



A resource for judges resolving water conflicts

Stephen E. Snyder
Executive Director



THE NATIONAL
JUDICIAL COLLEGE

Hon. Benes Z. Aldana (Ret.)
President

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Next DTW Conference: Salt Lake City?

The *Dividing the Waters* Conveners have started discussing the next conference, in Salt Lake City. The conference may address the challenge of fresh water diversions from streams feeding a terminal lake. UT currently has an adjudication on streams feeding the Great Salt Lake. Stay tuned!

SCOTUS: Navajo Tribal Water Claim Denied

The Supreme Court rejected the Navajo Tribe's claim that the US Government had a duty to take "affirmative steps to secure water for the Navajo." In *AZ v. Navajo Nation*, the Court reversed the 9th Circuit, holding that the 1868 Treaty with the Navajo provided water rights, but the Government did not accept responsibility to create a water supply.

The Navajo Tribe sued the US Government in 2003, for a breach of trust claim to "compel the Federal Defendants to determine the water required to meet the [Tribe's] needs." AZ, NV and CO intervened to defend their rights to the Colorado River. The district court dismissed the suit, but the 9th Circuit reversed, holding that the 1868 Treaty required the Government to take affirmative steps to secure water.

The Court reviewed the history and language of the Treaty to reject the Tribe's claim. The opinion described the 20 years leading to the Treaty as: "the United States and the Navajos often were at war with one another." It noted that the Treaty allowed the Navajo to return to their homeland from exile in the Bosque Redondo. While the Court recognized the Treaty's implicit water rights, it could find no "rights-imposing or duty-imposing" language in the Treaty. The Court also specifically rejected the Tribe's four factual arguments for why the Treaty required Government action.

Justice Gorsuch delivered a comprehensive dissent, joined by Sotomayor, Kagan and Jackson, drawing a very different historical picture of the years before and since the Treaty. The dissent reframes the question before the court, as the Navajo seeking an account of the water held in trust by the US, whether it has been misappropriated, and a plan for how to stop any misappropriation. It comprehensively describes:

- the pre-Treaty US plan for "removal, isolation and incarceration" of the Navajo
- the Government's refusal to allow the Tribe to participate in 20th-Century Colorado River negotiation and litigation
- jurisprudence for tribal trust responsibility claims

The dissent ends on a hopeful note, explaining that the Court recognizes that the Navajo may have other justiciable claims, such as alleging "direct interference in their water rights."

Hot Topic Webinar: *AZ v. Navajo Nation*

In its first rapid-response webinar on a hot topic, *Dividing the Waters* will convene a webinar this summer on implications of the SCOTUS decision in *AZ v. Navajo Nation*. Stay tuned!

NJC Building Interstate Program on Water

Working closely with *Dividing the Waters*, the National Judicial College has begun development of an interstate water law program, focused on the fundamentals. The program will start with online courses on water science, available 24/7, particularly for new water judges. The program will combine conferences, publications, and judge-only colloquies to offer a continuing judicial education certificate in water law.

In Focus: District Judge Christopher Seldin (CO)

Last year's *Dividing the Waters* conference in Santa Fe reminded CO Judge Christopher Seldin of his college thesis. He wrote about the Colorado River, specifically the federal Animas-La Plata water project near Durango, CO, where he grew up. For Seldin, water runs deep in his life story.

Seldin's recent appointment as the Water Judge for Water Division 5 (CO River Basin) returns him to those water roots. His college thesis was just a start. He wrote about water in his native CO from Dartmouth in NH. His water work continued at the Sierra Club Legal Defense Fund (now Earthjustice), and then at Berkeley Law. His water interest grew, with Joe Sax teaching and advising him on his *CLR* article on tribal water marketing in the CO River basin. Clerking for the late CO Justice Greg Hobbs gave him a peak experience in water.

Seldin started his law career in water quality at a private firm in CA, but he returned to CO to join the Pitkin County Attorney's Office in 2002. He also served on the Basalt Town Council and nonprofit boards. CO Gov. John Hickenlooper appointed Seldin to the 9th District Court in Glenwood Springs in 2015, and he now serves in Aspen. He steps up to Water Judge as Chief Judge/Water Judge James Boyd retires.

Returning to CO River disputes in Santa Fe, Seldin found remarkable similarities to his writing 30 years ago. But the conflicts have "certainly sharpened and polished their edges like never before." He found the *DTW* conference an impressive gathering of CO River experts and stakeholders. He found his judicial colleagues, from many states, had similar interests in adjudicating water conflicts. He looks forward to "delving into the nuts and bolts of local water rights issues in Colorado, and continuing to draw on *DTW* as a resource in the years to come."

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