Dividing the Waters:
A project for judges, masters & referees

John E. Thorson
Administrative Law Judge
California Public Utilities Commission
San Francisco
Critical Water Problems

- **American West**--Growing population in arid & semi-arid regions; drought

- **Midwest**--Low Missouri River flows; declining groundwater levels

- **South**--Growing populations & drought

- **East Coast**--Infrastructure needs
American Water Law

- **Eastern states**—Riparian principles borrowed from England
- **Western states**—Fashioned prior appropriation doctrine; incorporated certain Spanish law features
Recent Trends

- *Water law was principally practiced in western states*

- *Increased water law activity in western states*

- *Eastern states developing own water bar; interested in & borrowing western water law principles*
Water Issues Go To Court

- *Water litigation was “neighbor-versus-neighbor”*
- *Now water litigation*
  - Involves more parties
  - Involves more complex issues
Example No. 1: General Stream Adjudications

- Massive court actions to determine all rights to a water source (usually a river); almost all western states

- Reasons:
  - Water right information
  - Reserved rights of tribes & federal agencies
  - Strengthen a state’s position in potential interstate litigation
General Stream Adjudications

- **Party complexity**
  - E.g., Montana: 219,000 rights/80,000 parties; underway since 1973
  - Federal government, state government, tribes, cities, irrigation districts, mines, utilities, recreational users, individuals
Basin Location & Adjudication Status Map 12/29/2005
General Stream Adjudications

- Issue complexity
  - Complex case management
  - Water law
  - Indian law
  - Hydrology & ecology
  - Economics
  - Agricultural engineering
## Underway in Many States

<table>
<thead>
<tr>
<th>Arizona</th>
<th>New Mexico</th>
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<tr>
<td>California</td>
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<td>Nevada</td>
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Adjudications with International Aspects

San Pedro River
Example No. 2: Water Quality Litigation

Litigation, both before administrative agencies and courts, to determine specific water quality requirements or to remedy past abuses.
Water Quality Litigation

- Party complexity
  - E.g., San Francisco Bay-Delta water quality proceedings (D-1641); since 1980s
  - State agency proceedings (SWRCB), followed by court review
  - State and federal agencies, “area of origin” communities, large agricultural interests, large metropolitan areas (LA), environmental organizations, commercial fishermen
San Francisco Bay-Delta
CA’s Bay Delta Region
Water Quality Litigation

- Issue complexity
- Complex case management
- Huge administrative records (200,000 pages); sometimes prepared electronically
- Endangered & threatened species - salmon
- Water quality science
- Scientific uncertainty & risk
Example No. 3: Interstate Litigation

- Original actions before the U.S. Supreme Court involving conflicts between states
  - Boundary issues
  - Interstate waters
- Heard by Special Masters; finalized by Supreme Court
Kansas v. Colorado: Arkansas River
Interstate Litigation

- Relative party simplicity
  - States
  - Federal government, if federal interest involved
Interstate Litigation

- Issue complexity
  - Case management--few rules, long proceedings, delicate issue of litigating sovereigns
  - Legal issues--Law of interstate apportionment & use; difficulty of fashioning remedies
  - Science issues--Hydrology & ecology
Other Recent Original Proceedings

- *Kansas v. Nebraska* (Republican River)
- *Arizona v. California* (Colorado River; remaining issues)
- *Nebraska v. Wyoming* (Platte River)
Types of Judges & Courts Involved

- Administrative agencies--acting in quasi-judicial fashion
  - California’s State Water Resources Control Board (SWRCB)
  - Oregon’s Department of Water Resources (DWR)
Welcome to California

California Environmental Protection Agency

State Water Resources Control Board

"The State Board's mission is to preserve, enhance and restore the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations."

Regional Boards
(1) North Coast
(2) San Francisco Bay
(3) Central Coast
(4) Los Angeles
(5) Central Valley
(6) Lahonten
(7) Colorado River Basin
(8) Santa Ana
(9) San Diego

Water News

Enforcement
Go >>

Upcoming
Hearings, Meetings,
Workshops
Go >>

Grants and Loans
Go >>

GOVERNOR
Schwarzenegger
Click To Visit His Home Page

Flle an Environmental Complaint

Erase the Waste

PROGRAMS
- Blue-Green Algae
- Border Program
Types of Judges & Courts Involved

- General jurisdiction courts
  - Individual judges assigned complex water case
  - Part of regular caseload (civil, criminal, domestic)
  - May be assisted by Special Master, Commissioner or Referee
Arizona’s General Stream Adjudication

Online Arizona General Stream Adjudication Bulletin

Welcome to the Online Arizona General Stream Adjudication Bulletin
The Bulletin is published three times a year by the Office of the Special Master to provide information about proceedings in the Gila River Adjudication and the Little Colorado River Adjudication.

Departments:
- Calendar
- Links of Interest
- Archive

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The Bulletin relies on links as we believe that making a copy of the entire document available to our readers is better than a short summary. Always check our What’s New page frequently for up-to-date notices and documents.

Arizona Supreme Court Interlocutory Appeal

In re the Preliminary Effect of the Globe Equity No. 59 Decree on Spediford Park, Gila River Adjudication: On October 12, 2005, the Supreme Court heard oral argument in this interlocutory appeal. A decision is forthcoming.

Gila River Adjudication

In re Subflow Technical Report, San Pedro River Watershed: Judge Ballinger on September 28, 2005, issued his order regarding the Special Master’s report addressing the criteria for delineating the subflow zone, establishing a zone of depression test, and setting guidelines for de minimis water rights. The 43-page order, Special Master Schade’s 104-page report, and the Arizona Department of Water Resources’ technical report are available online.

Judge Ballinger’s ruling establishes the technical criteria and methods that the Department must follow when investigating and reporting uses of subflow. The Arizona Supreme Court has issued two decisions, arising from the Gila River Adjudication, concerning subflow. Judge Ballinger’s ruling implements the Supreme Court’s tests announced in those decisions.

On December 27, 2005, two groups of parties filed with the Arizona Supreme Court petitions for interlocutory review of portions of the Superior Court’s September 28, 2005, order. The Supreme Court’s Procedural Order Providing for Interlocutory Appeals and Certifications applies to these petitions.
New Mexico’s Rio Grande Adjudication

Court Orders

*Order on United States Motion to Amend Complaint - April 2, 2003

*Order Regarding Postponement of Adjudication of Amount of Water in Offers of Judgment and Subfile Orders Nunc Pro Tunc - June 12, 2003

*Order Regarding Procedure for Substitution of New Owners - August 12, 2003

Lower Rio Grande Adjudication

State of New Mexico
County of Doña Ana
Third Judicial District

State of New Mexico ex rel.
Office of the State Engineer, vs.
Elephant Butte Irrigation District, et al.
Wyoming’s Big Horn River Adjudication
Washington’s Yakima Basin Adjudication
Types of Judges & Courts Involved

- Specialized courts
  - Montana’s Water Court
  - Idaho’s Snake River Basin Court
Montana Water Court

General Information:
- Step-by-Step Guide Book
- Representing Yourself
- Outline of Basic Montana Water Law
- Video Tape Filer
- Generic Forms

Applicable Statutes & Rules:
- Adjudication Statutes
- Water Right Claim Examination Rules
- Rules of Civil Procedure
- Rules of Evidence
- Uniform District Court Rules

Other Informative Links:
- DNRC
- Environmental Quality Council
- Snake River Basin Adjudication
- Arizona General State Adjudication
- Dividing The Waters

Adjudication Information:
- Proposed Rules
- Basin Status Sheet

The 1979 Legislature created the Montana Water Court to expedite and facilitate the statewide adjudication of over 219,000 state law-based water rights (generally rights with a pre-July 1973 priority date) 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 from a list of nominees submitted by the Judicial Nomination Commission. A water judge is also designated for each of Montana’s major water divisions by a majority vote of a committee composed of the District Court Judge from each single-judge
Snake River Basin Adjudication Court

253 Third Avenue North
PO Box 2707
Twin Falls ID 83303-2707

Telephone: (208) 736-3011
Fax: (208) 736-2121

**SRBA Court Homepage** The Court website contains an abundance of information. If you know your subcase number (your adjudication claim number), you may want to start with "IWATRS Reports". Click "Display a Subcase Summary Sheet" to review information about a subcase including all filings and court dates. The Summary Sheet asks for a Basin (the first 2-digits of your claim number plus any suffix), Subcase: (the last 5-digits of your claim number plus any suffix). If your subcase number contains less than 5-digits you must add the leading zero's to your number, i.e. 00051. Additional links are provided below for your convenience, including frequently requested Court forms.
Types of Judges & Courts Involved

- Special Masters appointed by the U.S. Supreme Court in original proceedings
Arthur Littleworth
Kansas v.
Colorado
Owen Olpin
Nebraska v.
Wyoming
Jerry Muys
Texas v. New
Mexico
Many of these judicial officers were not experts in:

- Complex case management
- Scientific issues
- Settlement strategies (ADR)
- Water, Indian, or environmental law
Problems

- Because of ethical codes, these judges isolated from experts who could help
- Because of geography, these judges isolated from peers who could help
- Because most are not water law experts, they don’t attend legal education programs on water
24th Annual
Water Law Conference

19th Century Rules for the 21st Century:
Are Growth and Development Outpacing Water Law?

February 23-24, 2006
Hotel Del Coronado
San Diego, California

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Dividing the Waters

- Network of 175 judicial officers involved in complex water-related litigation
  - State and federal judges
  - Trial and appellate court judges
  - Certain administrative judges or hearing officers
Purposes

• to share information about how the different states and courts have structured and conducted stream adjudications and other complex water law litigation;

• to discuss some of the major problems judges confront in conducting these adjudications and cases;

• to discuss what works and what does not work so that others do not have to make the same mistakes;

• to benefit from the expertise of resource people who are involved in the many subject areas touched by these cases; and

• to enable judges, masters, and referees to meet one another and develop lasting personal and professional relationships.
# Dividing the Waters: Convenors

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<tr>
<th>John E. Thorson</th>
<th>Dan Hurlbutt</th>
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<tr>
<td>Arizona General Stream Adjudication; now California Public Utilities Commission</td>
<td>Idaho Snake River Adjudication</td>
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<tr>
<td>Greg Hobbs</td>
<td>Ron Robie</td>
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<tr>
<td>Colorado Supreme Court</td>
<td>California Court of Appeal</td>
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Staff

- Hosted by Arizona Supreme Court
- Carolyn Brickey, Executive Director
- Kathy Dolge, Administrative Director
- Contract staff
  - ADR
  - Science
Resources

- Foundations
  - Ford Foundation
  - William & Flora Hewlett Foundation
  - General Service Foundation
  - Compton Foundation
  - Water for California
Program: Major Conferences

- Nine major conferences (1993-present)
- Tenth conference in Nevada in Fall 2006
Program:
Specialized Workshops

- Complex case management
- Use of Alternative Dispute Resolution (ADR)
- Science
  - Groundwater
  - Instream flows
- Critically assessing models
Program: Technical Assistance

- Technical assistance, e.g., training new water law judges
- Klamath Basin ADR initiative
- Web site: www.dividingthewaters.org
Program: Publications

- Publications & support for publications
- Two books on Indian water rights
- Two articles on adjudications
- Monograph on water law & science
Program: Other

- Outreach to other judges’ organizations
  - E.g., workshop on scientific evidence for 2005 California Judicial Conference
Characteristics

- Confidential; off-the-record discussions
- Independence & integrity (Judicial Code)
- Stable, non-controversial funding
- Interesting, multi-faceted educational opportunities
  - Field trips
  - Hands-on experiences
- Informal, retreat settings for meetings
Results

- Improved critical understanding of important elements of managing & deciding complex water cases
- Personal & professional network
- Personal understanding of controversial water issues (Delta, Klamath, Rio Grande)
Future

- Renewed funding
- Groundwater
- Water quality
- Concluding some adjudications
- Beginning new adjudications
- Outreach to specialized Administrative Law Judges (state & federal)
Assessment

- Many judges did not ask for the complex water case to which they are assigned.
- Many feel uncomfortable with the authority they have over such an important public resource.
- Through *Dividing the Waters*, we help judges to make the best decisions they can & in turn promote the public interest.
Gracias
Results: Examples

- Case management--Lower Rio Grande
- Settlement Rules--Arizona & Montana
- Efforts to promote settlement--Klamath
- Redesigning adjudications--New Mexico, Washington
- Final decrees--Wyoming
Water Right General Adjudications

Frequently Asked Questions

- Background - What is an Adjudication?
- Why are general adjudications necessary?
- How does a general adjudication work?
- How do I protect my water right?
- Where can I find evidence to support my water right claim?
- Where do I look for historical evidence?
- Will the evidence I submit be returned

Status of General Adjudications

- What is the status of general adjudications in Washington?
- Where can I find more information?

Contacts

- General Adjudication and Yakima Adjudication Contacts
Private Providers

- Earn up to 7 Hours MCLE Credit
- Including One Hour of Ethics
- Earn up to 7 Hours Engineering Credit
- Earn up to 7 Hours Real Estate Credit

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**Dividing the Waters** seeks to improve communications between courts and the water users and communities affected by adjudications and other water litigation. The project also seeks to encourage the use of alternative dispute resolution (ADR) because negotiated settlements may reduce the length of an adjudication or other water law case, provide "wet" water to some water users sooner, and assist communities in addressing other important issues such as protection of endangered species, recreation and wetland restoration and preservation. The Stakeholder Training Initiative evolved as a means of expanding the ability of communities to better represent their interests and communicate more.
A majority of the western states are involved in general stream adjudications. These complex and lengthy lawsuits are among the largest civil proceedings ever to be litigated in state and federal courts. Here are the current listings:

**State Adjudications**

- Alaska
- Arizona
- California
- Colorado
- Idaho
- Kansas
- Montana
- Nebraska
- Nevada
- New Mexico
- North Dakota
- Oklahoma
- Oregon
- South Dakota
- Texas
- Utah
- Washington
- Wyoming