



A resource for judges resolving water conflicts

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THE NATIONAL  
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## The Network Note August 2022

### Groundwater Conflicts in the Upper Rio Grande

**SEP 15, 10 AM PDT: Lessons Learned from CO**

*Dividing the Waters* convened the 3<sup>rd</sup> [webinar on the Upper Rio Grande Basin, focused on groundwater rules and management](#). In the final segment, *DTW* will convene a roundtable on lessons learned from CO. **To view a webinar or register, visit the [Dividing the Waters webinar page](#).**

### 9<sup>th</sup> Cir: CA Water Board CWA §401 Certification Delays

The Ninth Circuit held that the CA State Water Resources Control Board (Water Board) did not coordinate a “scheme” to delay state certifications under Clean Water Act § 401. It vacated FERC orders with the “coordinated scheme” findings, in *CA State Water Resources Control Board v. FERC*.

Clean Water Act Section 401 requires states to certify, within one year, that a federal license can be issued for activities that may result in a discharge into navigable waters, such as FERC hydroelectric dam licenses. CA law requires environmental analysis/reports before the Water Board can certify FERC licenses, which usually requires more than one year.

Regulations required the Water Board to deny, without prejudice, a certification, if environmental review was not complete before one year lapsed. As a practice, applicants usually withdrew and resubmitted their applications, to avoid a denial and allow their interim FERC permit to continue.

In 2019, the DC Circuit held, in *Hoopa Valley Tribe v. FERC*, that CA and OR had waived their certification authority through continual withdrawal-and-resubmission of certification requests. Other applicants petitioned FERC to order that CA had waived its authority for their applications. The applicants had not completed, or even started, the required environmental analysis. FERC granted the petitions, holding that the Water Board “coordinated” with applicants, in a “scheme” to avoid deciding the request within a year.

The 9<sup>th</sup> Circuit vacated the FERC orders, holding that the findings of “coordination” were unsupported by substantial evidence. FERC offered evidence of Water Board staff email warnings that the year was about to elapse, leading to applicant resubmittals. The court held: “Even under FERC’s interpretation of the statute, the mere fact that withdrawals-and-resubmissions occurred cannot demonstrate that the State Board was engaged in a coordinated scheme to delay certification.” FERC evidence showed only Water Board acquiescence in resubmittals, not enough to show a scheme of coordination. The court remanded the orders to FERC.

### **REGISTER NOW: Colorado River Conference**

**November 30-December 3 in Santa Fe, NM**

On the Colorado River Compact’s 100<sup>th</sup> Anniversary, *Dividing the Waters* will convene in Santa Fe. Panels will address the “Law of the River,” as well as the Colorado River’s history, hydrology, and conflicts. *A water law fundamentals workshop, on November 30, will precede the conference.*

### **In Focus: Judge Alison Greene Webster (OR)**

Growing up in the City of Los Angeles, OR Administrative Law Judge Alison Greene Webster did not hear much about city fathers’ work to bring water hundreds of miles to quench the thirst of a growing city. Adjudicating OR water law disputes was not on her radar. Nor was law school.

After graduating from UCLA in communication studies, a friend told Webster that she would enjoy law school. So, she took the LSAT, studied law at Loyola Law School, passed the CA bar, and began practicing law at the LA office of a NYC-based law firm, and then at an appellate law firm. After a few years, she moved to Portland, with her husband. Once in Portland, she tackled the OR bar, and joined a downtown firm as a litigator on insurance defense and workers’ compensation.

Webster joined the OR Workers Compensation Board as an attorney and then became an ALJ, just as the State centralized hearings at the Office of Administrative Hearings (OAH). She has served the State of Oregon for 27 years, with 23 years as an ALJ. This year, the OR Water Resources Department recognized a growing need for ALJ work on water disputes, so Webster joined the OAH’s water law adjudication team.

*Dividing the Waters* introduced Webster to groundwater conflicts, in this year’s webinar series on the Upper Rio Grande Basin groundwater management system in CO. The webinars’ depth and the speakers’ passion for water made an impression. “The speakers have worked on these conflicts for decades. It is fascinating to hear the different perspectives from the judge, litigators, state engineers, and modeling experts. I am trying to soak in as much information as I can!”

Webster realized she has much to learn about water management generally, but other topics, such as water adjudication practice, may need her attention initially. She has heard from her OR colleagues that water conflicts can be very complex, and properly identifying the particular issues and matters in dispute and the scope of the case is of utmost importance. She has enjoyed and appreciated the *DTW* series, and hopes to participate in this fall’s Santa Fe conference.

**Ideas for Network Note? Court Decision on Water? Contact [ALFIII@sbcglobal.net](mailto:ALFIII@sbcglobal.net)**