

APPENDIX B – WESTERN STATES ADJUDICATION CONFERENCE QUESTIONNAIRE

In early October of 2002, representatives of the Department of Ecology attended the Western States Adjudication Conference in Nebraska. A questionnaire was prepared and distributed to conference participants. Responses were received from representatives of five states. This summary of responses is organized by the questions contained in the questionnaire.

What State do you represent?

Replies were received from California, Idaho, Nevada, New Mexico, and Wyoming.

Are procedures in your State administrative, judicial, or hybrid (judicial and administrative)?

California: Hybrid

Idaho: Hybrid, conducted under Court authority with investigation by Idaho Department of Water Resources (IDWR).

Nevada: Judicial and Administrative

New Mexico: Judicial through Federal and State District Courts with appointment of a Special Master in most cases.

Wyoming: Administrative

Briefly describe adjudication procedures in your State.

California: Statutory Adjudications are administrative procedures that lead to judicial decrees. In Judicial Adjudications (with or without a reference to the state), the administrative agency acts as Referee or Special Master.

Idaho: The court authorizes an adjudication. IDWR serves notice to claimants, receives claims, investigates water rights, prepares recommendations, and files the Director's Report of Recommendations with the Court. The court then resolves protests and issues decrees. (See Chapter 14, Title 42 of the Idaho Code.)

Nevada: The adjudication process verifies and quantifies pre-statutory water rights and Native American Indian and federal reserved water rights. The State Engineer initiates an adjudication. Claimants pay a fee for filing their proofs of claims. Claimants must also pay for surveys, map preparation, reporting, transcribing of testimony, and court hearings on exceptions. The State Engineer conducts field investigations and prepares surveys and maps. The State Engineer prepares a Preliminary Order of Determination, Abstract of Claims and notifies claimants that inspections will be conducted. Objections to the Preliminary Order of Determination may be filed with the State Engineer. The State Engineer arranges for hearing of objections to the Preliminary Order of Determination. The State Engineer may require

periodic statements of water elevations, diversions, amounts of water used for the purposes claimed, and acreage irrigated from all claimants. Following hearing on objections to Preliminary Order of Determination, the State Engineer enters an Order of Determination. The Order of Determination is filed with the county clerk and clerk of the district Court where the adjudication is located. Exceptions to the Order of Determination are filed with the court clerk. A hearing is held and the court makes findings on each exception and enters a decree affirming or modifying the Order of Determination.

New Mexico: The State Engineer conducts a hydrographic survey of all water use within the stream system and identifies and joins all users to the proceedings. The State serves offers of judgment or proposed consent orders on defendants which may be accepted or rejected. Once all individual claims have been resolved with the state, all determinations are subject to protest in a global *inter se* proceeding.

Wyoming: When the final notice of completion of beneficial use of water or completion of construction of a reservoir is filed by the water user, a proof of appropriation is forwarded from the Cheyenne Office of the State Board of Control to the Superintendent of the Water Division in which the water right is located. The Superintendent or a designee will make an on-the-ground inspection of the facility to determine if it has been completed within the terms of the permit. If completed, the proof of appropriation is advertised in a newspaper of general circulation in the area of the water right. If the proof of appropriation is uncontested and all else is in order, the Board will approve the appropriation and accept the proof. A certificate of appropriation or construction is issued by the State Board of Control.

What is your State's role in an adjudication?

California: The state's role varies. The state may conduct statutory adjudications or procedures as Referee or Special Master. Or, the state may not be involved at all.

Idaho: See comments under adjudication procedures above.

Nevada: See comments under adjudication procedures above.

New Mexico: See comments under adjudication procedures above.

Wyoming: The State Board of Control adjudicates all water rights within the state, and acts as Special Master for the District Court in Washakie County in the adjudication of water rights within the Big Horn River system pursuant to the Board of Control's statutory authority.

What are the strengths of your adjudication procedures?

California: Ability to integrate environmental (endangered species, instream flow, water quality) requirements into adjudication.

Idaho: Uses strengths of both institutions, the court resolves disputes and IDWR makes recommendations. IDWR is not a party (IDWR serves as technical assistant to the court and independent advisor). There has been consistent funding since 1985 (very important).

Deferral of *de minimus* rights (not required to litigate right until necessary at a later date).
High leverage of technology (state of the art computer system with fully integrated Geographic Information System spatial data). Good relationship with the public.
Permanently assigned deputy attorneys general to adjudication duties.

Nevada: Both surface and ground water claims are included.

New Mexico: Recent adoption of Arc-View / Arc-Map Geographic Information System mapping and associated Access Database system.

Wyoming: Adjudications have been a constant process since 1890 by the State Board of Control.

What are the weaknesses of your adjudication procedures?

California: No effective way to adjudicate ground water; and lack of reporting requirements and enforcement tools.

Idaho: Stock water has caused an inordinate effort (recommend looking at Utah's new procedure). Spend too much time on generic "basin-wide" issues.

Nevada: We do not address statutory water rights unless they are supplemental to vested claims.

New Mexico: Reliance upon the State making the initial determination of water use, or water rights, rather than a procedure that incorporates a submission of claims by the water users.

Wyoming: A fairly sound statutory system.

Have there been any recent Legislative or administrative changes to your adjudication procedures?

California: No.

Idaho: Major revisions in 1994 to remove IDWR as a party. Since then only minor changes. A change this year was to allow digital boundaries to define the place of use of irrigation districts and canal companies, the court actually decrees the digital file.

Nevada: No.

New Mexico: No.

Wyoming: No.

Do you have any suggestions for streamlining the adjudication process?

California: Expedited procedures or exemptions for small water users. Limit scope of judicial review of administrative procedures (for non-federal claims).

Idaho: We are pleased with the process at this point. See comments under weaknesses for items that may be addressed in the future. Good communication between the Court / the Legislature / and IDWR is vital. Also, IDWR needs to establish and maintain good communication with the federal government and the water users.

Nevada: Cut down on federal filings.

New Mexico: Geographic Information System mapping, a procedure (followed in most states but not in New Mexico) that requires water users to submit their claims, then follow-up by agency staff. Use of a specialized judicial proceeding, "Water Court" rather than simple District Court action and appointment of a Special Master.

Wyoming: No.

Who should we contact if follow-up information is needed?

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APPENDIX C – DISTINGUISHING FEATURES OF ADJUDICATIONS IN OTHER WESTERN STATES

Other Western States' Adjudications Models

Although the focus of this report is on streamlining adjudications in Washington, it may be useful for the Legislature to have an understanding of other adjudication models used throughout the West. Three models are described here: a judicial model, an administrative model, and lastly a hybrid model, which blends portions of the other two. A table of information on adjudications in six western states is also included.

1. Exclusively Judicial Model

Under the judicial model, an adjudication commences with the filing of a petition by a water user. Following the filing, district judges appoint a water referee who gathers evidence and submits a report of priorities and recommendations to the judge. This model, used by Colorado and Montana, relies upon water courts and can be used either on a right-by-right basis or within a geographic area.

2. Exclusively Administrative Model

Under the administrative model, the state engineer initiates an adjudication by measuring the flow of a stream and gauging the capacities of ditches. A divisional superintendent conducts hearings and compiles evidence on existing uses. These reports are submitted to a board of control that makes the final quantification and determination of priorities. Wyoming (outside Big Horn River adjudication), Nebraska, and Kansas have adopted this model.

3. Administrative – Judicial Hybrid Model

An administrative agency completes investigations then files its order of determination (similar to a report of referee) with the court that hears any exceptions to the order. Once the exceptions are resolved, the court enters a decree affirming the order. Oregon uses this model.

The following table summarizes some of the highlights of the adjudication process in six western states:

HIGHLIGHTS OF THE ADJUDICATION PROCESS IN SELECTED WESTERN STATES	
STATE	HIGHLIGHTS
California	To date, proceedings completed or pending for 93 river systems or ground water basins. Proceedings may be brought in superior court or before the State Water Resources Control Board.
Nebraska	Statewide 1895 adjudications of surface water completed between 1895 & 1904.

HIGHLIGHTS OF THE ADJUDICATION PROCESS IN SELECTED WESTERN STATES

STATE	HIGHLIGHTS
Oregon	Ongoing statewide adjudication. Three-fourths of watersheds have been adjudicated. Klamath River Basin adjudication pending. Hybrid system with significant administrative authority. State Water Resources Dept. receives claims, holds hearings & prepares proposed order of determination for circuit court.
Wyoming	Ongoing statewide, administrative adjudication of state-law water rights. Last of three phases of adjudication underway. Rights of Wind River Reservation adjudicated after U.S. Supreme Court affirmed lower court. Allottee water rights & state-law water rights now being adjudicated.
Idaho	All surface & ground water in major river basin covering 90% of state. District Court judge, with masters, assigned long-term to preside over case. Extensive federal claims (65,000).
Colorado	Statewide, 1879. Cumulatively, all surface & ground water users who seek legal recognition of their rights. Ongoing adjudication in 7 districts. Court issues monthly supplements. Difficult issues remain re: federal reserved rights for federal lands.