	**Type of Forum**	Judicial court, quasi-judicial tribunal, ombudsman or other	Vermont Environmental Court, Tasmania Resources, Management and Planning Appeals Tribunal, Hungary's Office of the Parliamentary Commissioner for Future Generations, Japan's Environmental Dispute Coordination Commission
2	**Legal Jurisdiction**	Laws included under ECT's authority: civil, administrative, criminal or combined jurisdiction	Land and Environment Court of New South Wales, Australia, Environmental Commission of Trinidad and Tobago
3	**ECT Level**	Internal agency review, trial, intermediate appellate, or final appellate	Supreme Court of India, United States Environment Protection Agency
4	**Geographic Area**	Area included in jurisdiction: municipal, regional, state, provincial, national or other	Amazonas Environmental Court in Brazil, Planning and Environment Court of Queensland, Australia
5	**Case Volume**	Number of cases needed to justify type of ECT selected	Environmental Court of Dhaka, Bangladesh
6	**Standing**	Plaintiff credentials needed to file a complaint	Republic of South Africa, Supreme Court, Philippines
7	**Costs**	Variety of costs and risks to parties filing an environmental complaint	Environmental Court of New Zealand

142. *Id.* at 20.

8	**Access to Scientific- Technical Expertise**	Methods for assuring decision-makers have access to unbiased experts	Environmental Court of Appeal in Sweden, Environmental Board of Appeal in Denmark
9	**Alternative Dispute Resolution (ADR)**	Incorporation of various types of ADR in ECT process to save money and generate better outcomes	Multi-door courthouse of Land and Environment Court of New South Wales, Australia
10	**Competence of ECT judges and decision- makers**	Need for selection processes, qualifications, training, tenure and salary to support competence	Finland's Supreme Administrative Court, Supreme Court of Thailand, New York City, Brazil
11	**Case Management**	Administrative tools to increase efficiency, effectiveness, and access	Planning and Environment Court of Queensland, Australia
12	**Enforcement Tools and Remedies**	Powers of ECT to use the right remedy(ies) to solve the problem	Federal prosecutors of Brazil

The remainder of this section discusses two specialized ECTs established to address internal water disputes. One, the New South Wales Land and Environment Court (with water as one component of its portfolio), has been lauded as a leading example of such specialized courts; the other, the South African Water Tribunal, has enjoyed lesser success.

A. New South Wales Land and Environment Court

New South Wales is a state in southeastern Australia extending 309,130 square miles—roughly twice the size of Montana.[143] The state, with its capital in Sydney, has a population of 7.52 million people.[144]

143. *Land Areas of States and Territories*, AUSTRALIAN GOVERNMENT (800,642 km2), http://www.ga.gov.au/scientific-topics/national-location-information/dimensions/area-of-australia-states-and-territories#heading-1 (last visited Nov. 4, 2015).

144. *New South Wales State Summary*, AUSTRALIAN BUREAU OF STATISTICS (June 2014), http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/3218.0Main%20Features202013-14?opendocument&tabname=Summary&prodno=3218.0&issue=2013-14&num=&view= (last visited Dec. 20, 2015).

Prior to 1980, the state had a series of specialized tribunals and courts separately handling such matters as property appraisal and taxation, building and subdivision matters, and other land-related matters.[145] At the time, environmental law was essentially nonexistent. Parliamentarians desired to create a specialized forum for environmental, planning, and land matters.[146] The result was passage of the Land and Environmental Court Act of 1979 creating the Land and Environment Court.[147]

Parliament vested the court with eight broad areas of original and appellate jurisdiction: (1) appeals of decisions from environmental and planning agencies; (2) appeals concerning tree and hedge disputes; (3) land condemnation cases including Aboriginal land claims; (4) review and enforcement of decisions under planning or environmental laws; (5) criminal proceedings concerning violations of planning or environmental laws; (6) review of criminal proceedings conducted by lower, local courts; (7) mining matters; and (8) appeals of decisions made by judges and commissioners of the court itself.[148] The court's jurisdiction in these areas is exclusive.[149]

The court's criminal law decisions can be appealed to the New South Wales Court of Criminal Appeal and subsequently to the High Court of Australia.[150] The court's noncriminal decisions can be appealed to the New South Wales Court of Appeal and subsequently to the High Court of Australia although the court may transfer certain proceedings to the New South Wales Supreme Court.[151]

Although the majority of the proceedings involve land and environmental matters, the court does hear proceedings under the state Water Management Act (2000) and the Threatened Species Conservation Act (1995).[152]

The court consists of judges (currently six) appointed by the state governor and full-time commissioners (currently six) and acting commissioners (currently 15) appointed by the court.[153] The acting commissioners need not be attorneys and the panel includes a diversity of experts in such areas as ecology, anthropology, surveying, and cultural heritage.[154] The chief judge

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145. Brian J. Preston, *Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study*, 29 PACE ENVTL. L. REV. 396, 402 (2012).

146. *Id.*

147. *Land and Environment Court Act 1979*, N.S.W. GOV'T, http://www.legislation.nsw.gov.au/inforcepdf/1979-204.pdf?id=8a083713-245b-4a4a-ccec-9bcf1a21101d (last visited Nov. 6, 2015).

148. Preston, *supra* note 145, at 403.

149. *Id.*

150. *Id.* at 401.

151. *Id.*

152. *Id.* at 405.

153. *Judicial Officers and Decision Makers*, LAND & ENV'T CT., http://www.lec.justice.nsw.gov.au/Pages/about/judicial_officers.aspx (last visited Dec. 20, 2015).

154. *Id.*

may direct that a commissioner sit with a judge or that two or more commissioners sit together to hear certain matters.[155]

Though an interested commentator, Chief Judge Brian Preston has published several articles describing the court and reviewing its merits.[156] He believes the court's ability to specialize has resulted in the rationalization and elaboration of environmental law; independence from other government agencies; improved decision-making legitimacy due to the stature of the court; and "value-added" which appears to be an argument that the court, because of its specialization and expertise, renders better decisions.[157]

A legislative review of the court in 2001 did document complaints by local governments that the court was preempting local decision making concerning land use and other matters—perhaps evidence of a political debate rather than an institutional shortcoming of the court.[158]

The Land and Environment Court has recently been emulated by other countries. In 2010, both Kenya and India established specialized environment courts. Kenya's 2010 constitution established a superior court of High Court status to address disputes relating to the environment and land.[159] India established a National Green Tribunal, also adopting the Land and Environment Court's example.[160]

B. South Africa Water Tribunal

The South Africa Water Tribunal was established in 1998 under the National Water Act to replace an earlier water court.[161] While purportedly an independent court, the tribunal has been enmeshed in a political debate concerning its authority that resulted in the court being dormant from 2011 to 2013.[162]

The water tribunal has a chair, deputy chair, and other members (presently a total of five part-time members) who are appointed by the Minister of Justice and Constitutional Development upon the recommendation of the Judicial Service Commission (the judicial council for the country).[163] Tribunal

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155. Stewart Smith, *A Review of the Land and Environment Court* 2–3 (N.S.W. Parliamentary Library Research Serv., Briefing Paper 13/2001), http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/ResearchBf132001 (hereinafter Briefing Paper).

156. *See*, *e.g.*, Preston, *supra* note145; Brian J. Preston, *Judicial Specialization through Environment Courts: A Case Study of the Land and Environment Court of New South Wales*, 29 PACE ENVTL. L. REV. 602 (2012).

157. Preston, *supra* note 145, at 436–39.

158. Briefing Paper, *supra* note 155, at 16–20.

159. CONSTITUTION art. 162(2) (2010) (Kenya).

160. National Green Tribunal Act, No. 19 of 2010, INDIA CODE (2010), vol. 25.

161. National Water Act 36 of 1998 § 146 (S. Afr.).

162. Wayne Ncube, *Resurrecting the Water Tribunal*, MAIL & GUARDIAN, (May 6, 2013), http://thoughtleader.co.za/lawyersforhumanrights/2013/05/06/resurrecting-the-water-tribunal/.

163. National Water Act 36 of 1998 § 146(5) (S. Afr.).

members are to be "knowledgeable in law, engineering, water resource management," or similar fields.[164]

The water tribunal hears appeals concerning a variety of decisions made under the National Water Act including disputes over permitting, transfers, and dam safety requirements.[165] At least some of these appeals may be heard *de novo*.[166] Appeals can be taken from the tribunal to a High Court, the general jurisdiction court for the country.[167]

The Water and Environmental Affairs Minister sought to disband the tribunal in 2011 pending the passage of legislation limiting the tribunal's jurisdiction.[168] A High Court judge ruled the minister lacked the authority to disband the court.[169] A lesson to be drawn from this experience is the peril to water dispute resolution forums when too closely tied to political officials.

VII. PERMANENT WATER COURT PROPOSALS

As previously discussed, a series of developments has rekindled the old debate between Colorado and Wyoming on administrative versus judicial approaches to water conflict-resolution. In the process, proposals for permanent water courts have been advanced in four states.

A. Idaho

Recognizing the "particular expertise in the area of water rights adjudication," the Idaho Supreme Court has already created a somewhat permanent water court.[170] On December 9, 2009, the court issued an administrative order, pursuant to its constitutional supervisory role, instructing, "all petitions for judicial review of any decision regarding the administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication, District Court. . . ."[171]

The administrative order does not address water law matters brought in another district court, but there are provisions under rules of civil procedure for the transfer of such cases.[172] The administrative order also does not specify what the procedure will be when the court completes its work in the northern Idaho adjudication. The likely duration of those cases does ensure that the court will handle administrative appeals for many years to come.

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164. *Id.* § 146(4).
165. *Id.* § 148.
166. *Id.*
167. *Id.*
168. Sue Blaine, *Tribunal Suspended After Losing Chairman*, BUSINESS DAY, (Sept. 13, 2012), http://www.bdlive.co.za/national/2012/09/13/water-tribunal-suspended-after-losing-chairman.
169. Michael Vermaak, Melissa Strydom van Dyke, *National Water Act: Challenging Appeal Decisions*, INTERNATIONAL LAW OFFICE 1–2 (Mar. 25, 2013), http://www.bowman.co.za/filebrowser/contentdocuments/national_water_act_challenging_appeal_decisions.pdf.
170. Appointment of the SRBA, *supra* note 5, at 3.
171. *Id.*
172. Idaho R. Civ. P. 40(e).

B. Washington

In 2002, the Washington legislature created a task force, subsequently known as the Water Disputes Task Force, to study how the resolution of water right disputes might be improved.[173] The task force consisted of representatives from the legislature, judiciary, the state Pollution Control Hearings Board (PCHB), and the Department of Ecology.[174]

The study appears to have been motivated by the great number of water rights that have not been adjudicated in the state, along with unquantified federal and Indian reserved water rights. As the task force subsequently noted, "there are currently 170,000 unadjudicated water right claims on file with the state. [The Department of] Ecology estimates the amount of time it will take to fully adjudicate all basins in the state to be in the range of decades, based on streamlining measures and the creation of a Water Court, to centuries if we retain current law and funding levels."[175]

When the task force reported in December 2003,"[o]ne overriding recommendation" was "the creation of a specialized water rights court."[176] The water court would be created as a branch of the superior court system and would require a state constitutional amendment.[177] The water court would be comprised of up to four judges, with one Judge coming from the geographic regions of the three courts of appeals divisions, and one judge "floating" state wide.[178] The task force also recommended that decisions of the superior court, or the water court if established, be given deference by the appellate courts.[179]

The task force recommended that the proposed water court's exclusive jurisdiction include general stream adjudications, appeals from the PCHB, and administrative procedure act challenges to stream-flow rules.[180] The task force acknowledged that a constitutional change would be necessary to modify the general jurisdiction of the superior court.[181] The task force also recommended that the constitutional amendment enable the specialized water court to update adjudication decrees and to hear cases involving water quality.[182] These latter two items, however, would also require legislative action.[183]

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173. Water Disputes Task Force, A Report to the Washington State Legislature (2003) [hereinafter Water Disputes Task Force].
174. *Id.* at 1.
175. *Id.* at 14.
176. *Id.* at 3.
177. *Id.* at 1.
178. *Id.* at 10–11.
179. *Id.* at 5.
180. *Id.* at 4.
181. *Id.* at 3.
182. *Id.* at 3.
183. *Id.* at 10.

While the task force proposed a water court with up to four judges, the legislature would determine how many positions would be filled based on current workload.[184] While the supreme court could recommend judicial candidates, the governor would appoint the judges who would stand at the next retention election.[185] Alternatively, some members of the task force advocated election of the water court judges by the voters of the counties in each of the divisions.[186] Qualifications for judicial positions would include five years of legal experience; desirable additional qualifications would be experience in water law or experience in a judicial or quasi-judicial setting.[187]

The water court would sit throughout the state.[188] The water court judges could also appoint court commissioners, special masters, or other staff to help them with the pending caseload.[189] The task force developed a detailed estimate on the cost of establishing a water court, with the estimates ranging from $2 million to $4 million per year depending on the number of judges and commissioners.[190] The source of funding would be state funding and filing fees.[191]

In support of its recommendations, the task force argued, "a Water Court system will provide the best means for completing general adjudications statewide in a meaningful timeframe."[192] The task force offered other justifications for its water court recommendation:

> [1] Specialized judges and court appointed commissioners, referees, and other Water Court staff can render decisions on the complex legal and technical issues that arise in water rights disputes more efficiently and consistently, with a resultant reduction in the cost and time of litigation.
>
> [2] The expertise developed by the specialized judges in water rights disputes will be able to be drawn upon in future water rights disputes, again reducing the time and cost of litigation.
>
> [3] A common system for managing court action involving water rights disputes will be easier to administer, will be more understandable and predictable, and will result in less cost and reduced time in litigation for all parties.
>
> [4] By sitting in each of the three regions of the state, the Water Court judges and proceedings will be considerably more accessible to the localities where the water rights disputes arise.
>
> [5] Finally, by creating a Water Court with multiple judges and referees, the Legislature will provide a system capable of completing the

184. *Id.* at 3.
185. *Id.* at 10–11.
186. *Id.* at 10.
187. *Id.* at 10–11.
188. *Id.* at 12.
189. *Id.* at 13.
190. *Id.* at 14.
191. *Id.* at 13–14.
192. *Id.* at 14.

> adjudication of pending water right claims within a reasonable time frame, thus fostering greater certainty for all water interests sooner.[193]

The Board for Judicial Administration (BJA), the policymaking body for the Washington judicial branch, considered the task force report and a study from its own Water Court Work Group. On July 16, 2004, the BJA adopted a judicial policy statement on general water right adjudications.[194] The policy statement distilled the work group's recommendations into a two-page set of principles. The policy statement supported the creation of a specialized water court if the legislative and executive branches decided to increase the pace of general adjudications.[195] The policy statement spelled out some of the desired features for a proposed water court including the selection process for the water court judges, the length of their terms, the types of cases to be heard, the need for state funding, the need for experienced court commissioners, the creation of a separate and adequately funded clerk's office, and the creation of regional divisions.[196] The BJA's policy statement represents the official position of the state judiciary.

The proposal, even with BJA's qualified blessing, never got traction in the legislature. Funding was an issue as the national recession deepened. The need for a constitutional amendment and the cost of a supporting campaign were hurdles that appear to have overshadowed the need to establish a permanent water court.

C. Montana

As mentioned, Montana may be within several years of completing its statewide adjudication, started in an earlier form in 1973 and assumed by the water court in 1979.[197] Like Idaho, the issue arises about what happens to the court when the adjudication is complete.

In 2014, the Montana Supreme Court asked the University of Montana's Land Use and Natural Resources Clinic to study and make recommendations on improvements to the adjudication process.[198] While the clinic's final report did not recommend a permanent water court, one recommendation (following Idaho's lead) was that the appeals of the Department of Natural Resources and Conservation's water decisions go, at the appellant's option, to the water

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193. *Id.* at 15.
194. Bd. for Jud. Admin., Policy Statement by the Board for Judicial Administration on General Water Right Adjudications (2004), www.courts.wa.gov/committee/docs/BJA%20policy%20statement.doc.
195. *Id.*
196. *Id.*
197. 1979 Mont. Laws 1901.
198. *See* Univ. of Mont., Land & Envtl. Clinic, Water Rights in Montana (2014).

court as an alternative venue.[199] The study argued, "the benefits of this process could be reduced workload to the district courts and increased expertise for water users appealing agency matters."[200]

The 2015 state legislature considered a bill presenting a variation of this recommendation. Senate Bill (S.B.) 362 was titled "An Act Providing Permanent Duties for the Water Court."[201] The bill would create a court of water appeals, consisting of the existing chief water judge and the associate water judge, who would hear (in addition to ongoing adjudication duties) appeals of "water distribution controversies" taken from other Montana district courts.[202] A party to such an appeal could also petition the supreme court to take a novel or constitutional question case and bypass the court of water appeals. Presumably, water-related appeals from state administrative agencies would continue to go, in the first instance, to district court under the administrative procedure act and, if considered a "water distribution controversy," could then be appealed to the court of water appeals.

This proposed legislation did not specifically address what happens to this appellate structure once the main work of the general stream adjudication is complete. Also, jurisdiction limited to water distribution disputes may be too narrow in a contemporary water management context. Finally, a two-judge panel may result in impasse in some cases. Equally troubling is the prospect that one judge on the appellate panel is under the ongoing, direct supervision of the other judge. For the moment, these concerns are moot as the bill failed to clear the state senate.

D. California

Persistent drought conditions, groundwater overdrafting (particularly in the southern part of the state), and other issues have resulted in a recent, public debate in California over the merits of a permanent water court. While the momentum for such a court has dissipated due to passage in 2014 of historic groundwater legislation,[203] the discussion of the relevant issues by the California water law community is helpful to other states as they consider similar measures.

Until passage of the groundwater law, "the court system offer[ed] the only available mandatory process for administering groundwater disputes,"[204] usually by joining all pumpers, imposing a management plan, and retaining jurisdiction. The judicial process, however, was very prone to de-

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199. *Id.* at 4.
200. *Id.* at 30.
201. S.B. 362, 64th Leg., Reg. Sess. (Mont. 2015).
202. *Id.*
203. Sustainable Groundwater Management Act, S.B. 1168, 2013-14 Reg. Sess. (Cal. 2014).
204. Markham, *supra* note 13, at 124.

lays. In the Santa Maria basin groundwater adjudication, the case was shuttled among five superior court judges, due to challenges and changes in court personnel, during a five-year period.[205]

Another proceeding, the Chino Basin adjudication, is an example of the transaction costs involved. There, the assigned judge, faced with the complexity of issues, appointed an attorney and an engineer to advise him.[206] As one critic, attorney James L. Markham, commented, "Parties to that action not only pay for their own engineers and for a complex system of committees and an elected Watermaster board, but also in essence employ an attorney and engineer to provide independent advice to the court."[207]

Markham proposed the designation of judicial water divisions to mirror the regional boards, with one water judge for each division.[208] The judge would be a superior court judge, presumably serving full-time in that capacity.[209] In addition to the usual qualifications for selection as a judge, the water judge would be required to have ten-years' experience with groundwater rights as a judge, practitioner, or law professor.[210] The water judge would have exclusive jurisdiction over groundwater cases.[211] The judge would not be subject to preemptory challenges; in cases of challenges for cause, another water judge would hear the case.[212] Appeals of the water judge's decisions would be directly to the state supreme court.[213]

Some elements of Markham's proposal were introduced in the California Assembly in 2005 as Assembly Bill (A.B.) 1453,[214] but the bill died in committee in early 2006. The bill faced stiff opposition by the California Judicial Council that frequently has opposed specialized courts (such as business courts) and has urged that complicated water cases be managed under more generic complex litigation procedures the Council has developed. Other commentators pointed to an apparent state preference for judicial generalists: "Although specialized judges can bring greater expertise to water disputes, any move toward greater specialization should also recognize the value of generalization. Judicial generalists often bring a broader perspective to water

205. *Id.* at 125.
206. *Id.*
207. *Id.*
208. *Id.* at 127.
209. *Id.* at 127–28.
210. Markham, *supra* note 13, at 128.
211. *Id.*
212. *Id.*
213. *Id.*
214. A.B. 1453, 2005 Leg. (Cal. 2005).

issues than specialists might, and they sometimes are more willing to question traditional solutions."[215] Other critics argued that even a specialized water court would not have the capacity to address California's complex water law.[216]

In view of this opposition, Yichuan Wang, in an overview of the water court controversy, concluded, "California's history with AB 1453 and the Judicial Council's resistance to special courts suggest that California may likely make more progress by improving existing tools."[217] Among those suggested tools are comprehensive basin management, drawing the boundary of water districts to be congruent with watersheds, developing metrics on the success of the Judicial Council's complex litigation program in addressing water adjudications, and improving judicial and public education concerning water law.[218] In addition to these modest measures, Yang offered one meriting more serious attention: California policymakers should avoid "path dependency"—that is, "resisting large institutional changes because of bias rather than analysis [thereby shutting] down a stream of potential solutions that might actually serve in addressing the state's mounting water challenges."[219] In short, remain receptive to change.

VIII. OTHER SPECIALIZATION MEASURES

Over the years, courts have developed methods for addressing the need for specialized, expert knowledge for resolving certain cases. In some courts, the presiding judge may assign cases to a judge with relevant expertise. Federal cases over the years concerning California's Bay Delta and the San Joaquin River were frequently assigned to the same federal judge in Fresno who developed expertise and detailed knowledge of the issues.[220] Such tailored assignment, however, is unavailable in courts practicing random or neutral case assignment (e.g., every third case is assigned to Judge A).

At the federal level, one relatively recent example of a specialized court is the United States Foreign Intelligence Surveillance Court.[221] Federal

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215. Ellen Hanak et al., Managing California's Water From Conflict to Reconciliation 356 (2011).

216. *See, e.g.*, Pitzer, *supra* note 13, at 7 (*quoting* Art Baggett): "Other western states have a real simple water rights system, it's almost all appropriative. It's simple—first in time, first in right."

217. Yichuan Yang, *Courting Colorado's Water Courts in California to Improve Water Rights Adjudication? Letting Go and Improving Existing Institutions*, 15 VT. J. ENVTL. L. 538, 560 (2013-14).

218. *Id.* at 560–63.

219. *Id.* at 562.

220. Pitzer, *supra* note 13, at 8 (*quoting* Alf Brandt): "'We kind of had the equivalent of a water court . . . where related cases go to the same judge so that judge develops expertise and it becomes the de facto water court. That's what [U.S. District Court] Judge Wanger was for many years.'"

221. *See* 50 U.S.C. § 1803(a) (2015).

judges from around the country are detailed for multiyear service in reviewing warrant requests in matters pertaining to national security and intelligence.[222]

At the state level, specialized divisions, such as domestic relations courts, probate courts, or drug courts, provide judges with the opportunity to become specialized in that area of law and practice.

State and federal courts also have instituted approaches for developing the specialized capacity of judges without necessarily creating specialized courts. Rules of civil procedure allow changes of venue for various reasons including the agreement of all parties,[223] or that "the ends of justice would be promoted by the change."[224] Such provisions allow actions to be transferred to a judge having special knowledge or experience in a particular subject matter such as water. California has a specific provision under its Environmental Quality Act requiring the superior courts in counties of more than 200,000 people to designate "CEQA judges" to develop expertise concerning the statute "and related land use and environmental laws, so that those judges will be available to hear, and quickly resolve, actions or proceedings . . . ."[225]

In some federal district courts, certain magistrate judges have been assigned to particularly large or complex water law cases to provide continuity, uniformity in decisions, and expertise. State and federal courts also may appoint special masters or referees, who may have special expertise, on a short- or long-term basis to hear certain matters, with the officer's report or recommendation eventually reviewed and approved by the court.[226] Special masters are commonly used in the water rights field. The U.S. Supreme Court regularly appoints special masters to hear lengthy and complex interstate water disputes.[227] Special masters have been used in Wyoming, New Mexico, and Arizona to preside over protracted, general stream adjudications.[228]

In addition to these measures, the following describes three other approaches for providing substantive expertise in addressing complex water litigation.

A. Coordination

Courts have developed (or legislatures have provided) procedures to facilitate the assignment of complex cases to a certain judge who may have developed expertise over the years. At the federal level, the U.S. Judicial Panel

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222. *See About the Foreign Intelligence Surveillance Court*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE CT., http://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court (last visited Nov. 6, 2015).

223. *See, e.g.*, MONT. CODE ANN. § 25-2-202 (2014). "Change of venue on agreement of parties. All the parties to an action, by stipulation or by consent in open court entered in the minutes, may agree that the place of trial may be changed to any county in the state. Thereupon the court must order the change as agreed upon." *Id.*

224. *Id.* § 25-2-201(3).

225. CAL. PUB. RES. CODE § 21167.1(b) (West 2015).

226. *See, e.g.*, FED. R. CIV. P. 53.

227. *See, e.g.*, Kansas v. Nebraska, 135 S.Ct. 1042, 1049 (2015).

228. *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-255 (2015).

on Multidistrict Litigation (MDL Panel) can coordinate and assign actually or likely related cases to one judge, even from a different part of the country. Congress created the MDL Panel in 1968.[229] The panel consists of seven sitting federal judges appointed to serve by the Chief Justice of the United States.[230] Over the years, the panel has considered motions for centralization of dockets involving more than 500,000 cases.[231]

The duties of the panel are to (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings.[232]

The transfer or centralization of cases before one judge is only for pretrial purposes (with one exception). The goal is to "avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary."[233] Unless pretrial motions or settlement resolve the cases, they are returned to the originating district court for trial.[234]

Under the MDL procedure, several highly controversial and complex water disputes, such as those involving the Missouri River, have been assigned to one federal judge (Judge Paul Magnuson from Minnesota).[235]

A similar process is employed in California under the Judicial Council's civil case coordination rules,[236] allowing similar cases pending in numerous superior courts to be heard and decided by one judge. While these procedures are available for all types of civil cases, particular rules govern complex cases—often including water cases. Under the California Rules of Court, a complex action is an action that "requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants."[237] The Judicial Council explains that "[s]uch a case may involve numerous time-consuming pretrial motions; a great number of witnesses or a substantial amount of evidence; many separately represented parties; other, related actions pending in other counties, states, or countries or in a federal court; or other issues."[238]

Upon receipt of a motion for coordination, the chief justice appoints a superior court judge to hear and rule on the motion.[239] If the motion is

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229. 28 U.S.C. § 1407 (2015).

230. *Overview of the Panel*, USCOURTS.GOV, http://www.jpml.uscourts.gov/panel-info/overview-panel (last visited Oct. 7, 2015).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *See generally In re* Operation of the Mo. River Sys. Litig., 277 F. Supp. 2d 1378 (2003).

236. Cal. Rules of Court 3.501–.550.

237. Cal. Rules of Court 3.400.

238. *Fact Sheet: Civil Case Coordination*, CAL. JUDICIAL COUNCIL (Sept. 2014), http://www.courts.ca.gov/documents/civcoord.pdf.

239. Cal. Rules of Court 3.524.

granted, the chief justice appoints a superior court judge to the coordinated cases.[240] Unlike the federal MDL cases, the superior court judge may take the cases to trial.[241]

Between 2001 and 2010, numerous water and environmental cases related to the San Francisco Bay-Delta Region and Colorado River were assigned to judges of the Sacramento Superior Court.[242]

B. Court Appointed Experts

Methods have been developed to assist a judge in understanding complex evidence. The Federal Rules of Evidence allow a court to appoint its own expert witness (Rule 706).[243] The advisory committee on the rules observed, "The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned."[244]

A party may move the court to appoint an expert or the court may do so on its own motion.[245] In either case, parties are given an opportunity to show cause why an expert should not be appointed.[246] The court may appoint an expert agreeable to the parties or an expert of its own choosing.[247]

After completing his or her duties, the expert "(1) must advise the parties of any findings the expert makes; (2) may be deposed by any party; (3) may be called to testify by the court or any party; and (4) may be cross-examined by any party, including the party that called the expert."[248]

Rules similar to federal rule 706 are in place in many states.[249]

Colorado water courts are utilizing new rules to improve the expert witness practice. Rule 11, adopted in 2009, was developed to assure the judge of an expert witness's independent judgment and to assist judges in understanding the science at issue in a proceeding.[250] Rule 11 indicates that the expert witness has a duty to the court to provide an opinion under the standards of conduct applicable to the expert's profession.[251] Expert witnesses are also required to meet before trial in an effort to resolve their differing opinions.[252]

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240. Cal. Rules of Court 3.540(a).
241. Cal. Rules of Court 3.540(b).
242. *See, e.g., SWRCB Special Proceeding: Sacramento Super. Ct.*, WWW.SACCOURT.GOV, https://www.saccourt.ca.gov/coordinated-cases/swrcb/swrcb.aspx (last visited Oct. 7, 2015); *QSA Special Proceeding: Sacramento Super. Ct.*, WWW.SACCOURT.GOV, https://www.saccourt.ca.gov/coordinated-cases/qsa/qsa.aspx (last visited Oct. 7, 2015).
243. Fed R. Evid. 706.
244. FED. R. EVID. 706 (advisory committee's note on 1972 Proposed Rules).
245. Fed. R. Evid. 706(a).
246. *Id.*
247. *Id.*
248. FED. R. EVID. 706(b).
249. Ariz. R. Evid. 706.
250. Colo. Water Ct. R. 11.
251.. *Id.*
252. *See* Stephen E. Snyder et al., *Adversarial Collaboration: Court-Mandated Collaboration Between Opposing Scientific Experts in Colorado's Water Courts*, NATURAL RES. & ENV'T, Summer 2013 at 8.

C. Judicial Education

Even without major structural change in how water disputes are resolved, a consensus exists that judges could benefit from improved continuing education concerning water and environmental law issues. In a recent critique of California's water policy, some commentators observed,

> Courts could also benefit from specialized training in water science and economics. The Land and Environment Court of New South Wales [*see infra* at Section VI(A)] provides its judges with professional development courses focused on relevant environmental knowledge, expertise, and skills, and requires that they attend such courses at least five days a year . . . . Subjects could range from scientific advances in hydrology to the potential effects of climate change on fresh water.[253]

Such educational opportunities are already available through the Dividing the Waters program at the National Judicial College in Reno.[254] Since 1992, this program has provide state and federal judges (both trial and appellate) presiding over a complex water litigation with educational programs on complex case management, the use of alternative dispute resolution (ADR) processes, hydrology, assessing scientific evidence and models, and basics and updates on western water law.[255]

IX. A MODEST PROPOSAL

The foregoing discussion demonstrates the promising range of institutional possibilities for improving water conflict resolution in a contemporary context. Administrative agencies have evolved over the decades from their water distribution origins to become responsible for a broader range of water-related programs—a trend demonstrated by the transition in many states from the state engineer to a director of water resources. In other jurisdictions, quasi-judicial agencies have emerged that are similarly working to incorporate a broader range of expertise in their decisionmaking structure. The NSW Land and Environment Court, with its specialized commissioners, and the South African Water Tribunal (even with its problems) demonstrate this tread—emulated to a lesser degree by the SWRCB and Washington's PCHB. Also, courts have demonstrated they can address the need for substantive expertise through specialized departments or calendars, use of appointed court personnel, or rules changes.

For the remainder of this article, I will discuss the potential of a permanent, state water court. As Andy Sawyer, legal counsel for the California State Water Resources Control Board, astutely observed, "when people talk

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253. Hanak, *supra* note 215, at 357.

254. *Dividing the Waters*, JUDGES.ORG, http://www.judges.org/dividingthewaters/ (last visited Nov. 11, 2015).

255. *Id.*

about water court, 'they are often talking about different things.'"[256] Accordingly, the following identifies the necessary characteristics of such a court. Such a permanent water court could be part of the judicial branch or stand as a quasi-judicial body, similar to the SWRCB or PCHB.

A. Criteria

Many qualities might be considered in fashioning a model water court proposal. The twelve design decisions identified by Pring and Pring help frame the discussion.[257] The following simplified criteria would be especially important in evaluating the merits of water court variations:

1. *Sound, principled decisionmaking*—The renewed interest in specialized water tribunals is founded on the need for judges to have and apply expert knowledge, not generally shared by their colleagues, in deciding complex water disputes. Also, there is a desire to continue to utilize the expertise of judges or tribunals that face disbandment, such as the adjudication courts in several states. This criterion requires that a specialized water tribunal produce quality outcomes—admittedly, a very difficult result to demonstrate.[258] This consideration raises a contemporary dichotomy: The field of water law these days is an equal mix of science and engineering, on the one hand, and law and public policy, on the other. The challenge is to design institutions and recruit adjudicators able to bridge both worlds.

Related to the concern for sound decisionmaking is the tension between finality and flexibility in decisions. Administrative agencies address this tension through program modifications over time. Courts may address this tension by retaining jurisdiction allowing the parties to seek necessary decree modifications.

2. *Efficiency*—Efficient dispute resolution requires the least amount of time and resources necessary to produce sound results.[259] Generally, because of their routinization of work, administrative agencies are considered more efficient than courts that typically have high transaction costs (in terms of delay, attorneys' fees, and other costs). What needs to be factored into this discussion is that proceedings before administrative agencies also are often lengthy and costly and may ultimately end up in court for the additional

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256. Pitzer, *supra* note 13, at 5.

257. Pring & Pring, *supra* note 135, at 553.

258. *See* M.P. Golding, *Principled Decision-Making and the Supreme Court,* 63 COLUM. L. REV. 35, 40 (1963) ("A decision or judgment is principled only when it is guided by some 'external consideration,' *i.e.,* a guiding principle that contributes to the deliberation on the case. Such a principle is a reason (or part of the reasons) for the decision. . . . [I]n applying a principle, the instant case must be treated as an instance of a more inclusive class of cases. . . . In this way every principled judgment makes, or rests upon, a universal, or general, claim.").

259. A sensitive relationship admittedly exists between efficiency and effectiveness: "[E]fficiency is the best use of resources; effectiveness, the achievement of goals. . . . [T]he simultaneous fulfillment of these values requires trade-offs and compromises . . . 'justice' may demand the possibility of a slow, costly appeal process; while a court proceeding, even if it is regarded as just, speedy, and inexpensive, may not be able to 'settle' the underlying dispute at all." HÉCTOR FIX-FIERRO, COURTS, JUSTICE, AND EFFICIENCY: A SOCIO-LEGAL STUDY OF ECONOMIC RATIONALITY IN ADJUDICATION 8 (2003).

rounds of litigation. A carefully conceived water court system, however, could be more efficient if certain layers of procedure were removed, e.g., extensive administrative hearings following by equally costly court proceedings. While administrative agencies may have some enforcement powers, they often go to court for aid in enforcement. Courts also have the ability to retain jurisdiction over the parties and issues.

3. *Coordination with other water policies and programs*—Regardless of whether most water-related dispute resolution occurs in an administrative agency or in a court, it is desirable that the jurisdiction's water policies and programs have a considerable degree of coordination. Although specific agencies have unique roles, and some friction among our branches of government is a necessary and often positive feature, we do not want agencies to consistently work at cross-purposes. Coordination is likely maximized when water-related functions are mostly housed in an administrative agency, but the New South Wales Land and Environment Court is an example of how this integration, in terms of water-related dispute resolution, can also take place in the judicial branch.

4. *Lawfulness and due process*—We want our adjudicators to follow the law, adhere to constitutional requirements, and do so exercising their independent judgment.[260] The components of due process are especially important: notice; opportunity to participate, comment, or respond; and reasoned, unbiased decisionmaking.[261] Courts inherently embody these values and, as indicated by recent polling, elicit more respect than other branches of government.[262] Courts also have the advantage of being constitutionally separated from other branches of government and being more immune to external pressures. The McCarran Amendment is one legal requirement that requires meaningful judicial involvement in cases adjudicating or administering federal water rights. Some administrative agencies also demonstrate a high level of legal practice under administrative procedure acts and the use of law-trained hearing officers. Many administrative agencies have also developed procedures for eliciting public participation and comment.

5. *Legitimacy*—The decisions of adjudicators should be considered legitimate by the parties and the interested public.[263] Legitimacy is a necessary requisite for enforcement of the decision, as well as maintaining the long-

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260. Bruce Ragsdale, *Judicial Independence and the Federal Courts*, FEDERAL JUDICIAL CENTER 1 (2006), http://www.fjc.gov/public/pdf.nsf/lookup/JudicialIndependence.pdf/$file/JudicialIndependence.pdf ("A central principle of the United States system of government holds that judges should be able to reach decisions free from political pressure.").

261. *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970).

262. *See, e.g.,* Frank Newport, *Americans Trust Judicial Branch Most, Legislative Least*, GALLUP (Sept. 26, 2012), http://www.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx.

263. *See, e.g.,* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1015 (2007) ("[T]he Court, in order to achieve its goals, has to be concerned with what other people think of it. In any given case, and especially in the most prominent ones, the Court must take care to behave in a way that inspires or maintains public confidence, . . .") (footnotes omitted).

term reputation of the tribunal as a fair and effective dispute-resolution forum. Polls and common experience suggest that public has more confidence in judges than in the executive or legislative branches.[264] While the public generally considers courts to be the most legitimate branch of government, courts do limit direct participation to those parties having standing.

Through notice and comment procedures, administrative agencies have more flexibility to allow public participation and are more likely to hear from a broader range of the public. These agencies are likely to be more lenient in allowing intervention into contested administrative proceedings. By contrast, courts typically limit participation to the actual parties in dispute or those other persons who can establish grounds for intervention. Courts, however, do employ other procedures, such as amicus briefs, to allow greater participation. Also, many of the complex water cases involve such a range of litigants that is possible to argue that almost every interest is represented. Regardless of the forum, the opportunity to be heard is important for litigant satisfaction.

B. Model Tribunal

States exist for a reason: to allow a group of residents sharing geographic, historic, cultural, and economic ties to govern themselves (subject to federal law constraints). As each western state has a unique set of water laws and institutions, shaped by local experience and conditions, a "one size fits all" approach probably will not succeed. While not undertaking a wholesale restructuring of how western states accomplish water dispute-resolution, those states actively seeking to improve their structures might consider a more comprehensive, permanent water tribunal. Such a tribunal should have many of these features:

1. The tribunal would be located either in the executive branch as a quasi-judicial agency, as in the case of the SWRCB, or in the judiciary, as in the case of the NSW Land and Environment Court.

2. The tribunal would have at least three judges, with terms and salaries equivalent to general jurisdiction judges in the state.

3. Since states have developed their procedures for selecting judges, these practices should be followed in selecting water tribunal judges. There is a strong argument, however, that a judicial nominating commission (forwarding three to five nominees to the governor) would be in a better position than the electorate to evaluate the expert qualifications of candidates for a specialized forum. Periodic retention elections would provide public accountability. The chief judge would be elected by his or her peers or appointed by the governor.

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264. *See* Newport, *supra* note 262.

4. The tribunal would establish a panel of commissioners who could be assigned by the chief judge to participate in certain proceedings. These commissioners would represent a broad range of specialties (similar to the New South Wales Land and Environment Court).

5. The tribunal would hear cases at locations throughout the state for the convenience of the parties.

6. The tribunal would adopt categories of cases and allow them to be heard in various configurations:

   a. One law-trained commissioner (e.g., routine, minor cases).

   b. One judge (e.g., large but routine cases).

   c. Three-member panels of judges and commissioners (e.g., large, complex cases of public importance; unusual law and/or facts).

   d. For initial decisions made by one judge or commissioner, a party could request rehearing before the full court.

7. Appeals from the tribunal would be to the state's intermediate court of appeals, with the possibility of petitioning the state supreme court to bypass the intermediate court in exigent circumstances.

8. The tribunal would have exclusive jurisdiction as follows:

   a. Review of permit and transfer decisions made by the water resources department.

   b. Review of water-related permit and enforcement decisions made by other state agencies or state-created special districts (including water quality, dam safety, and other water-related environmental regulation).

   c. Review of water-related regulations or plans adopted by state agencies that would previously be reviewed by a court under the state administrative procedure act.

   d. Preside over ground and surface water adjudications.

   e. Maintain continuing jurisdiction to enforce final decrees in ground and surface water adjudications and in other cases as necessary.

9. Procedures could also be available to allow private litigants with water cases pending elsewhere in the state to seek a transfer of venue to the water tribunal.

Except for the conduct of adjudications, this hypothetical tribunal is primarily an appellate body that substitutes for trial court review of administrative decisions. As such, it brings institutional expertise to these cases and expedites their resolution. The tribunal expands on the SWRCB's approach for integrating water quantity and quality but does not emulate that agency's initial permitting functions. Like the Land and Environment Court, the tri-

bunal seeks to build a broad range of substantive expertise into the institution. In terms of jurisdiction, the proposal is similar to the Washington Pollution Control Hearings Board (except for the PCHB's jurisdiction in nonwater areas such as air quality).

C. Evaluation

Preliminarily, it is useful to observe that the benefits of generalist versus specialist courts are being broadly debated.[265] In a 2011 book,[266] Lawrence Baum examined three potential results of court specialization: efficiencies, improved quality in decision making (in terms of consistency and accuracy), and whether specialization leads to an institutional advantage for one side or the other. He concludes there is little evidence on the question of efficiency, although a reviewer of the book points to examples of specialized appeals yielding prompt results (unemployment compensation appeals).[267] As for quality decision making, Baum concludes "we have little meaningful evidence of differences in the quality of decision making between generalist and specialized courts . . . [because of the] difficulty of measuring the quality of judges' work."[268] The book reviewer responds that litigants may perceive the judgments of a specialized court to be more legitimate—albeit a subjective measure of quality.[269] Finally, while Baum is concerned specialized courts may result in long-term policy advantages to certain litigants, the evidence is mixed.[270]

In contrast, the chief judge of the New South Wales Land and Environment Court is unequivocal in his view as to the multiple benefits of a specialized court. In listing a "desirable dozen" beneficial attributes of the court, he observes, "Rationalization and centralization of jurisdiction has resulted in the Court having a comprehensive, integrated, and coherent environmental jurisdiction."[271]

With this ongoing debate in mind, how well does this model proposal satisfy the criteria previously enumerated? Would this approach improve over existing practices in most states?

1. *Sound, principled decision making*—By empaneling expert adjudicators, who serve long terms focusing on water-related cases, the model tribunal would advance sound, principled decision making. These judges would

265. Similarly, Laura G. Pedraza-Farina explores widespread criticisms of the U.S. Court of Appeals for the Federal Circuit, which has a specialized role in reviewing almost all patent cases. She offers a behavioral explanation based on an "expert community" that probes the "important differences between how experts and non-expert generalists will decide cases and interact with other relevant actors—and in particular with other institutional actors such as agencies, district courts, other appellate courts, and the Supreme Court." *See* Laura G. Pedraza-Farina, *Understanding the Federal Circuit: A Model of Expert Decision-making* 5 (2014) (unpublished paper) (on file with author).

266. *See generally* BAUM, *supra* note 74.

267. Herbert Kritzer, *Where Are We Going: The Generalist vs. Specialist Challenge*, 47 TULSA L. REV. 51, 62 (2011).

268. BAUM, *supra* note 74, at 219.

269. Kritzer, *supra* note 267, at 64–65.

270. BAUM, *supra* note 74, at 62–63.

271. Preston, *supra* note 145, at 424.

become intimately familiar with the law, policies, and science concerning the state's water resources. If specialized commissioners (like those in the NSW Land and Environment Court) were available, the tribunal would have the benefit of a broad range of knowledge. The adjudicators would also be personally or institutionally familiar with decrees or decisions that might be reopened because of changed circumstances. To paraphrase a western water judge, a water court could develop over time a body of law providing predictability, consistency, and certainty to water users and management agencies alike.

2. *Efficiency*—Administrative agencies are often more efficient entities than courts, but the model tribunal would likely achieve efficiencies in certain areas. The model tribunal would remove one level of procedure (e.g., extensive administrative hearings followed by equally costly court proceedings). Also, because of the exclusive, well-defined jurisdiction of the tribunal, time would not be lost in procedures for change of venue, coordination, or similar efforts to find a knowledgeable judge or a forum advantage. The tribunal would also be in a better position to enforce its decisions through traditional judicial process (e.g., injunctions, mandates, attachments, instructions to water commissioners).

3. *Coordination with other water policies and programs*—The model tribunal is designed to adjudicate water-related disputes and not to promulgate a broad range of policies. So, the tribunal would never achieve the degree of coordination of water-related programs that is possible within departments of ecology or water resources. Yet, within its dispute-resolution realm, the tribunal would likely achieve coordination and uniform decision making not attainable when such cases are litigated in various courts.

4. *Lawfulness and due process*—Because the tribunal would be primarily a legal entity, it would likely achieve a high level of compliance with applicable law and constitutional requirements. Judicial independence would favor impartial decision making and due process.

5. *Legitimacy*—The tribunal's legitimacy would depend primarily on its actual operation, personnel, and decisions; but as a judicial or quasi-judicial entity, it would benefit from the public's perception of legitimacy of such judicial or quasi-judicial bodies. The tribunal would need to guarantee its accessibility and demonstrate it has not been captured by one community of interest—a criticism often brought against business courts (but one that is also made against administrative agencies as well).

X. CONCLUSION

Regardless of the institutional structure chosen for water-related dispute resolution, much of the success of the forum depends on the quality and expertise of the adjudicators. At the turn of the nineteenth century, a judge or a state engineer seeking to resolve a water dispute would need, in addition to an understanding of water law principles, some knowledge of property law, the common law and equity, civil engineering, surveying, and irrigation techniques. The evidence the adjudicator would consider would be oral, lay witness testimony and relatively few written documents.

By comparison, an adjudicator of a water law dispute in the twenty-first century requires a facility in water law (quantity and quality), property law, equity, constitutional law with an emphasis on federalism, public land law, Indian law, Reclamation law, federal environmental law, the management of complex litigation, and the effective use of ADR and settlement methods.

In terms of evidence, this twenty-first century adjudicator relies greatly on expert testimony. He or she is faced with exhibits or administrative records often running in excess of 100,000 pages.[272] He or she needs the ability to understand and apply scientific and technical evidence in a wide range of fields: hydrology (both surface and groundwater), geomorphology, economics, engineering, ichthyology, other ecological sciences, modeling, history and anthropology, global circulation models, adaptive management and ecosystem restoration, and traditional ecological knowledge (TEK).[273] And, according to some commentators, we will soon be adding resilience theory and panarchy to the decision maker's educational curriculum.[274]

More than ever, water-related dispute resolution requires the marriage of appropriately designed institutions and well-educated and experienced adjudicators. The institutions, whether judicial or quasi-judicial nominally located in the executive branch, should enable interdisciplinary understanding of water-related problems and legitimate outcomes. The adjudicators should bring dedication and expertise to their tasks, coupled with the willingness to appropriately consult relevant experts when the issues exceed their own knowledge. The water tribunal proposal previously discussed provides opportunities both for institutional improvement and the recruitment of capable adjudicators.

With aberrant weather and ever-increasing populations and economies, water resource management is emerging as the leading environmental issue

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272. For example, eleven individual civil cases challenged Decision 1641 or D-1641, a 206 page administrative decision issued by the State Water Resources Control Board ruling on water right issues and water quality responsibilities for the Sacramento River Delta region. These cases were coordinated under California's civil rules before a Sacramento superior court judge who presided over the cases for three years. The administrative record totaled 129,000 pages. Statement of Decision at 4–5, SWRCB Cases, No. JC 4118 (Sacramento Co. Super. Ct. May 5, 2003).

273. The knowledge acquired by indigenous people as to their environment and handled down from generation to generation, often by oral tradition. *See generally* TRADITIONAL ECOLOGICAL KNOWLEDGE AND NATURAL RESOURCE MANAGEMENT (Charles R. Menzies ed., 2006).

274. "The theory that we develop must of necessity transcend boundaries of scale and discipline. It must be capable of organizing our understanding of economic, ecological, and institutional systems. And it must explain situations where all three types of systems interact. The cross-scale, interdisciplinary, and dynamic nature of the theory has lead [sic] us to coin the term *panarchy* for it. Its essential focus is to rationalize the interplay between change and persistence, between the predictable and unpredictable." PANARCHY: UNDERSTANDING TRANSFORMATION IN HUMAN AND NATURAL SYSTEMS 5 (Lance H. Gunderson & C.S. Holling eds., 2001) (emphasis in original).

of the twenty-first century. Conflicts and litigation are inevitable and, if wisely resolved, may make the difference between successful or failed adaptation to this new reality. Contemporary versions of Spain's historic *tribunal de las aguas* may play an important role in that successful adaptation.