

OTHER STATES' WATER COURTS

FUTURE OF THE MONTANA WATER COURT

In 1979, the Montana Legislature created the Montana Water Court. The court has a limited—if complex and wide-impacting—function: It is charged with the litigation phase for the adjudication of historical water rights. Montana's legal framework for water rights is the prior appropriation doctrine, which is sometimes described as “first in time, first in right.” The Montana Water Court, the Department of Natural Resources and Conservation, and state district courts each play certain roles within this doctrine.

House Joint Resolution 14 asks the 2019-20 Water Policy Interim Committee to study the future of the Montana Water Court. In Sept. 2019, the WPIC asked for a general survey of other Western water courts. While each of the Western states have their own brand of water rights administration, only three states (Colorado, Idaho, and Montana) have water courts. This memo serves to generally detail how these water courts operate, but will also outline relevant water rights processes in other Western states.

WESTERN STATUTORY SYSTEMS

Many of the West's oldest water rights were established in the mid- to late-1800s.¹ The prior appropriation doctrine was developed “during the nation's rapid western expansion, particularly after the discovery of gold in California in 1848.”² The doctrine “was an expedient means to encourage development of the arid West, where much of the land is distant from streams and water is limited.”³ Especially in mostly arid states, “statutory systems have evolved to provide for initiation of appropriations, establishment and enforcement of priorities, and water distribution.”⁴

Constitutions in Western states “assume that water in its natural state belongs to no person or entity, but rather is a common resource to be administered for the benefit of society.”⁵ But beyond Constitutional language, what are these “statutory systems?”

¹ This is excepting tribal reserved rights, which predate the settlement era.

² David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 78.

³ David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 81.

⁴ Ibid.

⁵ David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 85.

Montana's system of water rights involves three distinct phases—adjudication,⁶ permitting (and changes to existing rights), and enforcement. These three phases are generally mirrored in the other Western states.

Water rights adjudication is “an action to determine all respective water rights on a stream system.”⁷ Like Montana, not all Western states have adjudicated all rights on all streams. For example, of 85 hydrologic basins, the Montana Water Court has issued final decrees—determining the important elements of priority, flow rate, source, and place of use—in 6 basins.⁸

Adjudication tends to follow two models: the Colorado model or the Wyoming model.⁹ In short, Colorado water rights are judicially determined; Wyoming's are administratively so. As Thorson observed, “Colorado remains the only western state with a permanent water court. By contrast, Wyoming, in advancing a California innovation, furthered the development of an administrative structure with a state engineer as its central character.”¹⁰

Some Western states have determined most rights on most streams.¹¹ For example, Wyoming and Colorado comprehensively determined their water rights more than a century ago. Subsequent rights are then based on those existing rights. Meanwhile, Montana began a statewide adjudication in the 1980s; Idaho completed an adjudication of 150,000 Snake River water claims in 2014. The process of adjudicating “old” claims was working in parallel with the permitting of “new” ones.

Colorado, Idaho, and Montana have judicially determined water rights—at least in part. All of the rights in Colorado are judicially determined. The Montana Water Court is adjudicating all pre-1973 water rights; the Snake River Adjudication Court adjudicated water rights throughout the entire Snake River system, including groundwater, which is home to about two-thirds of the state's irrigated agriculture.

In contrast to all other Western states, the Colorado Water Court also decrees new uses of water. For the others, including Montana, the “acquisition, exercise, transfer, and termination of water rights are regulated by administrative permit systems.”¹²

Enforcement, or water distribution, varies by state, but is generally performed by a state official of some ilk. In Montana, it is a district court-appointed water commissioner.

⁶ Adjudication is defined by Black's Law Dictionary as “the entry of a decree by a court in respect to the parties in a case.” For Montana, the Water Court is the court, and the parties are the water rights claimant and any objectors to that claim.

⁷ A. Dan Tarlock, *Law of Water Rights and Resources*, section 7:2, Thomson Reuters (2015).

⁸ Litigation of pre-1973 water rights claims is mostly complete in most basins. And the DNRC has issued nearly 150,000 water rights permits and groundwater certificates.

⁹ There are variations, of course, most notably Oregon's adoption of the Wyoming system, and how California's adjudication laid the groundwork for Wyoming's.

¹⁰ John E. Thorson, A Permanent Water Court Proposal for a Post-general Stream Adjudication World, *52 Idaho L. Rev.* 17 (2016).

¹¹ Although not necessarily for groundwater claims. California only recently adopted a groundwater permitting system.

¹² A. Dan Tarlock, *Law of Water Rights and Resources*, section 7:5, Thomson Reuters (2015).

WATER COURTS OF COLORADO

The Colorado water courts are permanent courts that adjudicate existing rights and determine new water rights and changes to water rights. Because Colorado adjudicated most of its water rights more than 100 years ago, “its modern adjudications are ‘supplemental’ to those historical decrees.”¹³ Historical water rights may be changed to different purposes or places of use by applying to a water court.

The court, which is composed of 7 water divisions within the state’s 7 major basins, was created in 1969, assuming functions previously performed by the district courts. The state engineer’s office provides technical assistance to the courts. Judges serving in one of the water divisions may also have a regular district court caseload.¹⁴ A water referee investigates water cases filed with a court, oversees settlement discussions, and issues proposed rulings. The water courts have a unique settlement rule that requires parties to resolve factual disputes.¹⁵ Administrative decisions of the state engineer may be appealed to a water court. Appeals of water court decisions go to the Colorado Supreme Court.

Water courts don’t distribute water; water commissioners do so as employees of the state engineer’s office.

IDAHO’S WATER COURT

The Snake River Basin Adjudication court was created in 1987 to adjudicate water rights in the Snake River Basin drainage, which covers about 87 percent of the state. This adjudication included federal and tribal claims.

In a process similar to Montana’s, the Idaho 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.”¹⁶ Prior to 1963 for groundwater and 1971 for surface water, water rights could be claimed by putting water to a beneficial use or by posting notice under law. The Snake River court is located in Twin Falls, Idaho.

The court completed its work with the Snake River final decree in 2014. The court will “continue to hear water-related appeals from state administrative agencies and now also turns its attention to smaller adjudications in northern Idaho.”¹⁷ Although the court continues to adjudicate and hear appeals, it appears to be a temporary one.

¹³ Land Use and Natural Resources Clinic, University of Montana School of Law, *Water Rights in Montana* (2014), 19.

¹⁴ In contrast to Montana, a judicial nominating committee appoints Colorado district court judges (Colo. Const. Art. VI, Sec. 24). Judges who wish to remain in office after the expiration of each judicial term must win a retention vote by electors of their judicial district. (Colo. Const. Art. VI, Sec. 25).

¹⁵ Land Use and Natural Resources Clinic, University of Montana School of Law, *Water Rights in Montana* (2014), 19.

¹⁶ John E. Thorson, A Permanent Water Court Proposal for a Post-general Stream Adjudication World, *52 Idaho L. Rev.* 17 (2016).

¹⁷ *Ibid.*

The Idaho Department of Water Resources processes applications for new water rights and for changes to existing rights. The Snake River court hears appeals to application decisions, distribution disputes, and other water-related decisions of the Idaho Department of Water Resources.

Distribution of water is through the Idaho Department of Water Resources and elected water masters.

THE MONTANA WATER COURT

The Water Court, with administrative and technical analysis by DNRC experts, conducts the statewide adjudication.

Senate Bill 76 (1979) created the Water Court to conduct the litigation phase of adjudication, after DNRC experts examine each claim. The Montana Supreme Court ordered everyone with a pre-1973 water claim to file with the DNRC. About 219,000 claims were filed by the April 30, 1982, deadline. It is these claims, plus an additional 30,000 late claims authorized by later legislatures, that the court is working through.

Although officially crafted to have a chief judge with four district court judges, the Water Court practically operates through the chief water judge with the help of an associate chief water judge and various water masters. Because the bulk of the Water Court's work is focused on those pre-1973 water claims, the court will have limited function after it issues final decrees, which must include federal and tribal reserved water rights.

The Montana Water Court has two other important roles: district courts use the Water Court and its judges and masters to certify claims involved in a distribution controversy, and the Water Court is a potential venue for an appeal of a DNRC decision on a water right permit or change application.

The DNRC issues permits and approves changes of water rights (some of which are appealable to the Water Court). District courts distribute water rights through the appointment of a water commissioner, who monitors streamflows and may close headgates to protect highest priority water rights.

OTHER SYSTEMS

As described above, a minority of Western states have a water court, whether permanent or temporary. However, it is worth understanding the systems in other states, including permitting and enforcement. It is also important to

note that district and superior courts are involved in appeals of administrative decisions. The following graphic¹⁸ sums up the water rights systems in 7 Western states¹⁹:

State	Adjudication	Permitting, changes	Distribution
Montana	Water Court, after technical analysis by Department of Natural Resources and Conservation (DNRC).	Since 1973, the DNRC has issued new permits and processes changes of water rights.	Water commissioners appointed by district court.
California	State Water Resources Control Board (SWRCB) investigates stream and claims and makes preliminary determination of surface water claims subject to judicial confirmation. Superior courts have historically conducted groundwater adjudications.	Since 1914, SWRCB permits new uses and changes for surface water. A 2014 law requires local agencies to sustainably manage groundwater under SWRCB oversight.	Trial court-appointed water master oversees exercise of decreed rights and may operate water diversion structures. Water master may be a public entity with a governing body in a major urban area.
Colorado	One of the state's 7 water courts with assistance from a water referee, who investigates a water case, oversees settlement discussions, and proposes rulings.	Water courts decree new water rights. On changes of rights, the courts receive technical support from the State Engineer. The engineer produces a "consultation report" with recommended findings and conditions.	Water Commissioners employed by the State Engineer distribute water according to water court decrees. Division engineers and water court referees may aid water commissioners in interpreting decrees.

¹⁸ Water Policy Interim Committee memo, "Comparison of Change of Water Right Process in 6 States," July 16, 2018; Land Use and Natural Resources Clinic, University of Montana School of Law, *Water Rights in Montana* (2014); A. Dan Tarlock, *Law of Water Rights and Resources*, section 7:5, Thomson Reuters (2015); and John E. Thorson, A Permanent Water Court Proposal for a Post-general Stream Adjudication World, *52 Idaho L. Rev.* 17 (2016).

¹⁹ Nevada, New Mexico, and Oregon do not employ water courts. Nevada and New Mexico have judicial adjudications with agency involvement. Oregon has an administrative adjudication, which must be filed as a judicial action. Permitting, changes, and enforcement are primarily executive agency functions.

State	Adjudication	Permitting, changes	Distribution
Idaho	Snake River Basin Adjudication court with technical assistance from the Idaho Department of Water Resources (IDWR). Court has completed largest basin (Snake River) and is conducting adjudications in Northern Idaho and Bear River basins.	IDWR processes post-1971 applications for new water uses and all changes of use. Appeals of agency decisions go to Snake River Basin Adjudication court.	IDWR water masters are elected from state water districts to distribute water.
Utah	State Engineer's Office initiates adjudication of pre-1903 surface claims and pre-1935 groundwater claims in district court. Users file claims, which may be objected to. Engineer's office recommends a "proposed determination" to the court. District court retains jurisdiction over decrees. Adjudication is ongoing.	Since 1903, the State Engineer's Office. District courts review engineer's office decisions on changes to water rights.	State Engineer's Office appoints water commissioners to 4-year terms with local users' input.

State	Adjudication	Permitting, changes	Distribution
Washington	Superior Court conducts adjudications, which are initiated by the Department of Ecology. These adjudications may include all appropriators – pre-1917 and -1932 claims and subsequent permits. Adjudication is complete in 83 basins; a superior court approved the important Yakima River basin adjudication most recently. Much of the state remains unadjudicated.	Department of Ecology issues permits for surface water use after 1917 (or 1932 in some instances) and for groundwater use after 1945. Changes are processed by the adjudication court, if a right is under adjudication, or Department of Ecology. Decisions may be appealed to trial court or a Pollution Control Hearings Board. Change proposals may go through the Water Transfer Working Group.	Adjudicating courts usually assign Department of Ecology with distribution and enforcement, although the courts may be more involved in some instances. The Department of Ecology hires, trains, and supervises “water masters” to distribute water.
Wyoming	State Engineer adjudicated 5,000 pre-1890 territorial water rights. Adjudication is thus complete.	Since 1890 statehood, the state engineer has issued water rights permits. The Board of Control (which includes the state engineer) considers changes to water rights.	State engineer hires water commissioners. Distribution decisions may be appealed to a district supervisor, state engineer, and the courts.

CONCLUSION

Three Western states employ water courts. One—Colorado's—has been virtually employed since the determination of water rights began. Colorado's water courts conduct virtually all water right processes—adjudication, permitting, and changes—although distribution and enforcement is up to the State Engineer's Office.

Montana's and Idaho's water courts were created more recently and are primarily used for adjudication of historical water rights, although Idaho's water court does hear appeals of permit and change decisions; the Montana Water Court may be chosen by an applicant to hear an appeal of a permit or change decision.

Throughout the West, each state's adjudication, permitting, and enforcement mechanisms reflect the particular history of the development of water use in that state. Further inquiry may be necessary to adapt specific processes from other states' systems into Montana's.