

COURTING COLORADO’S WATER COURTS IN CALIFORNIA TO
IMPROVE WATER RIGHTS ADJUDICATION? LETTING GO AND
IMPROVING EXISTING INSTITUTIONS

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ABSTRACT

Would California be better off adopting Colorado’s system of special
water courts to best remedy the cost, complexity, and delay of water rights

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Columbia, Canada. Sincere thanks to Professor Holly Doremus, James H. House and Hiram H. Hurd
Professor of Environmental Regulation, UC Berkeley for her patient guidance and detailed feedback on
an earlier draft. Thanks to the organizers and panelists of the 2013 California Water Law Symposium
for opening the debate, especially to Symposium volunteer Anne Baptiste, J.D. candidate, UC Davis for
enabling communication with the Symposium organizers and experts for follow-up questions. Thanks to
Mr. Alf Brandt, Principal Consultant for the California State Assembly, Committee on Water, Parks &
Wildlife, and Mr. Adam Walukiewicz, Regulatory Advocate at Association of California Water
Agencies for expert advice. Thanks to Berkeley Law Librarians Dean Rowan, Marlene Harmon, and
Archivist Bill Benemann for kind research guidance. Thanks to Dr. Sen Wang for his patient review.
Thanks to the entire VJEL editorial team for excellent guidance and professionalism throughout. Thanks
to Fulbright Canada and the Law Foundation of British Columbia for generous financial support for this
research and program of study. All errors remain my own.

adjudication? While Colorado's water courts offer many benefits, including aligning water divisions with watersheds and publishing a useful resume, California is likely better off focusing instead on improving existing institutional tools for several reasons.

First, there is little evidence indicating California has lifted the wariness it showed against special water courts when it kyboshed this very proposal in 2005. This resistance suggests California may make more progress by focusing on making tangible improvements in other ways. Second, Colorado's water courts do not serve as a panacea against cost and delay. On the contrary, not only is Colorado grappling with similar issues despite operating special water courts, but commentators have also suggested that it should even consider adopting some features of California's administrative permitting system to improve flexibility. Third, the underlying causes for cost, complexity, and delay in Californian water rights adjudication differ from those in Colorado, and therefore demand different solutions than water courts. Given California's unique features, the causes of costs, complexity, and delay pertain to civil procedure machinery and underlying substantive water and groundwater doctrines. Fourth, from a cost perspective, California's existing investment in functionally equivalent or similar tools may support the case to continue this path, although the real test is a cost-benefit analysis between setting up water courts and improving existing institutions.

Therefore, in remedying cost, delay, and complexity of water rights adjudication, California will likely make more progress by focusing on improving the functionality of existing tools rather than courting the idea of water courts any longer. Specifically, California will likely benefit from doing the following: (1) remove the underlying causes of these three problems; (2) reflect on the appropriateness of adopting certain useful features of Colorado's system and do so; (3) assess and improve the effectiveness of existing institutions like the complex civil litigation pilot project to tackle these three problems; (4) evaluate any inherent biases in designing institutions for water rights adjudications; (5) continue to bolster judicial education; (6) extend education efforts regarding water rights adjudication to the wider citizenry; and (7) tackle root causes that spawn water rights litigation and improve water planning.

In sum, opening the mind to other attractive models is helpful. However, we should not rush to adopt them blindly. Trying to plug them in at home like appliances into outlets will only get us burned. Instead, we can help ourselves by first reflecting critically to understand our own needs and then assessing whether we are better served by adopting other models or declining them in order to cultivate a solution that truly addresses our needs.

INTRODUCTION

At “the heart of twenty-first century water policy” lies “[a]djudication and administration” of the limited resource.¹ Water rights adjudication presents California with the challenges of high costs, complexities, and delays. This article evaluates the appropriateness of adopting special water courts in California to remedy these issues. Specifically, this article examines the appropriateness of adopting Colorado’s water courts system, given a recent California Water Law Symposium’s consideration of this proposal.² While a distinguished panel of jurists and an attorney from both California and Colorado offered insightful and interesting views,³ many questions remain. This article seeks to deepen the debate and explain why California may benefit more by dropping the idea of water courts, and working from within instead.

A. Adjudicating Water Rights in California: Costly, Complex, and Long

If Hobbes found life in a state of war “nasty, brutish, and short,”⁴ Californians find adjudicating water rights costly, complex, and long. Professor Sax found that settling fights over water rights in a basin usually involves great “cost, duration, and complexity.”⁵ Indeed, Littleworth and Garner consider California’s system for water management so “highly complex” that it “certainly would not have been invented in its present form.”⁶ Furthermore, many suits are so complex and costly that they result in stipulated judgments.⁷ The panelists in a recent symposium shared these

1. Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 ENVTL. L. 37, 37 (2002).

2. *Water Courts: Are they Right for California*, CALIFORNIA WATER LAW SYMPOSIUM, <http://www.waterlawsymposium.com/content/water-courts-are-they-right-california/> (last visited Jan. 27, 2014).

3. Yichuan Wang, *Courting the Idea of Water Courts in California: Whither a Eureka Moment?*, CAL. WATER L. J. (2013) (“Four distinguished panelists ran with the challenge: Justice Gregory Hobbs of the Colorado Supreme Court and Colorado Judicial Advisory Council; Justice Ronald Robie of the California Court of Appeal, Third Appellate District; attorney Stephanie Hastings of Brownstein Hyatt Farber Schreck, LLP; and Judge Jack Komar of the Santa Clara County Superior Court”).

4. THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME, AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL* 78 (Michael Oakeshott ed., London, Green Dragon in St. Paul’s Church-yard 1651).

5. Joseph L. Sax, *We Don’t Do Groundwater: A Morsel of California Legal History*, 6 U. DENV. WATER L. REV. 269, 317 (2003).

6. ARTHUR L. LITTLEWORTH & ERIC L. GARNER, *CALIFORNIA WATER II* 31 (2d ed. 2007).

7. *Id.* at 62.

concerns over costs and delays.⁸ Indeed, dissatisfaction with inefficiency and unpredictability in the current system prompted the Symposium to address this specific debate.⁹

B. California's System of Water Rights Adjudication

From achieving statehood in 1850 until 1914, California left water use regulation to the courts.¹⁰ In 1914, California established an administrative permitting system to regulate appropriative rights for surface water.¹¹ The State Water Resources Control Board (“SWRCB”) is responsible for allocating appropriative rights under the permitting system.¹²

All individuals seeking to appropriate surface water or water in “subterranean streams flowing through known and definite channels” must obtain a permit.¹³ Statutory adjudications of watercourses begin with water rights claimants petitioning to the SWRCB to start a general adjudication on the stream system.¹⁴ After giving notice to all interested parties, the SWRCB receives claims, conducts an investigation, holds hearings, and issues an order of determination.¹⁵ The order is filed with the court, which issues a final decree.¹⁶ This court decree finalizes adjudication of all rights of existing claimants for the system.¹⁷

Individuals navigating California’s water law to adjudicate water rights must grapple with three unique features:¹⁸ (1) California recognizes a hybrid system of riparian and prior appropriation rights,¹⁹ (2) California distinguishes percolating groundwater from surface water and subterranean streams,²⁰ and (3) California exempts “pre-1914” water rights from the state permit system.²¹

8. Wang, *supra* note 3

9. *Water Courts: Are they Right for California*, *supra* note 2.

10. LITTLEWORTH & GARNER, *supra* note 6, at 31.

11. CAL. WATER CODE, § 1225 (2013).

12. *Id.* § 174.

13. *Id.* § 1200.

14. *Id.* § 2500.

15. *Id.* §§ 2525–2783.

16. *Id.* §§ 2750–83.

17. *Id.* § 2768.

18. Professor John Leshy, Harry D. Sunderland Distinguished Professor of Real Property Law, University of California, Hastings College of the Law, Moderator of the 2013 California Water Law Symposium Session on “Water Courts: Are they Right for California” (January 26, 2013).

19. *Lux v. Haggin*, 10 P. 674, 704 (Cal. 1886).

20. CAL. WATER CODE, § 1200.

21. LITTLEWORTH & GARNER, *supra* note 6, at 32.

These unique features pose challenges for water rights administration and adjudication. For example, Professor Tarlock says the hybrid system complicates water rights administration.²² One reason is that riparian owners need not get permits. In principle, even if many rights holders should file statements of water diversion and use,²³ often they do not do so in practice.²⁴

I. CALIFORNIA'S FAILED ATTEMPT TO LAUNCH SPECIAL WATER COURTS

Research into the debate over special water courts in California beyond the recent Symposium reveals a hidden past that points toward improving existing institutions instead. While Symposium attendees might have assumed the debate was new, research reveals the contrary. The proposal was born in 2005 as a bill, but soon suffered a silent death. This failed attempt reveals the state's wariness against special courts and suggests we may remedy cost, delay, and complexity by focusing on progressing along other pathways.

The literature mentions this California water courts idea only thrice. The first instance occurred at the *2005 Symposium on the 25th Anniversary of the Report of the Governor's Commission to Review California Water Rights Law*.²⁵ Justice Robie chronicled the second instance, where Eric Garner and Jill Willis recommended creating a water court following the decision of *City of Barstow v. Mojave Water Agency*.²⁶ They predicted lengthier and costlier adjudications and worried that the California Supreme Court "took groundwater law back to the beginning" by "unanimously reject[ing] the doctrine of equitable apportionment" in Mojave.²⁷ The following details the third instance, a Californian attorney's proposal for water courts in 2005.

A. Attorney Markman's 2005 Call for Creating Water Courts in California

Symposium attendees might have walked away with the impression that the water courts debate was raging in California for the first time, as time limits did not permit exploration into a deeper historical context.

22. A. DAN TARLOCK ET AL., *WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* 303 (6 ed. 2009).

23. CAL. WATER CODE, § 5105.

24. TARLOCK ET AL., *supra* note 22, at 302.

25. Ronald B. Robie, *Introduction to Symposium on the 25th Anniversary of the Report of the Governor's Commission to Review California Water Rights Law*, 36 MCGEORGE REV. 1 (2005).

26. *City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 858 (Cal. 2000).

27. Robie, *supra* note 25, at 3.

Actually, attorney James L. Markman already proposed this very idea in 2005. The “core purpose” was to improve the efficiency of administering groundwater adjudications in California.²⁸ The proposal sought to improve efficiency by drawing on judges more experienced in water law, which was a “complex and foreign territory for the vast majority of judges” in California.²⁹ It was also intended that better adjudications would improve groundwater protection.³⁰

Markman explained that other states had established water courts, especially Colorado and Montana.³¹ He also noted Arizona applying judicial expertise to adjudicating groundwater disputes.³² Markman reasoned the need for special water courts for groundwater adjudication based on California’s lack of “administrative machinery” and continual groundwater depletion.³³

He pinned the delays and costs of existing court adjudications to two main causes. First, judges often lacked water law experience.³⁴ He drew on the complexity of the literature and length of cases (often exceeding fifty pages) as support. Markman showed how an excerpt of the Santa Maria litigation revealed a telling taste of “groundwater law complexities.”³⁵ Therefore, he argued, it would be unfair to expect judges unfamiliar with water law and also charged with other cases to decide these complex issues promptly and soundly.³⁶ Second, parties could use California Civil Procedure machinery to shuffle cases between counties and between judges.³⁷ For example, the then-pending Santa Maria Basin case³⁸ and related cross-actions highlighted how delays and moves could essentially hijack groundwater adjudications.³⁹

Therefore, Markman argued that water courts would expedite decisions.⁴⁰ Expert water judges would improve the legal soundness of cases and reduce appeals.⁴¹ He explained that this rationale was already

28. James L. Markman, *The California Legislature Should Establish Water Courts*, CALIF. WATER LAW POLICY, February 2005, at 123.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 124.

33. *Id.*

34. *Id.* at 125.

35. *Id.* at 125–27.

36. *Id.* at 127.

37. *Id.* at 125.

38. *Id.* at 127.

39. *Id.* at 125.

40. *Id.*

41. *Id.*

used by certain Superior Courts to establish California Environmental Quality Act (“CEQA”) panels.⁴²

Markman also argued that judicial water law expertise removed the need for any additional costs associated with independent lawyers and engineers that courts needed to employ to deal with complex arguments from experienced counsel.⁴³ For example, in the Chino Basin adjudication,⁴⁴ the judge acknowledged his need for exactly this kind of assistance.⁴⁵ The costs though, were borne by the parties, who also had to pay for their own lawyers and engineers, as well as a Watermaster board and a system of committees.⁴⁶

In closing, Markman presented a draft legislative bill intended to create water courts in California.⁴⁷ He rejected two other alternatives for the following reasons. First, providing exclusive water court jurisdiction was feared to incite opposition from the SWRCB.⁴⁸ Second, creating water panels like CEQA panels in big counties to raise judicial expertise would still not stave off litigants moving cases between counties, or parties challenging expert water judges without cause.⁴⁹

B. The Quick and Quiet Death of AB 1453

AB 1453’s quick and quiet death carries cautionary value against reviving the proposal to create water courts in California. Its brief legislative history portrayed below hints at the state’s wariness against special courts. Assembly Member Daucher introduced AB 1453 on February 22, 2005.⁵⁰ Originally, it had three aims: (1) to limit venue in groundwater production actions to certain superior courts, (2) to require such actions to be assigned to only judges with extensive experience in the area, with challenges to assignments forbidden, and (3) to have the Judicial Council promulgate special rules.⁵¹

By amendment, on March 30, 2005, AB 1453 became entitled “Superior courts: adjudication of rights to produce groundwater.”⁵² It now

42. *Id.*

43. *Id.* at 125–26.

44. *Id.* at 125.

45. *Id.*

46. *Id.*

47. *Id.* at 127.

48. *Id.* at 128.

49. *Id.*

50. Assemb. B. 1453 - Introduced, 2005–2006 Reg. Sess. (Cal. 2005), http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1451-1500/ab_1453_bill_20050222_introduced.html.

51. *Id.*

52. *Id.*

clearly aimed to “establish 9 water divisions in the superior courts of specified counties.”⁵³ Furthermore, it aimed to provide water judges with “exclusive subject matter jurisdiction” over groundwater production adjudications, and extend exclusive venue to water divisions.⁵⁴

The next day, AB 1453 was re-referred to committee.⁵⁵ The first committee hearing was set for April 26.⁵⁶ However, Daucher canceled it.⁵⁷ On January 31, 2006, it was pronounced dead pursuant to Art. IV, s. 10(c) of the Constitution.⁵⁸

If, as Professor Sax concluded that in California, “we don’t do groundwater,”⁵⁹ AB 1453 may teach the history lesson that “we don’t do special water courts.” This inference is buttressed by the 1996 Business Court Study Task Force recommendation against special business courts and subsequent launch of the Complex Civil Litigation Program in 2000.⁶⁰ The value of reviewing history includes gleaning lessons for improving next time. For example, Professor Getches argued that we have been recommitting the same water wrongs for thousands of years and the solution includes deciding to own that lesson and act better.⁶¹ Likewise, if we know strong opposition blocked the same proposal for special water courts, and no evidence suggests a cultural shift, might we not expect other pathways to afford more possibility and tangible improvement in water rights adjudication? Admittedly, we should not buy an argument for giving up a proposal merely based on opposition. Rather, the proposal’s effectiveness for remedying the problem at hand must be ascertained. Therefore, the following section evaluates the potential effectiveness of adopting Colorado’s water courts in California to remedy the latter’s challenges in water rights adjudication.

53. *Id.*

54. *Id.*

55. Assemb. B. 1453 - Amended (Cal. 2005–06), http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1451-1500/ab_1453_bill_20050330_amended_asm.html.

56. *Id.*

57. *Id.*

58. *Id.*

59. Sax, *supra* note 5, at 269.

60. JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, FACT SHEET: COMPLEX CIVIL LITIGATION PROGRAM 1–3 (July 2008), available at <http://www.courts.ca.gov/documents/comlit.pdf> [hereinafter FACT SHEET].

61. David Getches, *Water Wrongs: Why Can't We Get It Right the First Time?*, 34 ENVTL. L. 1, 1 (2004).

II. COLORADO'S SPECIALIZED WATER COURTS: NO PANACEA

A. Colorado's System of Water Courts

Among all prior appropriation states, Colorado alone shuns an administrative permitting system.⁶² Whereas other western states charge state engineers or a state board to handle certain matters, Coloradoans take them to court.⁶³

Colorado created seven water divisions of the district court,⁶⁴ under the Water Rights Determination and Administration Act of 1969 (the "1969 Act").⁶⁵ They wield "exclusive jurisdiction of water matters."⁶⁶ Each division has a water court with a district court judge chosen to preside as its water court judge.⁶⁷ A referee, clerk, and division engineer joins each water judge.⁶⁸

Water rights seekers file applications with the water clerk.⁶⁹ The water courts publish monthly resumes of the applications in a newspaper and notify potentially impacted parties.⁷⁰ Objectors may then oppose the applications.⁷¹ The referee rules on each application after consulting the engineer either at the state or division level.⁷² Dissatisfied interested parties may protest.⁷³ The protest prompts a de novo hearing by a water judge.⁷⁴ Even if the referee's rulings go un-protested, the water judge reviews them semi-annually for confirmation, modification, or reversal.⁷⁵ These rulings can be directly appealed to the Colorado Supreme Court.⁷⁶

B. Good Intent Behind Colorado's Water Courts

California can appreciate Colorado's good intentions for promoting its system of water courts. Colorado adopted its special courts to quell the

62. 2 WATERS AND WATER RIGHTS, § 15.05 (Robert E. Beck & Amy K. Kelley eds., 3 ed. 2009); TARLOCK ET AL., *supra* note 22, at 303.

63. David M. Getches, Foreword to P. ANDREW JONES & TOM CECH, COLORADO WATER LAW FOR NON-LAWYERS ix, x (Univ. Press of Colo. 2009).

64. COLO. REV. STAT., § 37-92-201 (2000).

65. *See generally, id.* §§ 37-92-101 to 602 (2000).

66. *Id.* § 37-92-203 (2000).

67. *Id.* § 37-92-03 (2000).

68. *Id.* §§ 37-92-202 to 203 (2000).

69. *Id.* §§ 37-92-301 to 304 (2000).

70. *Id.* §§ 37-92-401 to 402 (2000).

71. *Id.* §§ 37-92-301 to 304 (2000).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

“many inflated paper decrees” that had sprung from its previous system.⁷⁷ The inflation resulted from the state engineer providing minimal information in the adjudication process, and the state agencies’ lack of preparation.⁷⁸

C. Effectiveness of Colorado’s Water Courts: No Panacea

Building on the debate opened by the Symposium shows that major chinks actually exist in the walls of Colorado’s water courts system, despite many laudable aspects. These challenges militate against adopting Colorado’s system. In fact, Colorado might benefit from adopting certain aspects of administrative permitting states like California to improve flexibility. The pros and cons of Colorado’s system follow.

(1) Pros

The Water Court Committee struck by the Colorado Supreme Court in 2008 found many positive aspects in Colorado’s water court system. In this “performance reality check” forty years after the 1969 Act, the Committee found the following top three features: (1) knowledgeable water judges, (2) knowledgeable water referees, and (3) fairness of outcomes.⁷⁹ These were ranked by respondents in a general public survey conducted by the Colorado Water Conservation Board.⁸⁰

These merits are supported by the work of an authoritative figure on Colorado’s water law: the late Professor David Getches. He reported never hearing complaints of unfairness.⁸¹ He also considered “water judges in the most active water divisions” as “tru[e] experts.”⁸² This expertise made “well-informed” decisions.⁸³ In a counterintuitive way, he also viewed the specter of lengthy and expensive trials as a catalyst for settlement because of “competent and experienced water bar and expert engineers ready to testify.”⁸⁴ These settlements offer benefits and “often produce creative solutions to complex problems.”⁸⁵

77. TARLOCK ET AL., *supra* note 22, at 304.

78. *Id.* at 304.

79. GREGORY HOBBS, TIMELY, FAIR AND EFFECTIVE WATER COURTS: REPORT OF THE WATER COURT COMMITTEE TO CHIEF JUSTICE MARY J. MULLARKEY 7 (2008).

80. *Id.*

81. Getches, *supra* note 63, at xi.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

Others found Colorado's system virtuous in the simplicity it offered over other jurisdictions in obtaining a water right.⁸⁶ It was also considered good in affording "flexibility and evolution" and enabling assessment of "flows and delayed impacts of groundwater" within new water application evaluations.⁸⁷ This allowed Colorado's conjunctive groundwater management system to account for in-stream and recreational values.⁸⁸

Colorado's water court system also received praise for the heightened awareness among water users of competing applications brought about by its resume notice system, as well as the access to water courts brought about by the standing provisions of the 1969 Act.⁸⁹ The system was also commended for enabling consistency in decisions within each basin, by designating one judge for each water court in each division.⁹⁰ Each judge can then develop expertise in technical matters, the specific basin, and water law.⁹¹

One commentator, Cosens, found certain features of Colorado's system so effective that she recommended it as a model for developing "a dispute resolution forum for federal environmental and natural resources cases" for the following reasons.⁹² First, embedding the water court system within the district court system eases administration.⁹³ Second, the referees give the water court judges "neutral technical expertise" because of their expertise in both science and law.⁹⁴ Third, referees ease the court's docket and enable creative solutions.⁹⁵ This "court-organized settlement process" versus ad hoc settlement depending on the parties enables more access to justice.⁹⁶ Finally, Colorado's water courts hone judges with extensive water law experience, as the one-year appointments often renew repeatedly.⁹⁷ The state's extensive judicial education programs further facilitate this development of expertise, by allowing all discussions to be confidential.⁹⁸

86. WATERS AND WATER RIGHTS, *supra* note 62, at 15–49.

87. Ramsey L. Kropf, *Colorado Groundwater Law: Colorado's System—Integration (Or Not?) of Groundwater and Surface Water*, 49 ROCKY MTN. MIN. L. INST., 7B1–18 (2003).

88. *Id.* at 7B.

89. MARILYN C. O'LEARY, AN ANALYSIS OF THE COLORADO WATER COURT SYSTEM 18 (2003).

90. *Id.*

91. *Id.*

92. Barbara Cosens, *Resolving Conflict in Non-Ideal, Complex Systems: Solutions for the Law-Science Breakdown in Environmental and Natural Resource Law*, 48 NAT. RESOURCES. J. 257, 297 (2008).

93. *Id.*

94. *Id.* at 298.

95. *Id.* at 299.

96. *Id.*

97. *Id.*

98. *Id.* at 299–300.

The value of the above features notwithstanding, Cosens acknowledged that Colorado's water courts were no paragon for one important reason relevant to the debate in California. Despite all the merits, Colorado's bifurcation of water rights adjudication and administration into the bailiwicks of the courts and State Engineer attracted criticisms of higher costs to assert water rights.⁹⁹ For this reason, she recommended an "administrative permit system" that enabled determination of new water rights without going through the courts, saving costs and increasing accessibility.¹⁰⁰ Also, Kassen lamented Colorado's failure to modernize its "archaic court-based system" into one based on administrative permitting.¹⁰¹ Therefore, these research findings beyond the Symposium reveal an otherwise omitted undercurrent in the debate that may benefit Colorado if more consideration is given to it: that Colorado may benefit from adopting California's administrative permitting system. This question exceeds the scope of this article.

(2) Cons

(i) Colorado Suffers Similarly Elusive Search for Speed and Savings

Deeper analysis shows Colorado's water courts system is no panacea for resolving issues of cost, complexity, and delay. As Nichols and Kenney put it, "[w]ater court is not simple, fast, painless, or cheap."¹⁰² For example, a routine unopposed change of water right can involve engineering and legal costs that exceed the value of the water being fought over.¹⁰³ Complicated cases can drag on for years.¹⁰⁴ Appeals occur commonly.¹⁰⁵ Another problem is that all water rights disputes are locked into the same process, regardless if it is over "100 cubic feet per second or 100,000 acre-feet."¹⁰⁶

Costs particularly attract dissatisfaction. Professor Getches found them "troubling."¹⁰⁷ Nichols and Kenney attribute "[m]any of the most

99. *Id.* at 300.

100. *Id.*

101. Melinda Kassen, *A Critical Analysis of Colorado's Water Right Determination and Administration Act of 1969*, 3 U. DENV. WATER L. REV. 58, 59 (1999).

102. Peter D. Nichols & Douglas S. Kenney, *Watering Growth in Colorado: Swept Along by the Current or Choosing a Better Line?*, 6 U. DENV. WATER L. REV. 411, 420 (2003).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Getches, *supra* note 63, at x.

significant transaction costs” to water court.¹⁰⁸ While O’Leary suggested that water courts are not the only reason to blame for high costs, as the same criticism existed before the 1969 Act,¹⁰⁹ they do persist as problems. Indeed, the public in Colorado decried the delays and costs of the water courts following a 2006 enforcement of water rights priorities that forced hundreds of high-capacity wells to shutdown, dried expansive cropland, and hurt many local communities.¹¹⁰

Howe agreed that “[r]educing transaction costs remain a challenge in Colorado.”¹¹¹ He exposed some root causes. First, court requirements in Colorado can exacerbate delay and complexity.¹¹² For example, when dealing with appeals from the Water Court, the Colorado Supreme Court frequently requests amicus briefs from third parties.¹¹³ Second, inadequate basic information on water rights increases transaction costs.¹¹⁴ While water rights transactions are recorded at the county level, the water courts lack “centralized databases of the names of water right owners, making it difficult to contact owners.”¹¹⁵ This inadequacy slows down resolutions because water rights often have surface and subsurface tributaries that cover many counties.¹¹⁶

These high costs caused additional concerns. Kassen worried that the high costs and the need for lawyers chilled certain transactions.¹¹⁷ Furthermore, “the closed-nature of the court system” diminished public participation.¹¹⁸ She also worried that water courts block integration of water quantity and quality regulation.¹¹⁹ In contrast, in a single administrative agency, integration happens more seamlessly.¹²⁰ For example, the SWRCB does exactly both.¹²¹ Finally, she feared that fitting water rights adjudications into the forum of courts versus an agency limits room for water planning.¹²²

108. Nichols & Kenney, *supra* note 102, at 420.

109. O’LEARY, *supra* note 89, at 16.

110. Stephen E. Snyder et al., *Adversarial Collaboration: Court-Mandated Collaboration between Opposing Scientific Experts in Colorado’s Water Courts* 28 NAT. RESOURCES ENV’T, 1, 9–10 (2013).

111. Charles W. Howe, *Reconciling Water Law and Economic Efficiency in Colorado Water Administration*, 16 U. DENV. WATER L. REV. 37, 40 (2013).

112. *Id.* at 39.

113. *Id.* at 39 n. 13.

114. *Id.* at 39.

115. *Id.*

116. *Id.*

117. Kassen, *supra* note 101, at 60.

118. *Id.*

119. *Id.* at 61.

120. *Id.*

121. CAL. WATER CODE, § 174.

122. Kassen, *supra* note 101, at 62.

Additionally, Colorado's water courts system does not save its citizens the trouble of hiring private water engineers despite its engagement of state engineers.¹²³ Rather, they are often necessary from a party's perspective to command the technical aspects, including quantifying the party's water needs, evaluating potential water supplies, developing water use plans that do not injure other users, and serving as expert witnesses.¹²⁴

Finally, there is also fear of bias toward special interests. Speakers at the Colorado Agricultural Water Summit in 2011 said the expensive water court process "gives the advantage to better-funded municipal interests."¹²⁵ They also found the process "slow to adapt to new, more creative water uses."¹²⁶ In addition to these concerns supporting the finding that Colorado's water courts are no panacea against costs, complexity, and delay, the water courts themselves acknowledge these as areas for improvement as discussed below.

(ii) Water Court Committee Acknowledges Delay and Costs

The 2008 Water Court Committee found the public demanded improvement in three priority areas: "timely action by court[s]," process costs, as well as "responsiveness and professionalism of parties."¹²⁷ The Committee itself acknowledged the system was "prone to delay and increased costs [without] . . . (1) active case management . . . (2) adequate staffing of water courts, State and Division Engineer offices, and the Attorney General's Office, (3) professional competence . . . and (4) informed applicants."¹²⁸

Complaints that the water court system is "too costly and time consuming" persist, despite reform efforts.¹²⁹ For example, new procedural rules were implemented effective July 1, 2009, imposing "stricter deadlines to promote efficiency in the water courts."¹³⁰

In fact, costs are now so concerning that prominent Coloradan figures have spoken out. In 2012, Colorado's Governor Hickenlooper expressed his

123. Daniel S. Young & Duane D. Helton, *Developing a Water Supply in Colorado: The Role of an Engineer*, 3 U. DENV. WATER L. REV. 373, 390 (2000).

124. *Id.*

125. Chris Woodka, *Cooperation Key in Water Projects, Experts Say*, PUEBLO CHIEFTAIN, Dec. 5, 2011, <https://groups.google.com/forum/#!msg/wq-news/M9bggfTamig/5V5LtVILwroJ> (last visited Feb. 1, 2014).

126. *Id.*

127. WATER COURT COMMITTEE, *supra* note 79, at 7.

128. *Id.*

129. Ellen Michaels, *Water Law and Climate Change, Planning in an Uncertain Future (notes)*, 13 U. DENV. WATER L. REV. 497, 510 (2010).

130. *Id.*

interest in changing the water court system.¹³¹ He called the water court costs “insane.”¹³² He admitted they had “let the system run amuck.”¹³³ In April 2013, certain Coloradan water experts¹³⁴ also voiced concern over “the immense court costs” implicated by the state’s water law.¹³⁵ They worry that such costs are deterring water use to the extent that the law needs reform toward greater flexibility.¹³⁶

(iii) Colorado’s Water Courts Also Seek Flexibility

Finally, Colorado’s special response to a severe 2002 drought suggests that the “pure” court-based water rights determination envisioned by the 1969 Act might need more flexibility to meet the needs of Coloradans.¹³⁷ The drought spurred the General Assembly to nudge Colorado’s system toward one where state administrative agencies determine the water rights.¹³⁸ This vesting of power in the State Engineer to make “short-term material injury determinations” calls into question the ability of Colorado’s water courts system to respond flexibly to changing needs.¹³⁹ This suggests that in a debate where Colorado is recommending California adopt the water courts system, Colorado may benefit from understanding the merits of California’s administrative permitting system. In sum, Colorado’s many challenges with its water courts system suggest that California will likely benefit from examining how to build capacity through permitting tools to tackle the water courts cost, delay, and complexity.

131. Eric Brown, *Hickenlooper: State’s Water Can Be Put to Better Use*, TRIBUNE (October 2, 2012), <http://www.greeleytribune.com/news/2711153-113/hickenlooper-state-colorado-dave>.

132. *Id.*

133. *Id.*

134. Colorado Agriculture Commissioner John Salazar, Western Resources Advocates Director Bart Miller, and Denver Water CEO and Manager Jim Lochhead.

135. Panel: More flexibility in state’s water laws needed, TRIBUNE (April 23, 2013), <http://www.greeleytribune.com/news/business/6226919-113/colorado-percent-state-agriculture>.

136. *Id.*

137. Melinda Kassen, *Statutory Expansion of State Agencies’ Authority to Administer and Develop Water Resources in Response to Colorado’s Drought*, 7 U. DENV. WATER. L. REV. 47, 55 (2003).

138. *Id.*

139. *Id.* at 66.

III. CALIFORNIA'S CAUSES FOR COST, COMPLEXITY, AND DELAY DIFFER FROM THOSE IN COLORADO

A. *Water Courts do not Guarantee Remedy for Delay from Civil Procedure Machinery*

Water courts do not necessarily guarantee relief from delay when the delay results from civil procedure. One cause for delay is the availability of procedures like a motion for reference by the SWRCB.¹⁴⁰ Some parties deliberately wield this tactical tool to gain advantage from the resulting delay.¹⁴¹ It delays to different degrees, depending on whether the motion requests only an investigation of some or all physical facts, or requests the SWRCB to decide the whole case.¹⁴² Post-investigation, the SWRCB reports its findings of law and fact.¹⁴³ Parties may seize further opportunities for delay by taking exceptions to this report, which requires the court's determination in a *de novo* trial. Therefore, the reference procedure is one culprit for delays in California's water rights litigation.

The same goes for groundwater adjudications. For example, delay derives partly from a suggested judicial practice to "phas[e] the trial" in order to "most successfully" manage groundwater adjudication.¹⁴⁴ Specifically, the Judicial Council of California suggested the inclusion of four phases: (1) establish basin boundaries to identify water-producing parties, (2) determine basic characteristics to adjudicate water rights or provide for separate management, (3) determine "the nature and proportionate quantity of the parties' water production rights," and (4) establish a physical solution.¹⁴⁵ When it is recommended that courts include more phases in adjudicating groundwater rights, the process inevitably lengthens. Therefore, consolidating California's courts into special water courts, on its own, would not remedy this cause for delay.

Similarly, additional costs and complexities arise when public agencies or environmental groups bring claims.¹⁴⁶ Adopting special water courts offers less potential for improvement when the nature of the parties and their rights and responsibilities determine the costs.

140. CAL. WATER CODE, § 2000.

141. LITTLEWORTH & GARNER, *supra* note 6, at 64.

142. CAL. WATER CODE, § 2001.

143. CAL. WATER CODE, § 2010.

144. JUDICIAL COUNCIL OF CALIFORNIA, DESKBOOK ON THE MANAGEMENT OF COMPLEX CIVIL LITIGATION § 3.92 (2000).

145. *Id.* at § 3.92.

146. LITTLEWORTH & GARNER, *supra* note 6, at 62.

B. Hybrid System Limits Adoption of Colorado's Water Courts

California's hybrid system limits the appropriateness of adopting Colorado's model. Colorado's state water law sits "[i]n sharp contrast to the California doctrine."¹⁴⁷ In 1882, the "landmark case" of *Coffin v. Left Hand Ditch Co.*¹⁴⁸ stated Colorado's choice to depart "radical[ly]" from riparianism.¹⁴⁹ The fact that the 1969 Act aimed to perpetuate prior appropriation, in contrast to California, further challenges the potential effectiveness of California adopting Colorado's water courts to remedy its challenges.¹⁵⁰

C. Groundwater Law in California Limits Move to Water Courts

Finally, California's unique treatment of groundwater limits a move to specialized water courts similar to Colorado, because the primary purpose of the 1969 Act was to integrate groundwater and surface water adjudication.¹⁵¹ Whereas Colorado forces "almost all hydrologically linked water . . . into the surface water system,"¹⁵² California treats groundwater differently from surface water.¹⁵³

If prior appropriation boils down to "first in time, first in right," the approach to groundwater seems to stay "out of sight, out of mind." For example, the SWRCB can only adjudicate surface water rights and subsurface stream water.¹⁵⁴ Individuals seeking to resolve disputes over percolating basin groundwater can rely on the court system.¹⁵⁵ Since Professor Sax predicts "no easy way" to bring groundwater into the fold of the surface water permitting system,¹⁵⁶ creating special courts to incorporate groundwater adjudications would be difficult. AB 1453's defeat already shows how difficult incorporating groundwater adjudications would be.

147. NORRIS HUNDLEY, JR., *WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST* 72 (2nd ed. 2009).

148. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882).

149. Robert Haskell Abrams, *Legal Convergence of East and West in Contemporary American Water Law*, 42 ENVTL. L. 65, 67 (2012).

150. Sherry A. Caloia et al., *The Water Rights Determination and Administration Act of 1969: A Western Slope Perspective on the First Thirty Years*, 3 U. DENV. WATER L. REV. 39, 40 (1999).

151. *Id.*

152. Abrams, *supra* note 149, at 77.

153. CAL. WATER CODE, § 1200.

154. *Id.*

155. See CAL. WATER CODE, § 2500 (noting that underground water supplies are not included in the definition of water sources that are capable of being adjudicated).

156. Sax, *supra* note 5, at 316.

Groundwater adjudication is inherently complex in California for three reasons. First, it usually involves hundreds of parties.¹⁵⁷ Second, it requires hydrologists, engineers, and geologists to provide opinions for adjudication of facts.¹⁵⁸ Third, not only must it establish priority among the hundreds of rights, but also it must produce a “physical solution” to protect the basin as a water supply.¹⁵⁹ This physical solution is a court supervised management plan intended to protect the resource for the long term.¹⁶⁰ These three factors further challenge the creation of special water courts.

IV. CALIFORNIA MAY GET MORE MILEAGE FROM IMPROVING FUNCTIONALLY-EQUIVALENT TOOLS

A. Focus on Functionality

California would benefit from evaluating the proposal to adopt water courts by evaluating its functionality over form. Professor Tarlock illustrates the benefit of focusing on functionality over form by comparing the elements of Colorado’s and other states’ systems. He writes: “[u]nder the permit statutes adopted in all appropriation states but Colorado, a state administrative agency . . . has quasi-judicial functions. The same matters [of administering surface water rights] in Colorado are left to water courts that have administrative functions.”¹⁶¹ Indeed, Justice Hobbs acknowledges that western states, save Colorado, use a combination of “administrative and judicial proceedings” in creating their water allocation systems.¹⁶²

This separation of each state’s system into a pairing of both administrative and judicial elements shows that functionality, rather than a name, is what matters. Therefore, California would benefit by loosening its grip on any cachet inherent in the idea of “special” water courts. What matters most is whether an institutional arrangement responds to the state’s unique water needs.¹⁶³

Two existing institutions in California offer the potential to respond to California’s unique water needs. One is the SWRCB, which fulfills many functions performed by the referees in Colorado’s system. Some view the

157. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 144 at § 3.90.

158. *Id.*

159. *Id.*

160. *Id.*

161. TARLOCK ET AL., *supra* note 22, at 295.

162. GREGORY A. HOBBS, IN PRAISE OF FAIR COLORADO: THE PRACTICE OF POETRY, HISTORY, AND JUDGING 191 (2004).

163. TARLOCK ET AL., *supra* note 22, at 3.

SWRCB as a “court master.”¹⁶⁴ The other, warranting more discussion, is the complex civil litigation project.

B. Complex Litigation Project Offers Fertile Opportunities to Tackle Delay and Costs

If California hastens to pursue the use of water courts, it may miss fertile opportunities for nurturing homegrown solutions that are already tackling delay and cost. For example, California has already invested in developing tools for improving the management of groundwater adjudications.¹⁶⁵ Two tools in particular merit attention.

First, as part of the Complex Civil Litigation Pilot Project spearheaded by Judge Jack Komar, Santa Clara County Superior Court offers a website that allows individuals to view and file documents for the Santa Maria groundwater litigation.¹⁶⁶ Since having been declared complex on July 3, 2000, this case has amassed 824 parties, 20,813 documents in repository, and 10,640 documents in discovery.¹⁶⁷ The website seeks to facilitate management of this complex case by enabling individuals to see a calendar, see pleading and discovery documents filed, submit a document, see lists of parties and attorneys, and download sample forms for modification.¹⁶⁸ Of note, the website also displays an up-to-date document service list.¹⁶⁹ It even enables users to retrieve a U.S. mail service list for making mailing labels.¹⁷⁰

Second, Santa Clara County Superior Court offers a website for the Antelope Valley groundwater cases, also designated complex.¹⁷¹ While the Santa Maria groundwater litigation website contains all the essential information more neatly, the Antelope Valley website still links to important content. For example, users can access online documents, e-file documents, view lists of parties and calendar events, download a model

164. John E. Thorson, et al., *Dividing Western Waters, A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299, 352 (2006).

165. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 144, at § 3.93.

166. See generally *Santa Maria Groundwater Litigation*, SANTA CLARA COMPLEX CASES, <http://www.sccomplex.org/home/index.htm> (last visited Feb. 2, 2014) (displaying the case statistics and services available in this complex case).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Santa Clara County Superior Court E-Filing*, <http://www.scefiling.org/cases/casehome.jsp?caselid=19> (last visited Feb. 1, 2014).

answer to complaints and cross-complaints, and access orders relating to the trial phases.¹⁷²

While Colorado's resume system may offer even more administrative efficiency from its streamlined and consolidated approach, functional equivalence or at least similarity means California may save more costs by evaluating the potential for scaling up existing tools than to rush to replicate Colorado's resume system. Precisely how much can be saved is likely better predicted by careful cost-benefit analysis, which extends beyond the scope of this article. The point is, scaling up these features for other groundwater and surface water adjudications bears potential for reducing the delay and cost associated with lawyers having to identify every affected individual. Therefore, in contemplating whether or not to adopt another jurisdiction's system, California may benefit from at least doing an inventory of its existing worthy contenders.

C. Complex Litigation Offers Certain Advantages over Special Courts that Seem More Amenable for California

Working on California's complex civil litigation departments to manage complex water adjudications offers certain advantages over developing special water courts that seem more amenable for California. One reason is that a certain rationale identified by a 1996 Business Court Study Task Force against creating specialized courts in the business context also holds true for the current debate over special water courts. Then-Chief Justice Malcolm M. Lucas appointed the task force to conduct an "exhaustive national and statewide review."¹⁷³ Drawing on opinions from judges, lawyers, and business leaders, the task force recommended developing complex litigation departments in trial courts instead of creating special business courts for four major reasons.¹⁷⁴

First, complex litigation departments offer greater "responsiveness to the public" by handling business matters as well as other claims, whereas business courts only deal with business matters.¹⁷⁵ Second, many members of the public perceive business courts as favoring business interests, whereas complex litigation departments touch "all segments of society" through their cases.¹⁷⁶ Third, where business courts are confined to a certain type of case, complex litigation departments offer more flexibility by

172. *Id.*

173. FACT SHEET: COMPLEX CIVIL LITIGATION, *supra* note 60, at 1.

174. *Id.*

175. *Id.*

176. *Id.*

expanding or contracting in response to caseload fluctuations within a trial court system.¹⁷⁷ This response is also helpful for handling emergencies.¹⁷⁸ Finally, complex litigation departments match business courts in expertise through training, using a complex litigation manual, streamlining procedures by amending statutes and rules, and drawing on human and technological resources.¹⁷⁹

While the first reason matters less as applied to the water context than in the business context, the second and third reasons do matter. It would be especially prudent for California to consider the perception of some members of the public in Colorado that water courts favor wealthier municipal interests.¹⁸⁰ The ability of complex litigation departments to respond flexibly to overall caseload fluctuations also makes sense for the bigger picture. The process of designing the best judicial institutions to adjudicate water, be it honing departments or carving out special courts, would benefit from taking into account the institutions impact on the overall organization of judicial resources. Since establishing water courts would likely take considerable resources away from other matters that also need justice, on balance, strengthening departments within the judiciary may be more helpful during these tough economic times.

The question of expertise requires more nuanced evaluation. To claim that complex litigation departments match specialized water courts in expertise seems bold, especially if the latter are led by a single judge steeped in water cases, following Colorado's model. This means more investigation is required into the effectiveness of judicial education in cultivating the depth of desired judicial expertise, which is discussed more extensively below.

Finally, viewing water rights adjudications through a complex litigation lens does not necessarily hold California back when compared with Colorado. Some Coloradan lawyers assert, "a water court case is treated much like any other multi-party civil court case" once it becomes re-referred to the water judge. The court applies Colorado's Rules of Civil Procedure, "although modified slightly to account for unique aspects of water applications."¹⁸¹

177. *Id.* at 1–2.

178. *Id.* at 2.

179. *Id.*

180. Woodka, *supra* note 125, at 1.

181. P. ANDREW JONES & TOM CECH, COLORADO WATER LAW FOR NON-LAWYERS 93 (2009).

D. Other Water Courts

Lessons from water courts in Montana and Washington bolster the case for improving existing judicial tools to reduce the costs, delays, and complexities of water rights adjudication. Montana operates a “strongly judicial” adjudication scheme.¹⁸² In 1979, the Montana Legislature created its Water Court to expedite and help adjudicate over 219,000 claims,¹⁸³ the largest number in the U.S.¹⁸⁴ The Water Court wields exclusive jurisdiction over water rights claims.¹⁸⁵ The Montana Water Use Act¹⁸⁶ divides the state into four water divisions, and designates a district judge as its water judge.¹⁸⁷

Like Colorado, Montana’s water courts system is not immune from complex and lengthy hearings.¹⁸⁸ For example, in 2001, after nineteen years, the water courts had adjudicated only 56% of the 219,413 claims.¹⁸⁹ Montana’s Water Court also continues to grapple with the rising need for flexibility. For example, on March 21, 2008, the Montana Supreme Court approved rule changes that allowed non-lawyers to appear in Water Court.¹⁹⁰ The order explained that allowing for non-lawyer assistance “provides needed flexibility to the system.”¹⁹¹ This move may serve to alert California to the limitations of adopting water courts.

Washington’s experience with smoothly adopting water courts shows the importance of not only judicial buy-in, but also leadership in championing the idea. Washington created a water court in 1989.¹⁹² Interestingly, it did so fairly straightforwardly by amending § 90.03.160 of the Revised Code of Washington. This contrasts with Colorado and Montana, which “carefully and deliberately debated” the role and process of a water court.¹⁹³ One commentator credits retired Judge Walter A.

182. Thorson et al., *supra* note 164, at 343.

183. MONTANA JUDICIAL BRANCH, MONTANA WATER COURTS, <http://www.montanacourts.org/water/default.mcp>x (last visited February 2, 2014).

184. Thorson et al., *supra* note 164, at 343.

185. MONTANA JUDICIAL BRANCH, *supra* note 183.

186. WATER USE ACT, MONT. CODE ANN. §§. 85-2-101 TO 907 (2007).

187. MONT. CODE ANN. § 3-7-201 (2011), *available at* <http://leg.mt.gov/bills/2011/mca/3/7/3-7-201.htm>.

188. TARLOCK ET AL., *supra* note 22, at 300.

189. *Id.*

190. In re The Matter of the Revisions to the Water Right Claim Examination Rules No. 86-397 (Mont. Mar. 21, 2008).

191. *Id.* at 3.

192. WASH. REV. CODE § 90.03.160 (2009), *available at* <http://apps.leg.wa.gov/rcw/default.aspx?cite=90.03.160>.

193. Sidney P. Ottem, *In Memoriam: Judge Walter A. Stauffacher*, WATER RES. COMM. NEWSLETTER 5, 6 (Feb. 2006), <http://apps.americanbar.org/enviro/committees/waterresources/newsletter/feb06/waterres0206.pdf>.

Stauffacher's command of the public's confidence for "[s]uch a swift and relatively unfettered nod" to water courts, at least in part.¹⁹⁴ In contrast, California's history with AB 1453 and the Judicial Council's resistance to special courts suggest that California may likely make more progress by improving existing tools.

V. RECOMMENDATIONS: SIMPLIFY, SPEED UP, AND SAVE MONEY BY
WORKING FROM WITHIN

*A. Remove Underlying Causes of Cost, Delay, and Complexity in Water
Rights Adjudication*

California can benefit from first removing the underlying causes hampering water rights adjudication. Civil procedure machinery spawns delay and Judicial Council recommendations to engage in extensive phasing of trials. This includes simplifying underlying doctrines that cause complexity, notably concerning groundwater. One potential solution is comprehensive basin management, which, according to Professor Sax, offers the "most promising tool to achieve genuine integration of surface water and groundwater administration in California" amidst "serious basin-wide problems."¹⁹⁵

*B. Reflect on Appropriateness of Adapting Useful Features from
Colorado's System*

At the same time, California can reflect on the appropriateness of adapting useful elements of Colorado's system. One potential element that could be useful is designing water districts in congruence with watersheds. This has been credited for reducing jurisdictional conflict.¹⁹⁶ However, just because aligning water districts with watersheds sounds good on its own does not mean it best suits California. For example, if the nature of disputes is mainly trans-watershed, given California's history of moving water within the state, redrawing the lines would likely not alleviate conflict as much as if the disputes were contained within watersheds.

194. *Id.*

195. Sax, *supra* note 5, at 317.

196. Richard Hamann, *Law and Policy in Managing Florida's Water Resources*, in WATER RESOURCES ATLAS OF FLORIDA XX, XX (1998).

*C. Assess and Improve Effectiveness of Existing Tools to Speed up,
Simplify, and Save*

Since conflicts and changes are more likely to increase than not,¹⁹⁷ California can proactively prepare by developing metrics for gauging the effectiveness of its Complex Civil Litigation Program in responding to water rights adjudication needs. We cannot best improve something if we do not know how well it works now. These metrics can be modeled from those in the National Center for State Courts' ("NCSC") 2003 report entitled *Evaluation of the Centers for Complex Litigation Pilot Program*.¹⁹⁸ One useful example is the judge's compliance with "[o]ne of the most heavily emphasized recommendations in the Deskbook on the Management of Complex Civil Litigation."¹⁹⁹ It is entering a "comprehensive case management order" for "just, speedy, and economical determination of the litigation."²⁰⁰ Applying the empirical methods in the NCSC report on water rights adjudication ten years after its publication would help fill the information gaps in the NCSC report and California's *2012 Court Statistics Report*, which also did not specifically mention water.²⁰¹

The Civil and Small Claims Advisory Committee charged with ongoing responsibility for updating the Deskbook on the Management of Complex Civil Litigation²⁰² can augment the existing material on water adjudications. The authors of the Deskbook may consider drawing from materials published by the Dividing the Waters Program. The Committee would also likely benefit from ensuring that it continually takes its ongoing responsibility to recommend improvements to complex civil litigation programs seriously.²⁰³ Since nothing is constant but change, regular introspection can keep the legal system nimble and ready to respond.

D. Evaluate Biases toward Path Dependency

To cultivate the best solution to expedite, simplify, and render economically reasonable water rights adjudications, it is worth California

197. Getches, *supra* note 63, at xi.

198. PAULA L. HANNAFORD-AGOR, NICOLE L. MOTT & TIMOTHY F. FAUTSKO, NAT'L CTR. FOR STATE COURTS, CAL. ADMIN. OFFICE OF THE COURTS, EVALUATION OF THE CENTERS FOR COMPLEX CIVIL LITIGATION PILOT PROGRAM (2003).

199. *Id.* at 52.

200. *Id.*

201. See Judicial Council of California, 2012 Court Statistics Report Statewide Caseload Trends 2001–2002 Through 2010–2011 (2012), available at www.courts.ca.gov/12941.htm#id7495 (containing no information about water).

202. FACT SHEET: COMPLEX CIVIL LITIGATION, *supra* note 60, at 2.

203. *Id.*

examining if it holds any inherent bias for resisting sweeping changes in restructuring institutions. Two observations suggest this bias exists. First, the 1978 Governor's Commission to Review California Water Rights Law rejected proposals of a sweeping nature, which included adjudicating all water rights and enfolding groundwater within the permit system.²⁰⁴ Part of the resistance stemmed from a perception that the proposed system would not improve results.²⁰⁵ Second, California's rejection of special business courts in 1996 suggests another instance of this cautionary tendency.²⁰⁶

The reason for reflecting on whether California holds any inherent biases is because such unconscious path dependency carries dangers. For example, resisting large institutional changes because of bias rather than analysis may shut out a stream of potential solutions that might actually serve in addressing the state's mounting water challenges. Admittedly, institutional change is hard, hampered by political angst and strong endowment effects. However, if the water rights adjudication system resulting from this bias is so complicated, it may be worth asking if the approach still works.

Path dependency is also a concern for Colorado. Kassen hinted that a century of court-based decision-making extinguished hopes of changing to a permit system.²⁰⁷ It was simply "too late."²⁰⁸ Do we want to let this stop us from developing the solutions we really need? Perhaps the time has come that we think about this.

E. Continue Bolstering Judicial Education to Build Expertise

Bolstering judicial education matters especially because as Colorado's water courts show, judicial education helps hone significant judicial expertise. Efforts may continue through the Complex Civil Litigation Program²⁰⁹ and the Dividing the Waters program affiliated with the National Judicial College ("NJC").²¹⁰ This is particularly valuable given rapid and rising challenges with water: "climate change, water quality, endangered species and growing [thirsty] cities."²¹¹

204. LITTLEWORTH & GARNER, *supra* note 6, at 33.

205. *Id.*

206. FACT SHEET: COMPLEX CIVIL LITIGATION, *supra* note 60, at 1.

207. Kassen, *supra* note 101, at 59.

208. *Id.*

209. FACT SHEET: COMPLEX CIVIL LITIGATION, *supra* note 60, at 2-3.

210. Dividing the Waters History, THE NATIONAL JUDICIAL COLLEGE, <http://www.judges.org/dividingthewaters/dtw-history.html> (last visited Feb. 1, 2014).

211. *Id.*

F. Extend Education to Public

It would also help to extend education beyond the judiciary. While judicial expertise is required to handle a case smoothly and soundly, citizen awareness of water realities is required to minimize conflicts from arising in the first place. Professor Getches also found well-informed non-lawyers helpful for nudging lawyers toward settlement and producing creative solutions.²¹² Despite the mounting water law challenges, Getches argued that a society is more likely to find the solutions if the citizens also grasp “the rules of the game.”²¹³ An informed citizenry leads a path toward “find[ing] peaceable resolutions,” be it “at negotiating tables [or] across fences.”²¹⁴ As rising tides lift all boats, so would education lift all Californians into better understanding the true state of this precious resource.

G. Go Beyond Restructuring Judicial Institutions: Integrate with Planning

Reducing costs, delays, and complexities in water rights adjudications by restructuring judicial institutions cannot compete with preventing disputes from ever arising. In addition to mediating and resolving conflict, prevention is a vital part of the law’s job.²¹⁵ Prevention follows planning, because “[a]djudication’s essential purpose, to recognize and enforce water rights, follows from the imperatives of necessity and livability in the land of little rain.”²¹⁶ Since “[n]ot the law, but the land sets the limit,”²¹⁷ we need to know our limit and play within it.²¹⁸

CONCLUSION

In the debate of whether to adopt Colorado’s special water courts to remedy the cost, complexity, and delay of water rights adjudications, California may benefit from deeper introspection. To serve California well, it would be good for this introspection to include fully understanding its unique needs stemming from the unique causes for its cost, complexity, and

212. Getches, *supra* note 63, at xi.

213. *Id.*

214. *Id.* at xi–xii.

215. TARLOCK ET AL., *supra* note 22, at 3.

216. Gregory J. Hobbs, Jr., *Colorado’s 1969 Adjudication and Administration Act: Settling in*, 3 U. DENV. WATER L. REV. 1, 4 (1999).

217. MARY AUSTIN, *THE LAND OF LITTLE RAIN* 2 (1950).

218. *It Pays to Know*, ONTARIO LOTTERY AND GAMING CORPORATION, <http://www.knowyourlimit.ca/> (last visited Feb. 2, 2014).

delay. Just like a decision-maker being presented with an interesting proposal is deciding whether or not to adopt it or adapt it to remedy their discomforts, the decision-maker would be able to make a better decision if they understood the causes of their discomforts to ascertain if the proposed solution would be their best remedy. A good introspection also includes understanding both the pros and cons of the proposed solution at a deeper level in order to help the decision-maker make the most informed decision.

In addition to grasping pros and cons of the proposed solution, the decision-maker would benefit from reflecting on their alternative solutions. It is important that evaluating between different alternatives focuses on functionality over form so as to safeguard against attention on allure alone when the key is effectiveness. Finally, it would help the decision-maker to place the proposed solution in historical context to afford additional learning opportunities from hindsight. In sum, it is hoped that California may benefit from approaching this debate of whether to adopt Colorado's special water courts through the above awareness-generating practices, and realize as a result that it may be best served by focusing on working from within.