



A resource for judges resolving water conflicts

Stephen E. Snyder
Executive Director



THE NATIONAL
JUDICIAL COLLEGE

Hon. Benes Z. Aldana (Ret.)
President

The Network Note November 2023

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 Conveners have made good progress on developing the topics and potential speakers on the challenges for watersheds with “terminal lakes.” UT has worked on protecting the Great Salt Lake. CA and NV courts have addressed the effects of upstream diversions on their terminal lakes. The current Jordan River/Utah Lake water right adjudication affects the Great Salt Lake.

CA: County May Not Sue State for DWR Flood Spill

The CA Court of Appeal (3rd District) barred Butte County from suing the CA Department of Water Resources (DWR) for discharging harmful material to the Feather River fishery during an emergency flood discharge from Oroville Dam. It held, in *Oroville Dam Cases*, that DWR is not a “person” who may be sued under Fish & Game Code §5960.1.

DWR operates the State Water Project’s Oroville Dam on the Feather River in Butte County. Lake Oroville stores water for conveyance to So. Cal. and, under an annual FERC permit, the dam generates electricity. During a 2017 flood emergency, water levels in Lake Oroville reached the dam’s rim. In emergency operations, DWR released water out of the gated spillway and the emergency spillway, which had a dirt lining and had never been used. As a result, tons of dirt, concrete, and other debris flowed into the Feather River.

The County of Butte sued DWR for violation of Section 5960.1, which protects fish from any “person” dumping harmful material into rivers. It sought civil penalties and injunctive relief. The trial court granted summary judgment, holding that DWR is not a “person” within the scope of the statute, so the complaint failed to state a claim.

The Court of Appeal affirmed the trial court’s conclusion that that Section 5960.1 did not apply to DWR as a person and did not allow suits against state agencies. Its analysis focused on legislative intent, comparing other statutes that identified state agencies. It rejected the claim for injunctive relief, accepting DWR’s argument that it was unwarranted, because DWR rebuilt the Dam to prevent future discharges and ensure compliance with the statute.

Hydrology Module of Online Courses in New Year

With support from the Utah Supreme Court and NJC, the first module of online courses for the Western Judicial Consortium on Water Law is expected in the New Year from Southern Utah University. It will introduce judges to hydrology.

In Focus:

Judge Jennifer Valencia (UT)

At age 10, UT 2nd District Court Judge Jennifer Valencia dreamed of serving in a courtroom. She went to court to watch trials, with her father as the prosecutor. She loved watching lawyers argue. She loved the process and learning the rules. She did not, however, see water cases in her future.

Valencia proceeded down the path to becoming a prosecutor. She got her BA at Weber State University and her JD at the University of UT. She started as an Assistant AG in the Child and Family Support Division and moved to the Salt Lake City DA’s Office in 2008. She stepped out of the courtroom to join Governor Herbert’s office in 2013, as the Director of the UT Sentencing Commission. She built her reputation in criminal justice reform, through UT’s Justice Reinvestment Initiative. After four years, including interviewing candidates for judgeships, she realized she missed the courtroom and sought to return, as a judge, where she could have a more direct impact on her community. Herbert appointed her in 2017.

Her work on water cases started with a small irrigation dispute near Pineview Reservoir. It led to a greater understanding of UT’s big water challenge – shifting agricultural water to support new development. She discovered UT relied on bound volumes of 1950’s paper water share certificates and had limited regulation of water transfers to address effects on other water users. She learned more about hydrology, the application process, and the role of the State Engineer. She asked lots of questions and enjoyed the process.

When UT created its water judge program, Valencia volunteered, and then agreed to serve as Supervising Water Judge in 2023. She has worked on improving the resources available to UT water judges – hiring a water law clerk and working toward making water law resources more accessible and user-friendly. She has seen the disconnect between traditional property law principles and water law principles, such as prior appropriation in UT. She hopes the new program will assist UT judges to more competently adjudicate water law cases and to help make sense of water law to the broader public, as UT engages in its big water challenges.

While Valencia missed last year’s *Dividing the Waters* conference, she appreciated the recent webinar on SCOTUS’ opinion on WOTUS. She also learned from the experience of *DTW* Conveners Eric Wildman and Kate Appleby, who have developed/offered water programs to UT judges. She looks forward to participating in next May’s conference in SLC.

Ideas for Network Note? Court Decision on Water? Contact alfb@judges.org