



A resource for judges resolving water conflicts

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## The Network Note March 2024

### Great Salt Lake Conference: May 15-18, 2024 **TIME TO REGISTER AND BOOK!!**

The SLC conference is less than 2 months away, so now is the time to finish your registration and book your flights/hotel. (Hotel deadline is **April 17.**) Your registering NOW helps *Dividing the Waters* plan for your needs, including the Friday field trip to the Great Salt Lake. [View agenda and register!](#)

### NJC, SUU and DTW Complete Water Science Course

NJC and *Dividing the Waters* has worked with Southern Utah University (SUU) to complete the first module of the new online water training program for judges. SUU received initial funding from the Utah Judicial Council to create an online water course, and NJC joined the effort. DTW Convener Judge Kate Appleby and NJC’s Alf Brandt led the work with SUU, which has expertise in online courses. NJC and SUU now are discussing development of two more modules. Highlights include:

- Segments on surface and ground water, and water quality.
- Video illustration makes the science accessible.
- Taught by UC Davis Professor Thomas Harter

### OR: Storage Rights May Change Point of Diversion

The OR Court of Appeals allowed a reservoir owner to move the point of diversion for its storage rights, pursuant to OR statutes that allow such changes for “water use subject to transfer.” In *Bridge Creek Ranch v. OR Water Resources Department*, the court held that water storage “in and of itself is not a ‘use’ of water,” but in the context of a secondary permit allowing beneficial use, it can be transferred.

Bridge Creek Ranch (Ranch) owns an off-stream reservoir with two water right certificates allowing it to store and use water for irrigation. After agreeing to improvements to store water for fish, it applied to move its point of diversion from federal land. OWRD refused to process the application, arguing that OR law did not allow transfer of certificated storage rights. The Ranch filed a writ, and the trial court granted it, finding that storage qualifies as a water use.

The Court of Appeal affirmed, but on different grounds. The decision offers a detailed analysis of OR certificated water right statutes. It focused on the fact that the Ranch had a secondary permit for its reservoir that allowed water use. The court concluded that the water under the secondary permit was “water use subject to transfer.” The court therefore affirmed the trial court and held that the application to change the point of diversion “should be considered by the OWRD.”

### Online Water Science Course – Now Available

Judges in states that have contributed to the Western Judicial Consortium on Water Law now have access to the new online course on water science. Judges new to water may get the most benefit from this course on water science fundamentals. To gain access, contact [Alf W. Brandt at NJC](#).

### IN FOCUS: Justice Maria E. Berkenkotter (CO)

For CO lawyers, it is difficult to avoid touching on water at some point in your career. It took 35 years before water flowed into the career of CO Supreme Court Justice Maria Berkenkotter, as she took her seat on the state’s Supreme Court. As Convener-Justice Monica Márquez steps up to serve as Chief Justice, Berkenkotter plays a growing role in CO water courts and *Dividing the Waters*.

Berkenkotter moved west from the Midwest for law school at U of Denver. She started her career as a law clerk for one of her predecessors and practiced in a firm, before joining the CO Attorney General’s Office in 1990. For 16 years, she worked to enforce state/federal antitrust laws. As First Assistant AG, she led the Antitrust, Consumer Protection, and Tobacco Litigation Units, until Gov. Owen appointed her to the 20th Judicial District Court in 2006.

Berkenkotter served in the Boulder District Court for 11 years, including 4 years as its Chief Judge. As a trial judge, she presided over every type of docket. As Chief Judge, she worked with stakeholders across the district to improve county and district court operations. After stepping down from the bench in 2017, she worked on complex mediation, arbitration, and judge *pro tem* appointments. She also continued serving the judicial branch, as a “judicial coach” for judges throughout the state. Gov. Polis brought her back into the judiciary, appointing her to the Supreme Court on November 18, 2020.

Justice Márquez invited Berkenkotter to join her at the 2022 *Dividing the Waters* conference in Santa Fe. The conference impressed Berkenkotter, as an extraordinary opportunity for water judges, magistrates, and referees from across the West to come together to learn about everything from fundamentals to the most pressing water issues of the day. The opportunity for judicial officers to share their experiences and best ideas, across so many jurisdictions and state lines, was priceless.

CO and its water courts have a long history of leadership in water adjudication. Berkenkotter recognizes DTW’s unique opportunity to build interstate collaboration to build judicial capacity, and has supported the effort to create a consortium of states to learn from each other.

**Ideas for Network Note? Court Decision on Water? Contact [alfb@judges.org](mailto:alfb@judges.org)**

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