

Principles Regarding Allocation of Shared Interstate Intrastate Waters

Research compiled by Barbara Markham, AAG and summarized by Sharonne O'Shea, AAG

The statements below are those of the author and do not necessarily reflect the opinion of the Attorney General's Office

1. Just what is an adjudication?

An adjudication is a quiet title action that sorts out the relative rights of individuals to a particular water body, generally based upon the principles of beneficial use and priority date, and upon the water code. See Chapter 90.03 RCW detailing the adjudication process and later presentations.

2. Neither state alone can arrive at a conclusive answer regarding allocation of the shared water by conducting an independent adjudication.

Whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive.

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

3. Possible methods of allocation binding on both states include federal litigation, negotiation, or legislation.

a. *Interstate Compact*

The U.S. Supreme Court has encouraged states to reach an agreement between themselves to allocate the waters. *Hinderlider*. To effect any agreement, each state often enacts legislation to approve the compact. Congressional consent and presidential signature is required for the compact to be finalized. Ultimate adoption is not guaranteed, once adopted it may be vetoed, and the timeframe for resolution is unknown.

b. *Equitable Apportionment Suit*

The United States Supreme Court retains original jurisdiction over lawsuits between states. A state may seek permission from the Court to file a type of suit called an equitable apportionment action to allocate waters that cross state boundaries. If permission is granted, the Court then appoints a special master to hear the facts and recommend a decision. The Court may then adopt, reject, or modify the special master's recommendations.

In order for the Supreme Court to give permission, the petitioning state must demonstrate that the state is actually suffering an injury of serious magnitude from the actions of the other state. *Washington v. Oregon*, 297 U.S. 517, 524 (1936). Further, because the law suit is one of "equity," in order to prevail the petitioning state must have "clean hands," if it wishes to prevail. Depending upon the complexity and other scheduling factors, the case may take years to reach a resolution.

Generally, an equitable apportionment action will follow the prior appropriation doctrine's use of priority date to apportion water. *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922). However, other factors may be considered if strict adherence to priority date would be unfair. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

c. Direct Congressional Action

Unlike action of Congress to approve an agreement worked out between states, federal legislation dictating the result could also resolve the allocation questions. This would follow the usual process for enacting federal legislation with sponsorship, committee hearings, and eventual floor votes. Ultimate adoption is not guaranteed and the timeframe for resolution is unknown.

4. If a state-based adjudication does not provide a conclusive answer for the entire water body, why would we do one?

a. An adjudication is a systematic process with built in safeguards and standards to collect historic information about water use.

b. This information can support any of the above paths towards resolution: litigation, negotiation, or legislation.