



A resource for judges resolving water conflicts

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Hot Topic Webinar: WOTUS/*Sackett v. EPA*

Dividing the Waters will convene a webinar on **October 26 at 10 AM PDT** on the implications of this year's SCOTUS decision narrowing "Waters of the US" in *Sackett v. US EPA*. University of Utah Professor Robert Adler will lead a discussion on how federal courts protect wetlands and how state laws may fill in gaps. Stay tuned for registration!

CA: No Link in Discharge Permits and Reasonable Use

A CA appellate court recently denied any connection between issuance of a discharge permit under the Clean Water Act and judgment under the Reasonable Use Doctrine in the CA Constitution. The Court of Appeal reversed a Los Angeles trial court that issued a mandate to the State Water Resources Control Board (State Board) to judge whether discharge permits for treated water were a reasonable use when the water might be recycled and diverted to a new use.

The LA Regional Water Quality Control Board, in 2017, renewed permits to four city treatment plants to discharge treated water into the LA River or the ocean. The LA Waterkeeper objected and sought State Board review, arguing that discharging treated water was not reasonable because it could be redirected as recycled water to other uses. (CA Constitution Art X, Sec 2 requires all water use to be reasonable, not just beneficial.) The State Board declined review. Waterkeeper petitioned for a writ of mandate for the Regional and State Boards to consider reasonable use of treated water before issuing discharge permits. The State filed demurrers, arguing that neither it nor the Regional Board had any duty to consider reasonable use in discharge permits.

The trial court granted the mandate for the State Board, not the Regional Board, to address reasonable use for these discharge permits. It acknowledged that it could not order the State Board to exercise its discretion in a particular way, but the court could order it to exercise it in some way. The trial court also granted the demurrer as to CEQA applying to the permits.

The Court of Appeal reversed the trial court on the reasonable use doctrine and affirmed on its CEQA decision. It held that "neither the constitutional provision nor the Water Code imposes any limits on the State Board's discretion in regard to preventing unreasonable use of water." The appellate court offered an exhaustive analysis of the facts, the litigation and the legal/historical framework for the separate constitutional, statutory and regulatory structures related to wastewater discharge permits and the Reasonable Use Doctrine.

NV Supreme Court Adopts Water Judge Pilot Program

After hearing from its Commission to Study the Adjudication of Water Law Cases, the NV Supreme Court adopted Supreme Court Rule 18, creating a pilot program for designating district judges to hear water cases in their district, or in other districts lacking such designees. A designation requires that the judge have knowledge, education or experience with water and has participated in "specialized continuing education in the area of water law." It also requires a party to a water case to give the court notice after filing of a responsive pleading.

First States Contribute to New Western Consortium

Last December's colloquium with state supreme court justices showed state interest in an interstate judicial training program on water. Now state judicial branches have started to contribute to the creation of the Western Judicial Consortium on Water Law. The WA Supreme Court contributed \$50K this month and the states of CO and NM have agreed to contribute as well. In recent years, the NV Legislature appropriated \$25K to NJC every two years. Now that the NV Supreme Court has adopted the new water judge program, its participation may grow. CA's recent creation of a water and climate program also may lead to more CA participation.

In Memoriam: Judge Jerald Valentine (NM)

News reached *Dividing the Waters* that one of its early participants, NM District Judge Jerald "Jerry" Valentine, passed away in Las Cruces, NM, in October 2021, at age 79.

Valentine grew up in Clovis, NM and graduated with a BS in mechanical engineering from NM State University. While in college, NMSU work-study took him to Brazil and White Sands Missile Range, to work on satellites. While he started work at DuPont, he left for law school at U of TX. He returned to NM, for private practice, and Gov Bruce King appointed him District Judge in 1993.

When assigned the Lower Rio Grande Adjudication, Valentine went out of his way to engage with *Dividing the Waters*. He emphasized educational forums for claimants and the potential for ADR. In 2003, he published an article proposing water courts in NM, for the Institute for Court Management. He joined in creating the water law education program for NM judges. *DTW* Founder John Thorson describes Valentine as "a judge direct from Central Casting, though displaying more compassion than sternness." His passing remains a loss for the western water law community.

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