

The Network Note September 2022

Colorado River Conference: Three Events November 30-December 3 in Santa Fe, NM

The Conference

Registration for the Colorado River conference is filling up. Judges from River basin states may benefit most. Given the 1963 *AZ v. CA* Supreme Court decision, this conference may offer a good opportunity for federal judges to join their state counterparts in a conference on a River that has a unique state-federal character. Both courts may encounter distinct cases in their states. [Register](#) and invite a federal colleague!

Pre-Conference Workshop: Water Law Fundamentals

A fundamentals workshop will precede this year's conference, commencing at **9 am on November 30**, offering judges newer to water cases to learn the basics of western water law. Consider inviting a colleague who just got a water case.

Justices Colloquium on Judicial Education on Water

In conjunction with this year's conference, NM Chief Justice Shannon Bacon and CA Chief Justice Tani Cantil-Sakauye will convene a colloquium of western state supreme courts, to commit to a high level of professional competence for judges who handle water law cases. The group will discuss the role of NJC and DTW in interstate judicial education programming.

9th Circuit: Klamath Tribes Are Required Party.

The Ninth Circuit held that irrigators cannot challenge the Bureau of Reclamation's Klamath Project operations plan without the Klamath River tribes participating. In *Klamath Irrigation District v. USBR*, the Court affirmed the District Court's dismissal based on a motion from the Tribes.

The US Bureau of Reclamation manages one of its original water projects in the Klamath Basin, on the CA-OR border. It has multiple, sometimes conflicting, legal duties in managing Klamath River water, in both OR and CA – protecting water rights for irrigators and tribes, as well as saving endangered fish species pursuant to the ESA. OR adjudicated the basin and issued a 2014 order on rights in the River's water.

In the present dispute, USBR adopted a 2019 biological opinion on its Klamath River operations that maintained instream flows for listed fish species. Irrigators challenged the USBR action under the Administrative Procedures Act (APA). The Klamath Tribe (OR) and the Hoopa Valley Tribe (CA) intervened and moved to dismiss because they were required parties and had sovereign immunity in this APA suit. The trial court granted the Tribes' motion to dismiss.

The Ninth Circuit affirmed the dismissal, holding that the Klamath River Tribes were required parties under FRCP 19. It rejected irrigators arguments that USBR could represent the Tribes and the McCarran Act waived sovereign immunity. USBR had different interests and this action fell outside the McCarran Act. The concurring opinion suggested that the case could have fallen under the McCarran Act in OR, if not for the Hoopa Valley Tribe in CA.

In Focus: Judge Stephen Bushong (OR)

Growing up in Michigan, Judge Stephen Bushong had little awareness of water shortage or the arid West. The Great Lakes touch MI on three sides. After almost 40 years in OR, however, he now rightly claims OR as his "home state," albeit the wetter western side.

Bushong's legal career has long focused on critical, complex state issues, just not water, until recently. University of MI law school provided his JD. After clerking in MI, he moved to OR to practice complex civil litigation. In 1994, he joined the OR AG as lead trial counsel for constitutional cases, including defense of the State's "Death with Dignity" law, in *OR v Ashcroft*. He joined the AG's executive staff in 2005, with oversight responsibility for all civil lawsuits against the State, including cases challenging State water decisions.

OR Governor Kulongoski appointed Bushong to the Multnomah County Circuit Court in Portland in 2008. He won his 2020 reelection in the primary, after no one filed against him. He has served as Chief Civil Judge (2013-17) and Presiding Judge (2018-22). This year, OR Chief Justice Walters appointed Bushong to oversee the Klamath Basin Adjudication, after Klamath County Judge Wogan retired.

The Klamath River offers Bushong an opportunity to learn and adjudicate some of the West's most challenging water conflicts. He looks forward to drawing on *Dividing the Waters* – its publications, conferences, and network of experienced water right adjudication judges from other states.

Resources for Adjudicating Groundwater

- **Bench Book:** With growing conflict over groundwater, DTW's *Adjudicating Groundwater* bench book remains available, [through the NJC/DTW website](#).
- **Webinar on Groundwater Conflicts:** Discover what CO judges learned from groundwater litigation on the Upper Rio Grande. Go to [Dividing the Waters webinar page](#).

Ideas for Network Note? Court Decision on Water? Contact ALFIII@sbcglobal.net