



A resource for judges resolving water conflicts

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THE NATIONAL
JUDICIAL COLLEGE

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Save the Dates: May 15-18, 2024, Salt Lake City

Dividing the Waters will convene its next full conference in Salt Lake City next May. The conference will focus on the challenges for watersheds with “terminal lakes,” with the Great Salt Lake as a case study. Such lakes have provided the basis for major court decisions, in CA (Mono Lake) and NV (Walker Lake and Pyramid Lake). The current Jordan River water right adjudication affects the Great Salt Lake.

NM: Partial Forfeiture of Groundwater Right

The NM Supreme Court recognized that a groundwater right may be partially forfeited due to non-use. In *State Engineer v. Romero*, the Court affirmed the Court of Appeal and held that a discontinued railroad use forfeited the well owner’s right to pump 391 acre-feet of a 394-foot right.

In 1994, Toby Romero obtained a parcel of land with a well and groundwater rights from a railroad that had once operated trains in Cutter, NM, using the well water for steam engines. The railroad had built a station in 1880 to serve nearby mines and livestock ranches. After the mines closed, the railroad closed the station and stopped using steam engines. It had no need for water for railroad use, but nearby ranches continued using the well to water their livestock.

Romero claimed 394.85 acre-feet of water rights, based on the railroad’s maximum use in its peak traffic year (1944). He filed a claim with the State Engineer and later joined the Lower Rio Grande stream adjudication. The State Engineer found no water right. At hearing, a special master found that the right had been partially forfeited by 1965, but found 3 acre-feet of livestock use. Romero appealed, arguing that use of 3 acre-feet preserved the right. The district court and the court of appeal affirmed the special master’s conclusions.

Relying on statutes and the NM Constitution, the Supreme Court held that beneficial use requires forfeiture of any portion of unused water rights. The court traces history of the beneficial use doctrine back to the 1907 NM territorial water code and the territorial Supreme Court. The Legislature applied the doctrine to groundwater, and passed forfeiture statutes for both surface and groundwater. The court held that forfeiture could be partial and just for non-use. It concluded by “stress[ing] that the beneficial use doctrine, enshrined in Article XVI, Section 3 of the New Mexico Constitution, mandates that continuous beneficial use be ‘the basis, the measure and the limit of the right to the use of water’ and that water not subject to beneficial use reverts to the public and is subject to appropriation by the state.”

Alf W. Brandt Will Join National Judicial College

Network Note Editor Alf W. Brandt will join NJC next month, after completing his work in the CA State Assembly. He will work on water, the environment, and judicial independence.

Sackett/WOTUS Webinar Now Available to Registrants

The October 26 webinar on the SCOTUS *Sackett* decision on “Waters of the United States” offered the nuances of both the law and wetland science. Registered attendees may review the webinar, as provided in the post-webinar email.

In Focus: Judge Erin B. O’Connell (NM)

Some NM communities still get water from an “acequia,” a cooperative community water system dating back to Spanish colonization during the 17th/18th Centuries. An acequia led to this month’s *In Focus* profile of Judge Erin B. O’Connell. For over 10 years, she farmed and ranched with water from an acequia. Her “heart remains” on that farm in Northern NM, so it was natural that she accepted the Albuquerque water judge assignment when her predecessor retired during COVID.

After getting a BS in biology, O’Connell got her JD from University of NM and clerked for the NM Supreme Court. After her clerkship, she worked in private practice, as a trial and appellate attorney. In 2019, NM Governor Michelle Lujan Grisham appointed her to the 2nd Judicial District Court in Bernalillo County, which has the largest number of cases.

As a civil judge, O’Connell has shown commitment to facilitating and expanding access to civil legal services to New Mexicans in need across Bernalillo County and the State. She chairs her court’s Pro Bono Committee and the NM Supreme Court’s Access to Justice Commission. While her docket has no current water case, O’Connell recently sat by designation on the NM Supreme Court on the *Romero* case. She joined the unanimous decision to hold that a well owner partially forfeits its groundwater rights by partial non-use.

Last year’s Santa Fe conference offered O’Connell her first opportunity to experience the community and content of the *Dividing the Waters* program. She labels her experience “unequivocally excellent.” She appreciated both the nuts and bolts of the pre-conference fundamentals course and the broad sweep of history on the Colorado River. She considers her love of history a good fit for water, noting the 20th-Century history central to her *Romero* case. She looks forward to more from *DTW*, and from the emerging Western Judicial Consortium on Water Law, which NM has joined. She seeks more training on judicial practice for water cases.

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