



A resource for judges resolving water conflicts

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THE NATIONAL
JUDICIAL COLLEGE

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Help Develop Water Education for Judges!

You may be able to contribute to The National Judicial College's emerging interstate program on water. NJC and *Dividing the Waters* now seek to identify the scientists, judges, and law professors that YOU consider most helpful to your understanding of water. Send your ideas for the most helpful presenters to [Alf W. Brandt \(Network Note Editor\)](#).

CA: CEQA Not Pre-Empted by Federal Power Act

The CA Supreme Court held that the Federal Power Act does not pre-empt challenges to the environmental analysis required by the CA Environmental Quality Act for *State* applications for FERC dam permits. In *County of Butte v. Department of Water Resources*, it affirmed and reversed the Court of Appeal, creating a preemption exception for State agencies.

The CA Department of Water Resources (DWR) operates the State Water Project, which stores and conveys water hundreds of miles, from Lake Oroville to So Cal. DWR operates Oroville Dam to store water and generate hydroelectricity, in part to pump water over the Tehachapi Mountains.

Oroville's federal power license expired in 2007. In 1999, when DWR prepared to apply for its renewal, it chose the "alternative licensing process," a voluntary process to achieve consensus among interested parties on the terms of the license before submitting the renewal application. DWR negotiated a settlement agreement, signed by 50 parties in 2006. Oroville's home County of Butte, however, did not sign.

DWR submitted the settlement and a "preliminary draft environmental assessment" to FERC, which drafted a NEPA EIS. DWR then drafted a CEQA EIR. In 2008, DWR issued a final EIR determination with list of mitigation measures required by the permit, leading DWR to conclude that the renewal would have no significant impacts. Butte County, and a few other parties, filed suit. The Court of Appeal held that the Federal Power Act (FPA) pre-empted CEQA.

The CA Supreme Court held that the FPA does not pre-empt state court review of CEQA compliance by a *state* agency. It rejected preemption arguments based on conflict, express, and field preemption. The decision crafted a narrow exception, requiring the State's compliance, and only for actions that did not affect the settlement and FERC permit terms. The Court noted the higher bar for pre-empting state requirements for its own agencies, and noted that the State could later request changes to its FERC permits. It accepted FPA's preemption of CEQA compliance for non-state applicants to FERC. The dissent argued that the FPA completely pre-empted CEQA.

Utah Judicial Council Funds Water Webinar for Judges

The Utah Judicial Council granted \$40,000 to Southern Utah University (SUU) to develop the first course of an online water education program for judges. SUU will match an in-kind contribution for the webinar, focused on hydrology. NJC will work with SUU and others to develop an interstate judicial education program on water. *DTW* will contribute by identifying program topics and subject matter experts.

In Focus: Judge Michelle Szambelan (WA)

As a native of the Arizona desert (Phoenix), WA Superior Court Judge Shelley Szambelan had a deep awareness of water's value. Salt River Project canals weaved through her neighborhood. When she moved to Spokane for college at Gonzaga University, she discovered the "heresy" of fellow students letting the water run while they brushed their teeth.

Discovery of the heresy, however, did not lead to a career in water. Szambelan got a BS in Poli Sci. She did spend her law school summers working at Central AZ Water Conservation District, but she started her career in an appellate clerkship and then complex civil litigation. She spent a decade in appellate prosecution before joining the bench in 2008.

Last year, her Presiding Judge "drafted" Szambelan to succeed the retiring water rights judge. The WA Legislature, in 2021, approved funding for water right adjudications involving Lake Roosevelt and the Nooksack River watershed. The WA judiciary has started expanding its resources for adjudications, with assignments of judges and a water specialist at the WA Administrative Office of the Courts.

Since she took the municipal court bench in 2008, Szambelan has served the judiciary in many ways. She has focused her service on education, publications, and ethics, as well supporting youth in marginalized communities. In 2018, Gov Inslee appointed her to the Superior Court, where she now serves as Assistant Presiding Judge. Szambelan appreciates the opportunity, as a judge, to return to learning about water.

The recent Santa Fe conference offered Szambelan her first exposure to *Dividing the Waters*. The conference gave her an "excellent foundation" on water. She agrees, however, with Justice Márquez's observation in last month's *Network Note*, that new water judges need information immediately. They cannot wait for the next *DTW* conference. Given her experience in judicial education, recent discussions about webinars and bench books on water intrigue her. Perhaps she will contribute to interstate programs in the future, after she has gained experience in the Lake Roosevelt adjudication.

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

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