



A resource for judges resolving water conflicts

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THE NATIONAL
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Successful Colorado River Conference

Dividing the Waters held its largest conference in Santa Fe, on the Colorado River Basin, on the 100th anniversary of the River's Compact. The conference offered state judges unique insights into the 20-year drought and interstate/federal conflict over which states need to cut back diversions. Hearing from state and federal water leaders, as well as scientists and authors, gave judges a deeper understanding of the water conflicts that affect the seven Basin states. The field trip took judges to the Cochiti Pueblo (and dam) and the Albuquerque drinking water system along the Rio Grande.

NM: Right to Walk/Wade in Private River Beds

The NM Supreme Court held that the public has a right to wade in non-navigable rivers, even when the streambed is privately owned. In *Adobe Whitewater Club v NM State Game Commission*, the Court rejected proposed rules that would allow owners of riverbeds to close their property.

In 2015, the Legislature enacted a statute that barred hunting and fishing that required access to streams "through non-navigable public water." The NM Game Commission adopted regulations that would allow landowners to obtain a certificate allowing them to close their streambed property.

Outdoor advocates directly petitioned the NM Supreme Court for prohibitory mandamus challenging the constitutionality of the regulations. Landowners intervened, arguing that direct petition was inappropriate and the public could only boat, not wade, in the water overlying privately owned streambeds. The Court found direct petition was appropriate.

The Court held "the Regulations are an unconstitutional infringement on the public's right to use public water." It largely relied on its 1945 *State Game Commission v. Red River Valley Co.* decision, which concluded that the State Constitution gave a right to recreate and fish in public water.

The Court explained the right to walk on private land underlying public water in the context of both the 1912 state Constitution as well as pre-statehood law dating back centuries, to the control of Mexico and Spain. It contrasted decisions from WY and UT. It noted that its own *Red River* decision had rejected limitations on the public's rights to navigable streams. The Court concluded that *Red River* "implicitly condones the use of beds beneath public water." Finally, the Court interpreted the statute as constitutional, to avoid a constitutional question as to the Legislature's action. It therefore held that the Game Commission lacked authority to promulgate the regulations.

Justices Agree to Collaborate on Water Education

At the post-conference Colloquium, state supreme court justices agreed on the need for judicial education on water. They also agreed that interstate collaboration through NJC would be valuable, particularly on topics that states have in common, such as water science. Since the Colloquium, the Water Foundation awarded NJC \$30K to start the program.

In Focus: Justice Monica Márquez (CO)

CO Supreme Court Justice Monica Márquez did not plan to serve as a water judge. Former Chief Justice Michael Bender and the late Justice Greg Hobbs, however, had other ideas. Shortly after she was appointed, Bender assigned Márquez an important water law case as her first opinion. To get up to speed, Márquez quickly dove into the Court's Water Law Benchbook to learn water law fundamentals. Several water opinions later, in 2017, Hobbs invited Márquez to chair the Water Court Rules Committee as the Supreme Court's liaison.

Márquez has deep roots in CO, growing up in Grand Junction. Her family goes back several generations in CO's San Luis Valley, where water remains central to community. She took a detour to CA for Stanford, and then to NJ/PA to serve as an inner-city teacher and community organizer for the Jesuit Volunteer Corps. She then went to Yale for law school.

She returned to CO as a Denver lawyer, starting in private practice. She spent 9 years with the CO AG, representing state agencies/officials. She renewed her connections to her Latinx/Catholic community, serving on boards for the Hispanic Bar Association, GLBT Bar Association, and Latina Initiative. She chaired the Denver GLBT Commission.

Gov Ritter appointed Márquez to the Supreme Court in 2010. Her leadership continues on the bench, where she serves as liaison for attorney regulation and water courts. She works on "Judicial Well-Being," and diversity and inclusion in the CO judiciary. Her leadership has earned her many awards.

This year's *Dividing the Waters* conference gave Márquez her first in-person opportunity to participate, and then she participated in the justices' Colloquium. She finds *DTW* critical for judges: "Water is such a unique area of the law, with its own nomenclature and foundational principles. If you're not well-versed in the foundations, you can't even begin to address the issues." In the Colloquium, her bench book experience led to her assert that judges new to water need information immediately. They cannot wait 18 months for the next *DTW* conference, so she supported a program of webinars and water publications for judges' immediate use.

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

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