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Water Judges Wade Into Battles Over A Dwindling Resource

By **Jack Karp**

Law360 (November 10, 2022, 12:31 PM EST) -- Utah's courts reassigned nine state judges this month, but not to tackle a backlog of criminal trials or speed up commercial disputes. They were tapped instead to deal with water.

Population growth, drought and climate change are all impacting water supplies, particularly in the West, sparking contentious legal fights between Native American tribes, farmers, residents and governments in battles over what some worry is a dwindling resource.

Utah hopes its new dedicated water judges will be able to develop the expertise and consistency needed to resolve these disputes, as water judges already do in the few other states that have them.

That number of states could grow, however, as decreasing water levels and increasingly urgent litigation may lead more states to consider implementing their own versions of water judges, experts say.

"I think it's a great innovation," University of Southern California's Gould School of Law professor Robin Craig told Law360 Pulse. "To have a dedicated court where judges are continually interacting with that law and becoming true experts in it, I think makes sense."

'A Unique Skill Set'

The complexity of water litigation is the main reason some states have appointed specialized water judges, experts say.

Colorado's seven water judges, for example, are charged with adjudicating petitions for new water rights, changing earlier water rights, quantifying how much water a rights holder can use and ensuring water is put to beneficial use, according to Judge James Hartmann, retired chief judge of Colorado's 19th Judicial District and a former water judge.

Weighing those interests requires water judges to have "a very unique skill set" that includes knowledge of hydrology, geography and history, as well as familiarity with the state's water laws and interstate water compacts, Hartmann explained.

"It is such a specific type of case. It involves so much engineering, so much science," Hartmann said. "It's a completely different type of litigation than I see in other cases that I handle."

So water judges, who are often selected by a state's chief justice or Judicial Council, participate in trainings and courses, including through a program called Dividing the Waters offered by the National Judicial College, according to judges.

But much of their expertise is gained on the job, with most water judges handling exclusively or primarily water-related cases, they say.

Having judges who are knowledgeable in this highly technical area of law means attorneys don't

have to constantly explain the issues in court, according to David M. Shohet of Colorado water law firm Monson Cummins Shohet & Farr LLC.

"Practitioners worry a little bit that if this were to move to a generalist type of court, you're going to have to spend a lot more time and effort trying to educate the judge or lay foundational work for some very complex issues that most water judges have a grasp on," Shohet said.

It's not just the science and the law that are complicated, say judges. It's also the cases themselves, which sometimes involve thousands of parties and take decades to litigate.

"Anybody who uses or has an interest in water, which is pretty much everyone in the state of Montana, ends up getting involved on some level," said Judge Russell McElyea, Montana's chief water judge. One case a colleague of his handled had a service list of 68,000 parties, he added.

Managing the procedural details of cases like that can be just as important — and difficult — as understanding the science of water, according to judges and attorneys.

"We have a lot of expertise, but I will tell you that I feel like I'm learning new things every day practically," Judge McElyea said. "I don't ever expect to get to the point where I feel like I've got comprehensive knowledge of the subject."

Making Consistent Rulings

Consistency is another reason New Mexico appointed one statewide judge to handle water rights adjudications and water judges in each judicial district to handle nonadjudication water matters, according to Celina Jones, general counsel of the state's Administrative Office of the Courts.

New Mexico's 13 judicial districts are drawn based on population, while water adjudications are based on hydrological watersheds, and the two don't line up, Jones explained.

So assigning a single judge to adjudicate water rights throughout the state made more sense, "instead of trying in a clunky way to go through judicial districts when it really was a geologic process," Jones said.

Under the previous system, judges in different parts of the state were also deciding water-related issues differently, according to Jones.

"That's not unusual for a lot of complex litigation. But the thought was here, let's really try to implement best practices in a consistent way across the state," she added.

That consistency can be an advantage and a disadvantage of these specialized court systems, according to Shohet, who said that the limited number of water judges mean they can get a little "predictable."

Shohet has handled almost 500 water litigation matters over nearly 18 years, but he's only appeared before five or six water judges in all those cases, he said. That can make water law more consistent, but it can also mean that judges and attorneys aren't trying to "push the envelope."

"We are not coming up with novel and creative laws that are evolving potentially," Shohet said.

But overall, the advantages of having dedicated water judges outweigh the disadvantages, Shohet added.

"I certainly think there's judicial efficiency and legal efficiency to our specialized courts," he said.

Keeping Cases From Clogging Up

Dedicated water judges also make sure disputes over water actually get heard, according to judges and attorneys.

Montana's two water judges and 11 special water masters currently have about 250,000 water rights claims before them and issue close to a thousand orders a month, said Judge McElyea, who called it "a massive effort."

The state's district judges handled that effort themselves before the water court was created.

But those judges have crowded dockets that include criminal cases with defendants who have a constitutional right to speedy trials. Those judges also have more than 60 legislative mandates requiring them to prioritize certain cases, including child abuse cases and involuntary mental health commitments, according to Judge McElyea.

"What was happening is that water cases kept getting bumped because district court judges are basically so busy dealing with all the stuff that the legislature has required them to address that they didn't have the bandwidth to get the job done," Judge McElyea said.

So having judges dedicated full time to water cases allows those cases to get the attention they warrant, according to USC's Craig, who specializes in water law.

"You kind of have to have one person taking that all in and getting used to just the procedural complexity," she said, "how to divide up claims, how to weed out the easy ones early."

Idaho, for instance, doesn't have formal water courts or judges. But it does funnel all of its water-related disputes to one judge through a series of informal arrangements, according to Craig.

"And that was just a reflection of the fact that somebody had to figure out how to get it done," Craig said.

'Much More Contentious'

Getting those cases done is getting more urgent, according to experts.

Population growth means water once used for agriculture is being shifted to residential use. At the same time, climate change, drought and an increase in genetically modified crops that consume water differently are all impacting the water supply, Judge McElyea said.

"So all these things are adding complexity and demand to the equation," Judge McElyea added. "It's a certainty that conflict over water is going to increase, not only in Montana, but throughout the West and worldwide."

That's true in Colorado, where water-related litigation is growing "much more contentious," according to Shohet of Monson Cummins.

There's always a small margin of error when attorneys and judges calculate water use and changes to water rights, for instance, but parties have historically been willing to accept that margin, explained Shohet. They aren't willing anymore.

"We seem to be fighting much more over a 2 to 3 or 4% margin of error, whereas previously we said that's good enough for us, let's move on," Shohet said.

Even in the eastern U.S., where water has been less of an issue, courts are seeing more litigation over water, according to Craig.

"Drought is making some fundamental shortages in the water supplies more obvious, and there's been more interstate lawsuits in the East than there's been in a long time," she explained.

Just last year, the U.S. Supreme Court issued rulings in battles over water fought between **Florida and Georgia** and **Mississippi and Tennessee**.

The growing urgency of these issues is why Utah's specialized water judges started work on Nov.

1. And other states could follow suit, say some experts.

Former water judge Hartmann, for instance, has met with officials from Idaho, California, Arizona, Texas, Nevada and Wyoming to discuss how Colorado handles water disputes, he said.

"Many states are looking to Colorado for our model, and trying to see if that would fit into their system well," Hartmann added.

But whether other states can and should appoint dedicated water judges will ultimately depend on each state's unique laws, needs, hydrology and infrastructure, according to Hartmann and others.

"There is no consensus answer," Judge McElyea acknowledged. "But what's good about our system is that it requires that people that have competing interests in the same resource put their cards on the table and sit down and talk to each other and try to work through what their issues are."

"That's really helpful in getting to more streamlined, efficient definitions of water rights," he added, "and then ultimately to the real game, which is how to administer water in a clear, efficient manner."

--Editing by Nicole Bleier.

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