



A resource for judges resolving water conflicts

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THE NATIONAL
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SAVE THE DATE: 2020 Conference in SLC

Don't forget to save the dates for next fall's *Dividing the Waters* general conference in Salt Lake City for **September 23-26**, at the University of Utah law school.

Federal Circuit: Reclamation Rights Subordinate to Tribe

After 18 years of litigation, the Federal Circuit Court of Appeals rejected the 5th Amendment property takings claims of farmers in the Klamath water project along the Oregon-California border. The court concluded, in *Baley v US*, that "the appellants' water rights were subordinate to the Tribes' federal reserved water rights." It therefore affirmed the Court of Federal Claims' 2017 holding that temporary halt to water deliveries did not constitute an unconstitutional taking.

The US Bureau of Reclamation manages the Klamath River Basin Reclamation Project (Project), to deliver water to 200,000 acres of farmland and protect the tribal trust resources of several Indian tribes near the CA-OR border.

The Klamath, Yurok and Hoopa Valley Tribes have fishing rights pursuant to treaties and executive orders dating back to 1855. While non-consumptive rights, they nevertheless may allow a tribe to prevent a junior appropriator from drying up the stream. In the Klamath case, courts have recognized a priority date for some tribal rights as "time immemorial."

In 2001, Reclamation halted water deliveries to farmers and irrigation districts served by the Project, in order to comply with requirements of the Endangered Species Act (ESA), to protect salmon and sucker fish. Reclamation also took this action to fulfill its tribal trust obligations. Farmers and irrigation districts filed in the Court of Federal Claims for an unconstitutional taking of their water rights under state law and the Klamath River Basin Compact. The litigation has gone through several rounds of decisions and appeals.

The Federal Circuit rejected multiple arguments from the plaintiffs about why the tribal rights do not defeat the farmers' rights to water from the Klamath Project. "At the bare minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy." The Circuit also held that the Tribes' water rights are not limited in geographic scope, as the water rights may extend beyond the range of the fishing rights. Tribal reserved water rights are federal, and not governed by state law or state adjudications.

Adjudicating Groundwater Bench Book Still Available

You may get your own copy of the Program's bench book on groundwater science, by visiting the NJC/DTW webpage: <https://www.judges.org/dtw/adjudicating-groundwater/>

In Focus: Judge Renee Worke (MN Court of Appeals)

Coming from "the Land of 10,000 Lakes," Minnesota Court of Appeals Judge Renee Worke experiences water conflicts from a perspective very different than her western state colleagues. She observes that her state has so much water that "one state is negotiating a deal to buy water from us!" Her state's major water cases relate to water quality, such as contamination from industry and mining, which she has heard on the appellate bench. As noted in the June 2019 *Network Note*, MN courts hear disputes over the impacts of northern MN mining on the Great Lakes and the boundary waters. MN law recognizes how pollution migrates via groundwater to surface waters.

Since she started judging 25 years ago, Worke has focused her judicial committee work on specialty courts, for veterans, child protection, and tribal law. After a decade in private practice in criminal law, she served as an administrative law judge on child support disputes. MN Governor Carlson appointed Worke as district judge in 1996, and she served as Chief Judge for the 3rd Judicial District. Governor Pawlenty elevated her to the Court of Appeals in 2005.

The draw to *Dividing the Waters* originated with her husband, a grain farmer in Southern MN. He works with organizations to promote water and soil health. As a conservation farmer, he focuses attention on educating the public on groundwater contamination, and "how we all need to do our share to preserve our greatest resource." Last year's Stanford *DTW* conference, Worke's first, impressed her: "The sessions were informative and lively when you mix judges from states with varying problems, all looking for cost-effective solutions!" Each month, she and her husband read the *Network Note* and discuss other states' lack-of-water issues in comparison with Minnesota's abundance of water.

Worke gained all her education in Minnesota, starting with an undergraduate degree in sociology/law enforcement from Minnesota State University. She earned her JD from William Mitchell College of Law and was a policy fellow at University of Minnesota's Humphrey School of Public Affairs. She serves on the appellate court in St. Paul, but commutes an hour to her home in Owatonna.

Recent court decision? Something to share? Contact the *Network Note* Editor at ALFIII@sbcglobal.net