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Litigant participation and success in water rights cases in the Western States

Robert L. Perry[a,*], Kelly A. Tzoumis[b], Craig F. Emmert[a]

[a] Department of Social Sciences, The University of Texas of the Permian Basin, 4901 East University Boulevard, Odessa, TX 79762, USA
[b] DePaul University, 990 West Fullerton, Suite 102, Chicago, IL 60614, USA

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ABSTRACT

Over the years, many decisions concerning the rights to water resources have been addressed in state legislatures and federal courts; however, the majority of decisions concerning the conflicting demands over water have been addressed in state courts. This study examines the body of water rights cases heard in state supreme courts of the eleven Western states and focus on litigant participation and success. The data set includes all the water rights cases decided between 1972 and 2008 in the eleven western state high courts (Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming). The study explores the propensity of different types of litigants to initiate water rights cases at the state supreme court level, and also examines litigation patterns to determine which litigants are the targets of these appeals. Galanter's (1974) party capability theory is used to help explain patterns of litigant success.

1. Introduction

This study focuses on litigant participation and success in state supreme courts. The data set includes all the water rights cases decided between 1972 and 2008 in eleven western state high courts. The study explores the propensity of different types of litigants to initiate water rights cases at the state supreme court level. Litigation patterns are also examined to determine which litigants are the targets of these appeals. Next, Galanter's (1974) party capability theory is used to help explain patterns of litigant success.

The historical record concerning government's involvement in water policy is extensive. To cite just a few examples: Lepawsky (1950), Hundley (1975), Gates (1979), Pisani (1982, 1992), Worster (1985), Reisner (1986), McCool (1987), Rogers (1993), Anderson and Snyder (1997), Raheem (2014), and Wolters and Hubbard (2014). Similarly, the exploration of developments in water rights case law has a long history, such as Dunbar (1983), Wilkinson (1992), Sherk (2000), and Getches (2001). However, these studies have not focused on which litigants initiate cases, nor have they focused on litigant success.

The time period for this study, 1972 through 2008, corresponds to the rise of the environmental movement and the passage of the Clean Water Act, increased government regulation of water use, urbanization and suburban sprawl with increasing demands for municipal water supplies. The focus on these cases should provide an effective portrait of the litigants involved in these cases and allow success rate analysis for different types of litigants. As discussed below, the analysis demonstrates that governmental litigants and those with water issue expertise are most successful.

The eleven western states in this study were included for two primary reasons. The first reason is that these states comprise a distinct cultural region; one in which

* Corresponding author. Tel.: +1 432 552 2343.
E-mail address: perry_r@utpb.edu (R.L. Perry).

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water rights are especially important. The states are geographically large with fast-growing urban and suburban populations (May & Moncrief, 2011, pp. 40–41) Water resources are limited in all these states. As a result, water rights cases are especially significant in the West.

The judges who decide the water rights cases in this examination recognize the importance of the disputes that they must resolve. In one case, Justice Feldman of the Arizona Supreme Court stated that, "We deal . . . with questions of adjudication and quantification of water rights – one of the most important issues conceivable in an arid state such as Arizona."[1] Justice Utter of the Washington Supreme Court added, "Water resource allocation concerns everyone in our state. Its common use for household consumption, agriculture, manufacturing and hydroelectric power makes water a highly coveted resource."[2]

The second reason is that the overwhelming majority of state supreme court water rights cases are decided in these eleven states. From 1972 through 2000, the eleven western states' high courts decided 459 cases, an average of nearly 42 cases each.[3] In contrast, only 164 cases were decided in non-western state supreme courts, an average of approximately 4 per court.

2. Methods

2.1. Description of the cases

The cases in this data set include different types of water rights disputes. There are cases involving interpretation of federal statutes,[4] and challenges to state laws,[5] and local irrigation district regulations.[6] Other cases involve water rights on federal lands, such as federal grazing lands and national forests.[7] Others deal with conflicts between state and national authority to regulate water rights,[8] or between state and local authority.[9] Some involve alleged violations of existing water rights when states used imminent domain for highway construction,[10] or when a city built a new water treatment system.[11]

Many of the cases are more routine. They deal with such issues as denial of applications for water rights,[12] or changes in the terms and conditions of existing water rights.[13] Other cases involve disputes between neighboring landowners, subsequent purchasers, and others over the existence, ownership, and use of water rights.[14]

2.2. Party capability theory

Party capability theory holds that litigants with more resources and greater expertise will be involved in a substantial proportion of cases and that they will be more successful relative to other parties (Galanter, 1974; Kritzer & Silbey, 2003). Galanter's (1974) article, "Why the 'Haves' Come Out Ahead," posited that due to their greater resources, expertise, and experience, government agencies and business corporations and other 'haves' would prevail against "have-nots' more often in court. They could hire better lawyers, expend more resources, and take more time in resolving cases. Furthermore, they were 'repeat players' who gained experience over time and could play for rules changes and development of favorable legal doctrines. Their 'one-shotter' opponents were only concerned about the outcome of their own immediate cases. The cumulative advantages of governmental and corporate litigants – haves, repeat players over individuals – have-nots, one-shotters should lead to greater levels of overall success.

The existence of these resource disparities means that organizational litigants will initiate a large proportion of cases. Perhaps more important, it means that government agencies and officials, and business organizations, will more often prevail over individuals (Songer & Sheehan, 1992; Wheeler et al., 1987).

This approach has been most often applied in the study of trial courts (Dumas & Haynie, 2012). It has also been applied to appellate court studies. Studies of the U.S. Supreme Court and U.S. Courts of Appeals consistently demonstrate that the federal government is the most successful party (Collins & Martinek, 2010; Hettinger & Lindquist, 2012; Sheehan, Mishler, & Songer, 1992; Songer & Sheehan, 1992; Songer, Sheehan, & Haire, 1999). Some studies find that businesses enjoy higher levels of success than individuals (Songer & Sheehan, 1992; Songer et al., 1999) while others do not (Collins & Martinek, 2010).

Party capability theory has also been used in state supreme court studies. In these studies, state government agencies and officials have consistently been most successful (Emmert, 1991; Farole, 1999; Songer, Kuersten, & Kaheny, 2000; Wheeler et al., 1987). Some studies have found that businesses are more successful overall relative to individuals (Farole, 1999; Songer et al., 2000; Wheeler et al., 1987). On the other hand some studies have found that the differences between business and individual success have been fairly small or nonexistent (Emmert, 1991; Wheeler et al., 1987). The results of these studies, then, are consistent regarding the success of governmental litigants. They are more mixed, however, when it comes to the success of business litigants at the appellate level.

[1] E.g., *USA v. Superior Court, County of Maricopa/San Carlos Tribe v. Superior Court, County of Maricopa*, 697 P. 2d 658 (Ariz., 1985).

[2] E.g., *Department of Ecology v. Abbott, et al*., 694 P. 2d 1071 (Wash., 1985).

[3] Our original dataset was comprised of water rights cases in all fifty states between the years 1816 and 2000. In that set, 2344 of 3341 cases (70.2%) were decided in the eleven western states. We then updated our dataset to 2008, and focused solely on the western states.

[4] E.g., *Potlatch Corporation and Hecla Mining v. USA*, P. 3d 1256 (Idaho, 2000).

[5] E.g., *McDonald, et al. v. State of Montana*, 722 P. 2d 598 (Mont., 1986).

[6] E.g., *Neubert et al. v. Yakima-Tieton Irrigation District* (Wash., 1991).

[7] E.g., West Elk Ranch, L.L.C. v. USA, 65 P. 3d 479 (Colo., 2002).

[8] E.g., *Department of Ecology v. U.S. Bureau of Reclamation, Quincy-Columbia Basin Irrigation District, et al*., 827 P. 2d 275 (Wash., 1974).

[9] E.g., *City of Roswell v. Reynolds*, 522 P. 2d 796 (N.M., 1972).

[10] E.g., *State of Montana v. Roth*, 496 P. 2d 1136 (Mont., 1972).

[11] E.g., *Thayer, et al. v. City of Rawlins*, 594 P. 2d 951 (Wyo., 1979).

[12] E.g., *Peterson v. Ground Water Commission, et al*. 579 P. 2d 951 (Colo., 1978).

[13] E.g., *Beker Industries, Inc. v. Georgetown Irrigation District*, 610 P. 2d 546 (Idaho, 1980).

[14] E.g., *Axtell v. M.S. Consulting, et al*., 955 P. 2d 1362 (Mont., 1998).