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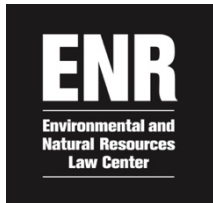
School of Law

Environmental and Natural
Resources Law Center



Western State Strategies to Improve Efficiency in Water Allocation Decision Making

**A Report by the University of Oregon School of Law
Environmental and Natural Resources Law Center
Oceans, Coasts, and Watersheds Project**



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About this report

This report is a collaborative effort of the ENR Center's Oceans, Coasts, and Watersheds Project an interdisciplinary research project focused on engaging the law to promote sustainability for ocean, coastal, and freshwater resources.

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I. Introduction

Increasing pressure on water resources from over allocation and climate change is requiring that states actively manage water resources to ensure that finite water supplies can meet both instream and out-of-stream needs. In the West, most water has been appropriated. In addition, increasing scarcity and seasonal and yearly fluctuations are shifting when and where water is available and when and where it is needed. These factors are increasing the complexity of and demand for administrative and judicial processes that allocate water. In particular, these factors are amplifying the need for responsive and flexible water management frameworks that allow states and water users to reallocate existing water rights to meet new and different demands.

State water allocation frameworks are the processes through which states authorize and manage water appropriation and use. In Western states, allocation frameworks generally include administrative processes to approve new water uses and changes to existing water uses, legal processes to confirm and quantify unpermitted water rights, and administrative and judicial processes to oversee the distribution and enforcement of water rights. Inefficiencies in these frameworks can lead to backlogs in decision making, which can impede states and water users from actively managing water to meet current and future water needs.

As with other Western states, Oregon faces challenges in evolving its water allocation frameworks to remove barriers to efficient and flexible water management. This report provides an overview of strategies Western states have used to increase the efficiency of water allocation processes.¹ This report focuses on Western states, which have broadly similar water allocation frameworks and water availability challenges. Strategies used in these states can therefore provide models that may be adaptable to address Oregon's unique challenges. While the strategies other Western states have used to improve their water allocation processes are instructive, state frameworks for managing water resources are distinct and each state must consider their own legal and regulatory frameworks and practices in finding solutions.

The aim of this report is to survey and describe strategies used in other states to address efficiency barriers in water allocation decision making to inform ongoing efforts to improve Oregon's water allocation processes. This report does not assess the efficacy of the highlighted strategies or make recommendations for Oregon.

Report Organization

This report first provides an overview of water allocation processes and the challenges posed by inefficient decision-making processes. This report then describes strategies states have used to improve the efficiency of water allocation frameworks and highlights

¹ Importantly, efficiency is just one value that states may choose to prioritize in decision-making frameworks.

examples of how states have implemented these strategies. Strategies are categorized as: (1) workgroups, (2) judicial specialization, (3) education and information accessibility, (4) funding, and (5) procedural and substantive changes. Appendix A of this report provides an overview of Western state water allocation frameworks.

II. Context: Western state water allocation frameworks and the impacts of inefficient decision making

The following provides a high-level overview of Western state water allocation frameworks and describes the challenges posed by inefficient systems.

A. Water allocation frameworks overview

Western states have adopted legal frameworks that control the appropriation and use of water and codify the common law prior appropriation doctrine (which broadly allocates water according to the earliest date of beneficial use).

Administrative processes. Apart from Colorado, Western states have adopted centralized administrative permitting systems for the appropriation and use of water.² Administrative frameworks vary but typically require agency approval of new water rights and changes to existing water rights. In Oregon, the Oregon Water Resources Department (OWRD) permits new water uses and approves changes to existing water rights, termed “transfers” (including place and purpose of use).³

Western states also adopt statutory frameworks for the distribution and regulation of water rights. Depending on the state, distribution and regulation may be overseen by an administrative agency, a court-appointed commissioner, or independent state engineer. In Oregon, the OWRD distributes and regulates water according to the priority system and water permit conditions.

State statutory frameworks provide for the protest and appeal of administrative orders, which can include permitting decisions and enforcement orders. Typically, these include an administrative appeals process and subsequent judicial review. In Oregon, protests of administrative orders, if not settled, are heard by an administrative law judge housed within the state’s independent Office of Administrative Hearing, and then appealed to the court of appeals.

Adjudications. State statutory frameworks authorize the adjudication of water rights, which serves as a legal process to confirm and quantify the extent and character of water rights that were appropriated prior to the establishment of state permit systems or

² All water uses in Colorado, including changes to existing water rights, are judicially decreed.

³ Oregon’s statutory frameworks for the appropriation and use of water are predominately found in Oregon Revised Statute Chapters 537 (governing the appropriation of water) and 540 (governing changes in water rights, and distribution and enforcement).

established outside of the state appropriation framework (e.g., Tribal water rights and water rights associated with federal land reservations). The federal government has consented to be joined in state court general stream adjudications, which allows for the adjudication of federal and Tribal water rights claims in state proceedings.⁴

The scope of adjudications has varied by state. Some states have initiated comprehensive state-wide adjudications while others are adjudicating individual river basins. In addition, some state statutes only authorize comprehensive stream adjudications while others allow for adjudication of individual water right claims. Because adjudications must be comprehensive to join federal claims, most state adjudications address entire river basins.

Most states adopt a hybrid model for adjudications that includes both administrative and judicial components. Under these frameworks, water resources agencies play a role in developing factual findings and recommendations. The scope of the judiciary's role varies by state, but typically will include resolution of disputes and, in all cases, issuing final decrees.⁵

Only Colorado uses a purely judicial model, where adjudications are conducted entirely by the state's specialized water courts, which adjudicate water rights, in addition to issuing new water right decrees and overseeing the administration of water rights.

Federal and Tribal water rights claims increase the complexity of state adjudications and litigation is often not the mechanism preferred by Tribes to validate and quantify water rights. In lieu of litigation, states have authorized the settlement of federal water rights claims. Settlement models vary by state, including the entity authorized to negotiate settlement and processes for review and approval of settlements.⁶

General stream adjudications can involve thousands of individual water rights claims, requiring the development of large factual records and resolution of complex legal issues. Due to these complexities, adjudications have commonly taken decades to complete and required significant investments in the capacity of state agencies and judicial departments. In addition, adjudications completed prior to the federal government's consent to be joined in state general stream adjudications did not address federal and

⁴ 43 U.S.C. § 666 (2015) (known as The McCarran Amendment).

⁵ The McCarran Amendment, which waives federal sovereign immunity for stream adjudications in "state court," has been interpreted to require state adjudications to have a judicial component to bring in federal claims. Therefore, purely administrative processes cannot address federal claims.

⁶ Montana has been successful in resolving federal and Tribal water rights claims. In 1979 the Montana State Legislature established the Reserved Water Rights Compact Commission to proactively negotiate federal and Tribal water rights claims (Mont. Code Ann. § 85-2-701). Members of the commission include state legislators and individuals designated by the governor's office and attorney general's office. Through the commission, Montana has entered 18 compacts settling seven Tribal water rights claims and 11 federal water rights claims. Water rights settled through compacts are decreed by the state's water court. Montana Department of Natural Resources and Conservation, Compact Implementation Program, <https://dnrc.mt.gov/Water-Resources/Compacts/>.

Tribal water rights, leaving important water rights claims unquantified even in river basins that have adjudicated state appropriative rights.

In Oregon, the OWRD initiates adjudications, receives evidence, and prepares proposed orders determining the relative rights to the streams and reaches.⁷ Exceptions to the proposed order are heard by an administrative law judge and the OWRD then files a final order of determination with the circuit court, who hears remaining exceptions and issues water rights decrees. Oregon authorizes the adjudication of federal and Tribal water rights as part of general stream adjudications and authorizes the OWRD to negotiate with Tribes to determine water rights claims (Or. Rev. Stat. §§ 539.310 through .350).

B. Impacts of inefficient decision making

Water allocation frameworks that support efficient and quality decision making are increasingly necessary to manage water to meet demands in the face of twenty-first century water challenges. Importantly, inefficiencies in allocation frameworks have reduced the timeliness and responsiveness of decision making, imposing barriers to the use of existing tools to meet water needs and the implementation of innovative water management solutions.

Administrative processes. Over allocation of water resources and changing temporal and spatial availability of water is imposing new demands on state administrative frameworks by (1) increasing the complexity of approving new water uses, including in determining water availability and protecting existing uses from injury, (2) increasing the demand for administrative processes that are necessary to reallocate water to meet new demands, (3) increasing conflict in water decision making, which increases the complexity and length of administrative processes, and (4) increasing the demand for state regulation to distribute and enforce water rights to protect priority uses and ensure compliance with permit conditions and consistency with state laws.

As in other Western states, there have been increasing demands on Oregon's administrative processes that control the allocation of water, including higher numbers of water right applications, protests of agency decisions and regulatory actions, and increased complexity of decisions. Recent legislative investments have increased agency decision-making capacity; however, significant backlogs remain. In 2024 the OWRD identified backlogs of 572 water right applications, 419 transfers, 907 claims of beneficial

⁷ Oregon Revised Statutes Chapter 539 governs the determination of pre-1909 water rights and Tribal reserved water rights.

use,⁸ 126 requests for permit extensions, and 223 protests.⁹ In 2023 over 83% of the protests were to instream water rights applications.¹⁰

Adjudications. Under existing statutory frameworks, adjudications are necessary for states to confirm and quantify unpermitted water rights. Clearly defined water rights facilitate more active management of water and can streamline and reduce costs of water allocation processes.

Without adjudications, states do not know the quantity or characteristics of existing water rights, which impacts a state's ability to determine whether water is available for new uses and to assess the impact of changes on existing water rights. Many states also require adjudication before water rights can be managed within the priority system. In addition, state frameworks may prohibit transfers of unadjudicated water rights claims, which reduces management flexibility to change how water is used to meet new or different demands.

Resolution of federal and Tribal water rights is of particular importance. Tribal water rights claims are typically the most senior in the state and can involve significant volumes of water within a river basin.

Oregon has adjudicated appropriative surface rights for about two thirds of its river basins. However, the State has not adjudicated appropriative groundwater rights. The state's only active adjudication is for the Klamath Basin, which began in 1975. Unadjudicated water rights cannot be enforced within the priority system and cannot be transferred.¹¹

Because many of Oregon's adjudications occurred prior to the federal government's consent to be joined in state adjudications, most federal and Tribal water rights remain unquantified in the state. Oregon has settled water rights claims with the Confederated Tribes of Warm Springs and has quantified water rights for the Klamath Tribes as part of the Klamath Basin Adjudication.¹² The OWRD has had ongoing water rights settlement negotiations with the Confederated Tribes of the Umatilla Indian Reservation since 2012. Federal water rights in the state have only been adjudicated in the Klamath Basin.

⁸ A claim of beneficial use is the process through which the OWRD determines whether permit conditions have been met and issues a water right certificate.

⁹ Water Rights Transaction, Briefing Paper, 2025 Legislative and Agency Request Budget Development, Oregon Water Resources Department (2024),

<https://www.oregon.gov/owrd/Documents/Water%20Right%20Transactions%20Briefing%20Paper.pdf>.

¹⁰ Update on Water Rights and Transfers Backlog Reeducation Efforts for the House Committee on Agriculture, Land Use, Natural Resources and Water, The Oregon Water Resources Department (March 7, 2023) (186 of the 224 protests were to instream water rights applications),

<https://olis.oregonlegislature.gov/2023R1/Downloads/publicTestimonyDocument/60623>.

¹¹ In limited circumstances, water rights claimants in the Klamath River Basin may temporarily transfer water rights claims prior to final adjudication (Or. Rev. Stat. § 539.170).

¹² Oregon Water Resources Department 2023 Government-to-Government Report, [https://www.oregon.gov/owrd/Documents/2023%20Govt-to-Govt%20Report%20\(OWRD\).pdf](https://www.oregon.gov/owrd/Documents/2023%20Govt-to-Govt%20Report%20(OWRD).pdf).

III. State strategies to improve water allocation processes

The following describes strategies Western states have used to remove decision-making backlogs and improve the efficiency and consistency of water allocation processes. Importantly, state efforts to refine and improve water allocation have been iterative. Examples of how states have implemented these strategies are provided in each section.

The strategies described in this report are:

- The use of workgroups to evaluate water management frameworks and build support for solutions.
- Specialization of judges and courts to improve and expedite adjudications and the resolution of appeals.
- The development of educational resources and decision-making information to build expertise and capacity of decision makers, professionals, and water users.
- Funding to support administrative and judicial capacity to meet increasing demand for water management and to resolve conflict.
- Procedural and substantive changes to administrative and judicial processes.

A. Workgroups

Several Western states have convened stakeholder workgroups and agency task forces to evaluate water allocation frameworks, develop approaches to improve efficiency, and build support for proposed changes. These processes have been effective in helping policy makers understand their state's unique efficiency barriers and tailor policy approaches to remove those barriers. State workgroups have been convened by legislators, courts, and agencies.

Stakeholder workgroups that draw members from diverse perspectives can also help identify tradeoffs that may result from strategies that increase efficiency and flexibility. For example, condensed administrative timelines or reduced opportunities for public participation may shorten decision-making timelines but at the expense of processes that are equitable and protective of the public interest.

- The Colorado Supreme Court established the Water Court Committee in 2007 to provide recommendations to increase the efficiency of the water court system.¹³ Based on the committee's recommendations, the court adopted a suite of reforms to improve the timeliness and fairness of decision making. As part of those reforms, the court established the committee as a standing committee, which now meets semiannually to review water processes, identify opportunities to increase efficiencies, and support competency of water court participants.

¹³ Colorado Judicial Branch, Water Court Committee, https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=27.

- The Nevada Supreme Court established the Commission to Study the Adjudication of Water Law Cases to develop recommendations to improve “the education, training, specialization, timeliness, and efficiency” of the judicial review process for water law cases.¹⁴ Commission members represented the state water resources agency, water rights engineers, hydrologists, water rights attorneys, municipal, rural and economic water interests, environmental organizations, district court judges, Nevada counties, and Tribes. The workgroup developed recommended rules to establish a 3-year pilot program establishing a water law judge position and water law curriculum, both of which were adopted by the supreme court in 2022.¹⁵
- In 2021 the Montana Department of Natural Resources and Conservation launched an effort to evaluate and reform state water administration—named the Comprehensive Water Review.¹⁶ The department engaged in statewide listening sessions to identify challenges and prioritize issues. The agency subsequently convened a Comprehensive Review Stakeholder Workgroup to provide feedback on policy reform and develop recommendations. As a result of this process, in 2023, the state legislature adopted legislation to reform the state’s water permitting framework with the goal of increasing its transparency, timeliness, and consistency (HB 114 (2023)). The workgroup continues to meet to develop recommendations to address other priority areas, including developing a permanent water court.

B. Judicial Specialization

The complexity of facts and law in water law cases has prompted several Western states to adopt judicial specialization frameworks with the goal of improving both the timeliness and quality of decisions. Specialization increases the expertise of judges hearing cases, which reduces decision-making timelines and improves outcomes.

Judicial specialization in water cases has most commonly been considered as a tool to support general stream adjudications, which typically involve large numbers of claims, complex factual records, and complex legal issues. Specialization in adjudications has been used to reduce caseload burdens on general jurisdiction courts and streamline outcomes.

More recently, states have used specialization to improve the efficiency and consistency of petitions for judicial review of administrative appeals and to better integrate adjudication and administrative processes. Specialization models could also conceptually support the more efficient resolution of administrative protests by administrative law judges (ALJ).

¹⁴ Supreme Court of Nevada, Overview of the Commission to Study the Adjudication of Water Law Cases, https://nvcourts.gov/aoc/committees_and_commissions/water_law/overview.

¹⁵ Supreme Court of Nevada, Water Judges Pilot Program, https://nvcourts.gov/aoc/committees_and_commissions/water_law/water_judges_pilot_program.

¹⁶ Montana Department of Natural Resources and Conservation, Comprehensive Water Review, <https://dnrc.mt.gov/Water-Resources/Comprehensive-Water-Review/>.

Several states use generalist ALJs, who hear appeals from all or a subset of agencies. As with generalist judges, generalist ALJs may not bring expertise in water law, which can increase decision-making timelines and reduce the consistency of ALJ orders.

States have used different models for specialization, including establishing water courts, creating water judge positions, and authorizing the appointment of water commissioners and other specialized water court staff.

Water courts are specialized courts set up within a state court system that have jurisdiction over water law matters. State models include water courts that administer all water allocations, water courts with limited jurisdiction over water rights adjudications, and, more recently, jurisdiction over administrative appeals. All models generally have appointed water judges and adopt special procedural rules intended to support efficient administration of adjudications and water law cases.

- Established in 1969 by the Colorado State Legislature, Colorado’s water court system is the longest running and most comprehensive water court system among prior appropriation states. The water court is a specialized court within the state’s district courts (Colo. Code Title 37, Article 92, Part 2). The water court consists of seven water divisions, which correspond to the state’s river basins. Each division has a district court judge appointed by the supreme court as a water judge, water rights commissioner (who interacts with water users) appointed by the state engineer, and a water referee (who investigates and makes an initial determination on applications). Colorado’s water courts are unique in that they administer all water rights actions in the states, including decreeing all water rights and overseeing the use and administration of water rights.
- Idaho’s adjudications and water rights administrative appeals are heard by a single specialized district court. In 1987 the Idaho State Legislature directed the state water resources agency to file a petition with the district court to commence the Snake River Basin Adjudication (Idaho Code § 42-1406A (repealed)). Pursuant to the state adjudication statute, the Idaho Supreme Court designated a single district court as the venue for the adjudication and assigned a district court judge to manage the litigation (Idaho Code § 42-1407).¹⁷ The “court” became known as the Snake River Basin Adjudication Court (SRBAC). The SRBAC is supported by two special masters. The Snake River final decree was issued in 2014, adjudicating surface and ground water rights in 86% of the state.

The state legislature has authorized four additional adjudications—covering the remainder of the state—and sited jurisdiction for the adjudications with the SRBAC.¹⁸ In

¹⁷ Order Appointing District Judge and Determining Venue of Petition for General Adjudication of Water Rights in Snake River Basin, *In re SRBA* Case No. 39576 (June 26, 1987).

¹⁸ See e.g., Northern Idaho Water Rights Adjudication (Idaho Code § 42-1406B); Bear River Water Rights Adjudication (Idaho Code § 42-1406C).

2009 the supreme court directed that all administrative appeals of the state water resources department be assigned to the SRBAC.¹⁹ The order recognizes the SRBAC's water law expertise and that such expertise could improve the timeliness, quality, and consistency of judicial review of agency decisions.

- Montana began adjudicating water rights claims with the passage of its 1973 Water Use Act, which directed the state water resources agency to confirm and decree pre-1973 water rights. Responding to the slow pace of the administrative process and the need to develop a judicial process to join federal claims, the Montana State Legislature established the Water Court in 1979 (SB 76 (1979)). The court is divided into four divisions, corresponding with the state's water drainages, and include a chief judge and four associate water judges (Mont. Code Ann. Title 3, Chapter 7). The chief water judge is appointed by the supreme court. Associate water judges are elected by a pool of district court judges. Water judges serve four-year terms and may be reelected.

The water court has exclusive jurisdiction of general stream adjudications. Parties in contested case hearings may elect to file their petition for judicial review of a water law case with the water court in lieu of a district court (Mont. Code Ann. § 2-4-702(b)(e)(i).

In 2023, the state legislature considered a bill to make the water court permanent and give the water court exclusive jurisdiction over water law disputes (SB 72 (2023)). The bill did not pass out of committee. A workgroup organized under the Montana Department of Natural Resources and Conservation's Comprehensive Water Reform effort continues to meet and develop policy options to address water administration post-adjudication.²⁰

- While ultimately not implemented, several state workgroups have recommended judicial specialization to streamline and improve the outcomes of adjudications and administrative appeals.²¹ In 2002 the Washington State Legislature established the Washington Water Dispute Task Force to study opportunities to accelerate the adjudication of water rights (SB 6387 (2002)).²² The task force recommended a specialized water court be established to hear adjudications and water law cases if the

¹⁹ In the Matter of the Appointment of the SRBA District Court to Hear all Petitions for Judicial Review from the Department of Water Resources Involving the Administration of Water Rights, Administrative Order, Idaho Supreme Court (December 10, 2009), <http://srba.idaho.gov/Images/sct%20order.pdf>.

²⁰ Montana Department of Natural Resources, Final Decree Transition, Sub-working group, <https://dnrc.mt.gov/Water-Resources/Comprehensive-Water-Review/Final-Decree-Transition>.

²¹ In 2023 legislation was proposed to establish specialized water judges and provide for continuing trainings related to water (CA AB2313). Similarly, New Mexico considered the use of judicial specialization to streamline adjudications. A Water Court for New Mexico, Perspectives from the Bench, Institute for Court Management (May 2003).

²² The resulting report can be found here: Department of Ecology, Streamlining the Water Rights General Adjudication Procedures, 2002 Report to the Legislature (Dec. 2002), <https://apps.ecology.wa.gov/publications/documents/0211019.pdf>.

state increased the number of ongoing adjudications. The state court board for judicial administration subsequently adopted a policy recommending the establishment of a water court to hear adjudications and water law administrative appeals.²³

In lieu of establishing a water court system, several states have created water judge appointments. Water judges are specially appointed state judges who have or are required to develop water law expertise and are assigned to hear water law cases. State frameworks have established the qualifications of water judges, process for and term of appointment, and jurisdiction.

- In 2022 the Utah Judicial Council adopted rules for appointing at least three district court water judges (UCJA Rule 6-104). The rule was adopted to facilitate the timely and consistent resolution of water disputes. The Utah Supreme Court modeled the rule after existing tax court judge rules, which provide for the designation of district court judges to hear tax law cases.

The rules authorize the supreme court to designate water judges based on the judge's knowledge of and experience with water law or their willingness to develop expertise. Water judges may hear non-water law cases if they do not have a full workload with water law cases. As of November 2023, the state had nine appointed water law judges.

Requests for assignment to a water judge must be made by a party. In cases involving new water rights appropriations and changes to existing water rights, the presiding judge must reassign the case to a water judge if a party requests assignment at the beginning of an action. In other types of water law cases, the presiding judge will assign the case to a water judge if the case raises "sufficient legal complexity as related to water law."

- Responding to increasing demand for court resources to resolve water disputes, in 2023 the Nevada Supreme Court adopted rules providing for the designation of district court judges as water judges to adjudicate water law cases (Nev. Sup. Ct. R. 18). The designation of water judges is intended to build expertise that will improve timeliness and efficiency in judicial review processes. The program is a pilot for a minimum of three years, though the rules will stay in effect unless repealed. The rules provide for annual status reports on progress and efficacy of the program.

The supreme court designates water judges considering the judge's knowledge of water law. Water judges are also required to satisfy minimum continuing educational requirements. As of February 2024, the supreme court has appointed twelve water law judges with three additional judges pending certification.

²³ Washington Courts, Water Issues, General Water Right Adjudication and Water Courts: Background Information, https://www.courts.wa.gov/committee/?fa=committee.display&item_id=425&committee_id=109.

The rule designates certain types of “water law cases” that must be assigned to a water judge and provides a process for parties to request assignment of other types of water cases. “Water law cases” include cases arising under the state water code, including, appropriations, adjudications, change applications, and regulation and use. Cases that raise water law issues but do not qualify as a “water law case” may be assigned at the request of a party to the case or by the presiding judge after consultation with the parties. If the water judge does not have a full docket with water law cases, they may hear non-water law cases.

- The New Mexico Supreme Court assigns a water judge within each of the state’s district courts (N.M. R. Civ. P. Dist. Ct. 1-071.5). The water judge hears water law cases in addition to a general docket. The supreme court also assigns judges to hear adjudications in lieu of the normal random assignment process.

States have used specially appointed adjuncts—known by various titles, including special masters, commissioners, and referees—to provide expertise to support judges in managing adjudications and water law cases. Appointment of expert adjuncts can improve case management timelines and bring subject matter expertise. Adjuncts support adjudications in Arizona, Colorado, Idaho, New Mexico, Montana, and Washington.

- Montana’s water judges are authorized to appoint water masters to make factual findings, resolve disputes, and develop preliminary decrees for court adoption. Water judges are directed to appoint water masters based on the “proposed water master’s experience with water law, water use and water rights” (Mont. Code. Ann. § 3-7-301).
- In 2024 the Washington State Legislature created a statutory water commissioner position to be appointed by superior court judges (SB 5828 (2024)).²⁴ Under the legislation, the superior courts may appoint a water attorney with expertise in water law to serve as a full or part-time water commissioner. The legislation requires the commissioner to receive training on water law, Indian law, hydrology, and cultural awareness, including Tribal history. Commissioners have broad authority to hold hearings, determine legal and factual issues, and issue orders and findings.

The statutory commissioner position adds capacity to superior courts in advance of two adjudications that are scheduled to begin in 2024. The need for a statutory commissioner position was identified as part of a review of the recently completed Yakima Basin Adjudication to identify capacity and staffing deficiencies that created

²⁴ While the appointment of court commissioners was previously allowed, the state constitution limited the number of court commissioners per county to three. The new statutory water commission position removes this limitation for water commissioners.

barriers to the timely resolution of the adjudication.²⁵ The bill also allows the court to appoint referees (who hold evidentiary hearings and issue findings of fact) without the consent of the parties.

C. Education and Information

States have supported water education programs and centers and improved the accessibility of decision-making information to build capacity among decision makers, professionals, and the public to administer and engage in water allocation processes. State education strategies include establishing judicial education standards and resources, supporting water education centers and ombudsman programs, and requiring accessible water decision-making information.

States have developed educational programs and requirements that build the water law competency of judges to improve the timeliness and quality of judicial decision making.

- Nevada’s rules for district court water judges articulate competency requirements for water judges and enacts continuing education requirements (Nev. Sup. Ct. R. 18). The Nevada Supreme Court’s order on water judges outlines specific water competency requirements including legal, technical, and practical knowledge.²⁶ Water law judges are required to complete two annual continuing education credits on updates to Nevada water statutes and water law, and updates on hydrology, water modeling, and water measurements.
- Utah’s rules establishing a water judge position directs the supervising water judge to oversee the water law education of water judges and to use court resources to support the development of water expertise among water judges and “facilitate consistency in the development of [water law] case precedence” (UCJA Rule 6-104(4)).
- The California judiciary is developing trainings for state judges to educate them on water law and climate change issues.²⁷ The effort aims to build the competency necessary to hear water law cases. The judicial branch received general funding to support the development of the educational trainings.

²⁵ The state legislature has also funded an additional superior court judge position to add capacity for the adjudication.

²⁶ Order Adopting Rules and Curriculum Related to Specialized Education and Appointment of Specialty Water Law Judges, ADKT 0576, Nevada Supreme Court (July 7, 2023), https://nvcourts.gov/__data/assets/pdf_file/0021/41385/ADKT_0576_-_Order_Adopting_Rules_and_Curriculum_Related_to_Specialized_Education_and_Water_Judge_Appointment.pdf.

²⁷ Educating the Judiciary on Water and Climate Change, Public Policy Institute of California (Aug. 22, 2023), <https://www.ppic.org/blog/educating-the-judiciary-on-water-and-climate-change/>.

- The National Judicial College’s Dividing the Waters program provides water law education for judges and other judicial officers who preside over adjudications or other water law cases.²⁸ The program has been used by most Western states to support judicial education.²⁹

States have supported the development of water education centers and programs, which provide educational resources for decision makers, water professionals, and the public.

- The University of New Mexico maintains an Ombudsman Program to provide resources to water rights holders on the adjudication process and participation.³⁰
- Following severe drought in 2002, the Colorado State Legislature founded Water Education Colorado, a non-governmental nonprofit, to provide water education for the state.³¹ The foundation develops non-partisan educational materials for decision-makers, water professionals, and water users to build a better understanding of water issues and water management. The state legislature continues to fund the foundation. Other states with water education centers include California and Texas.³² The state legislature plays varying roles in supporting these centers, including funding and capacity support.

State water law, comprised of statutes, rules, and case law, as applied through agency policies and administrative orders, guides administrative policies and decision-making. The availability of relevant water law information is therefore important to decision makers and the public to understand how decisions will be made and to ensure consistency in decision making. While statutes and rules are generally accessible, case law, agency policies, and administrative orders can be difficult to access. To facilitate access to water law resources, states have required publication of certain information and made relevant water law precedent publicly available.

- Utah’s rule establishing district court water judges requires that “water law case[s] of first impression” shall be made publicly available (UCJA Rule 6-104(5)). Utah’s water court decrees are available online and the water resources agency maintains a list of decrees with “important interpretive impact on Utah Water Law.”³³

²⁸ The National Judicial College, Dividing the Waters, https://www.judge.org/dividing_the_waters/about-dwt.

²⁹ Oregon judges have generally not participated in the Dividing the Waters Programs.

³⁰ Joe M Stell Water Ombudsman Program, Utton Transboundary Research Center, The University of New Mexico, <https://uttoncenter.unm.edu/resources/ombudsman/index.html>.

³¹ Water Education Foundation Colorado <https://www.watereducationcolorado.org/>.

³² California Water Education Foundation (<https://watereducation.org/>); Texas Water Foundation (<https://www.texaswater.org/>).

³³ Utah Division of Water Rights, General Adjudication Information, <https://www.waterrights.utah.gov/adjdinfo/default.asp>.

- Idaho law requires agencies to make precedential orders publicly available (Idaho Statute § 67-5250). The Idaho Department of Water Resources' website includes databases with precedential administrative orders, administrative actions, and district court actions.³⁴
- Nevada's rules for water judges requires that water law judges provide decisions to the state engineer to be posted on its website (Nev. Sup. Ct. R. 18). Nevada's state engineer maintains a digital collection of significant water law cases.³⁵
- The Montana Water Court maintains a suite of decision-making materials to support water users and litigants. These include water law guides and court and administrative process overviews.³⁶ State compacts, court orders, and administrative hearing orders are available online.³⁷
- Decisions of the Washington Pollution Control Board, which hears administrative appeals from the Department of Ecology, are available online in a searchable database.³⁸

D. Funding

Adequate funding is an essential component of efficient water allocation frameworks. Funding is necessary to support agency capacity to administer water appropriation processes and to manage and enforce water use. Funding can also be necessary to ensure adequate capacity in the judicial department to administer adjudications and hear appeals of agency orders. Lack of adequate funding has been identified as a cause of decision-making backlogs in several states, including Oregon.

- In 2019 the Washington State Legislature funded the Department of Ecology to assess opportunities to use water rights adjudications to address water management challenges. The resulting report identified two watersheds that would benefit from adjudications.³⁹ In 2021 the state legislature funded the Department of Ecology for two years to prepare and file adjudications in two priority watersheds. To compliment the

³⁴ Idaho Department of Water Resources, IDWR-Issued Orders, <https://idwr.idaho.gov/legal-actions/district-court-actions/> <https://idwr.idaho.gov/legal-actions/orders/>.

³⁵ Supreme Court of Nevada, Nevada Water Law, <https://nvsctlawlib.github.io/WaterLawNV/>.

³⁶ Montana Judicial Branch, Water Court, Legal Resources, <https://courts.mt.gov/courts/water/LegalResources>.

³⁷ Montana Judicial Branch, Water Court Recent Orders, <https://courts.mt.gov/courts/water/orders>; Montana Department of Natural Resources and Conservation, Administrative Hearing Orders, <https://dnrc.mt.gov/Directors-Office/HearingOrders>.

³⁸ Environmental and Land Use Hearings Office, Case Search, <https://elaho2022.my.site.com/casemanager/s/>.

³⁹ Department of Ecology, Water Resources Adjudication Legislative Report, Watersheds Proposed for Urgent Adjudication and Future Assessment (Sept. 2020), <https://apps.ecology.wa.gov/publications/documents/2011084.pdf>.

adjudication, the state legislature also funded a companion collaborative process in one of the priority watersheds to support mediation, planning, technical assessment, and development of local solutions (SB 5092 (2019)). Other legislative investments included funding to hire an additional superior court judge and water commissioner (HB 1993 (2023)).

- Consistent funding has been cited as key to the successful completion of Idaho’s Snake River Basin adjudication (which adjudicated water rights in 86% of the state). Adjudication was funded through fees on filed water rights claims and significant and consistent funding from the state legislature. The consistent funding also supported staff retention, which grew institutional expertise further increasing efficiencies.⁴⁰

E. Procedural and Substantive Changes

Procedural and substantive requirements in administrative and judicial processes can create barriers to, and conversely support, efficient water allocation decision making. To improve efficiency, legislatures, agencies, and courts have amended legal frameworks and revised agency processes. While the following provides examples of state efforts to reform water allocation frameworks, it is important to emphasize that state legal frameworks and processes for managing water are distinct and the solutions to improve efficiency will therefore also be distinct.

- In 2023 the Montana State Legislature adopted a comprehensive reform of the state’s water permitting framework for new water rights and water rights changes (HB 114 (2023)). Amendments added a new application review pathway, clarified procedural timeframes, and provided earlier public notice periods. Montana has also made iterative revisions to its water adjudication framework, including imposing benchmarks for agency staff to complete initial investigations and claims evaluations, improved decree recordkeeping, establishing a process to adjudicate exempt water uses, and requiring quarterly progress reports to the state legislature’s water policy committee (HB 22 (2005); SB57 (2015); HB 110 (2017)).
- In 2009 the Washington State Legislature amended the state’s water rights adjudication statute to improve efficiency and accessibility of the adjudication process (HB 1571 (2009)). Changes included allowing the court to adopt simplified procedures for small water uses, providing for appointment of referees to support fact finding, and imposing timelines for the filing of claims. The legislation encouraged the use of innovative practices to expedite processes and the use of out-of-court settlements. To support proactive efforts to determine capacity needs, the legislation requires the state's water resources agency to consult with the judicial department about the availability of

⁴⁰ Nevada Legislative Commission’s Committee to Study the Use, Management, and Allocation of Resources, Snake River Basin Adjudication in Idaho, Presentation (Jan. 13, 2006), <https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/23176?rewrote=1>.

resources to conduct adjudications and to report to the state legislature on budget needs.

- The Colorado Supreme Court continues to refine water court rules to improve the efficiency and the quality of decision making. Revisions to water court rules have included shortened and stricter timelines, frameworks to improve expert testimony and support the narrowing of disputed issues, and provisions to support settlement, including a clarified and expanded role for the referee.⁴¹

IV. Conclusion

The overallocation of water resources and climate change are imposing new pressures on state water allocation frameworks. Improved efficiency in decision making is one tool states can use to better prepare to meet the challenges of twenty-first century water management. The above strategies provide models that Oregon can draw from to remove decision-making barriers and leverage the full suite of management options that can support a resilient water future for communities and ecosystems.

⁴¹ Water Court Rules, <https://www.courts.state.co.us/Courts/Water/Rules.cfm>.

Appendix A: Western state water allocation frameworks

State	Adjudication	Administrative frameworks
Arizona	<p>Adjudication is conducted by the superior court. In 1981 the supreme court consolidated the three ongoing adjudications and assigned the case to one superior court.</p> <p>A special master resolves factual and legal issues and prepares a recommended final decree for the court. Both adjudications have adopted rules for proceedings before the special master. The Department of Water Resources serves as the state's technical advisor, investigating claims and preparing technical reports.</p> <p>The adjudication addresses pre-water code appropriative surface water and groundwater rights, and federal and Tribal reserved water rights. Arizona has two ongoing adjudications, covering most of the state, and has approved eight Tribal water rights settlements.</p>	<p>The Arizona Department of Water Resources administers the state water code, including permitting new water rights and transfers.</p> <p>ADWR is charged with overseeing water distribution and enforcement.</p> <p>ADWR decisions are reviewed by an administrative law judge, from the independent Office of Administrative Hearings, and then appealed to the superior court.</p>
Colorado	<p>Water courts, which are statutorily created and divided into seven divisions corresponding to hydrologic basins, determine water rights and oversee the use and administration of water rights. Each court has a district court judge assigned as a water judge, water referee, and court staff.</p>	<p>All water uses, including new uses and changes, are judicially determined by water judges.</p> <p>The State Engineer, an executive branch office, oversees enforcement and distribution through local water commissioners.</p>

	<p>Colorado conducts rolling adjudications, which adjudicate individual water rights claims as they are filed. Decisions on individual claims are binding against all other water rights holders.</p>	
Idaho	<p>Adjudication is conducted by the Snake River Basin Adjudication Court, a separate division of the district courts. The water court includes a presiding judge and special masters. The Idaho Supreme Court established the SRBAC within the state district courts in 1987.</p> <p>Adjudications for individual river basins are authorized by statute. Authorizing legislation for each of the four current adjudications designates SRBAC as the adjudication court.</p> <p>The Idaho Department of Water Resources is not a party in adjudication proceedings, allowing it to serve as a neutral technical expert.</p> <p>The Snake River Basin Adjudication, covering 85% of the state and initiated in 1987, was completed in 2014. Adjudication resolved appropriative groundwater and surface water rights and federal and Tribal reserved water rights.</p>	<p>The Idaho Department of Water Resources administers the state water code, including permitting new water rights and transfers.</p> <p>IDWR oversees administration and regulation of water use through water districts, which elect a watermaster to administer water use in the district.</p> <p>Appeals from IDWR decisions are heard by the SRBAC. The Idaho Supreme Court gave SRBAC exclusive jurisdiction to hear appeals of IDWR in 2014.</p>
Montana	<p>Water adjudications are heard by the Montana Water Court, a division of the state district courts. The water court was</p>	<p>The Montana Department of Natural Resources and Conservation administers the state water code, including permitting for new water</p>

	<p>established by the state legislature in 1979 and includes a chief water judge, associate water judge, and four division water judges appointed by the supreme court. The water court is supported by water masters.</p> <p>The Department of Natural Resources and Conservation provides technical assistance to the court.</p> <p>Montana is conducting a statewide adjudication that includes all pre water code surface water and groundwater rights, and federal and Tribal reserved water rights. The estimated completion date for the statewide adjudication is 2028. Through a special state commission, the state has completed 18 compacts settling federal and Tribal water rights claims.</p>	<p>rights and changes to existing water rights.</p> <p>The DNRC enforces water rights in the state through the district court, which may appoint water commissioners to distribute water.</p> <p>Administrative appeals are head by the DNRC’s Office of Administrative Hearings and then to the district courts. In 2017 the state legislature allowed parties to file water law appeals from the DNRC with the Montana Water Court in lieu of the district court (SB 28 (2017)).</p>
<p>Nevada</p>	<p>Adjudications are conducted by the state superior court through specially assigned water judges.</p> <p>The State Engineer or water users may initiate an adjudication, and the State Engineer develops the factual record and proposed determinations for review by the court.</p>	<p>The State Engineer’s Office oversees permitting of new water rights and changes to water rights and distributes and enforces water rights.</p> <p>Appeals of decisions of the State Engineer are heard by the district court.</p>
<p>New Mexico</p>	<p>State water adjudications are heard by the state district courts. Judge assignments for adjudications are made by the supreme court. Several adjudications are occurring in federal court.</p>	<p>Water right permits are administered by the Office of the State Engineer.</p> <p>The OSE distributes and enforces water rights. The OSE may preliminarily determine unadjudicated water rights for purposes of enforcement.</p>

	<p>Adjudications are initiated by the attorney general on behalf of the Office of the State Engineer. The OSE prepares a survey of water rights claims, which are presumptively correct absent objection by the water user or other water users.</p> <p>The University of New Mexico maintain the Water Ombudsman Program, which provides resources to pro se parties about water rights adjudications and how to participate.</p> <p>New Mexico requires adjudication judges and the State Engineer’s Office to meet annually to allocate resources to support adjudication priorities.</p>	<p>Appeals are heard by water judges in the district court. Water judges are district court judges appointed by the New Mexico Supreme Court to hear water law cases. Water judges are required to maintain minimum educational competencies.</p>
Utah	<p>Adjudications are conducted by state district courts and randomly assigned to judges. The State Engineer initiates general stream adjudications.</p> <p>The State Engineer reviews water rights claims and assigns water rights numbers.</p>	<p>The State Engineer oversees new appropriations and water rights changes.</p> <p>The State Engineer, through appointed water commissioners, distributes and enforces water rights.</p> <p>Appeals of water rights permitting decisions are to the district court.</p>
Washington	<p>The superior court (the state trial court) adjudicates water rights claims and is supported by water rights commissioners.</p> <p>The Department of Ecology commences the adjudication, investigates claims, and reports findings to the court.</p> <p>Washington completed over 80 smaller stream adjudications</p>	<p>The Department of Ecology administers the water code, including permitting new water rights and transfers.</p> <p>Transfers within the Yakima River Basin are encouraged to go through the Water Transfer Working Group, which can support technical review and approval.</p> <p>Washington allows for tentative determinations of non-decreed water rights. Determinations are subject to</p>

	<p>through 1990. It completed the Yakima River Adjudication in 2019, which confirmed over 4,000 surface water rights.</p>	<p>findings of an adjudication but can help expedite agency assessments during adjudications and allow water users to make changes to unadjudicated water rights.</p> <p>The Department of Ecology oversees enforcement and distribution of water use.</p> <p>Administrative appeals are heard by the Pollution Control Board and then the superior court.</p>
<p>Wyoming</p>	<p>Appropriative rights were adjudicated through a purely administrative framework. Because Wyoming adopted water permitting requirements early in statehood, it had relatively few unpermitted appropriative water rights.</p> <p>Federal and Tribal reserved water rights are adjudicated in a hybrid administrative/judicial process. The state district court hears adjudications and is supported by a special master. The state completed the Big Horn River Adjudication in 2014.</p>	<p>The State Board of Control is a quasi-judicial body comprised of the State Engineer, who is appointed by the governor and approved by the senate, and four superintendents, which oversee the state's four water divisions. The BOC oversees water appropriation, distribution, and enforcement.</p>