



A resource for judges resolving water conflicts

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THE NATIONAL
JUDICIAL COLLEGE

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The Network Note Post-Conference – 2017

Conference at Baylor Digs into Groundwater

This year's conference offered judges great insight into the science and management of groundwater, in Texas and across the West. The highlight was the keynote by Texas Chief Justice Nathan Hecht on how his court addressed the state's "rule of capture" for groundwater. Participants responded positively to science presentations offered by USGS scientists and Baylor's Dr. Joe Yelderman, who led the field day, with experts showing judges how to study groundwater and how collaborative groundwater management protects salamander habitat in a natural spring in Salado, Texas.

Water Takings Decisions in Court of Federal Claims

The Court of Federal Claims (CFC) has resolved two long-running claims for just compensation of alleged federal government takings of water. One decision found no taking of water and one found a compensable taking. These recent decisions remain subject to appeal, but the court's comprehensive analysis of water takings merit attention.

Klamath Basin. In 2001, the U.S. Bureau of Reclamation terminated water deliveries to its contractors in the Klamath Project, to protect endangered/threatened fish species in the Klamath River and Klamath Lake, pursuant to the Endangered Species Act (ESA). The court concluded, in a 75-page decision, that plaintiffs did not have water rights that required compensation, noting that the Klamath, Yurok and Hoopa Valley tribes had senior water rights to Klamath contractors.

New Mexico. Starting in the 1990's, the U.S. Forest Service excluded cattle by fencing certain water sources used by a long-standing grazing permit holder. These waters provided critical habitat for ESA-listed plant species in the Sacramento Mountains of New Mexico. The Sacramento Grazing Association holds grazing permits and water rights in the water sources, and filed a taking claim in 2004 for excluding its cattle, as a taking of water rights.

Physical Taking. After reaffirming that plaintiffs had filed within the statute of limitation, CFC Chief Judge Susan Braden concluded that plaintiffs had proven their water rights and then applied a physical-takings analysis to USFS actions. The court concluded: "SGA's right to beneficial use of stock water sources in the Sacramento Allotment was incrementally and then finally denied." The day after filing the decision, Judge Braden spoke to the DTW conference on water takings.

DTW Needs Your Help: Groundwater Bench Book Review

After learning about groundwater models from USGS' Dr. Michael Fienen, conference participants heard first-hand experience with adjudicating groundwater models from Idaho Judge Eric Wildman. The "conference draft" of the DTW's new groundwater bench book, *Adjudicating Groundwater*, supported the presentations, and judges provided feedback on the bench book in the context of the presentations.

Dividing the Waters now seeks other judges with groundwater experience to review and comment on the conference draft.

After revisions, USGS will take the bench book through peer review, before publication in 2018. If you can review the bench book soon, please contact the [Executive Director](#).

Webinar on Groundwater Law Available

Just before the conference, University of Montana Professor Michelle Bryan offered a one-hour webinar providing a survey of groundwater rights laws across the nation. The webinar and its materials can be accessed at the [DTW Resources Webpage](#).

Access to Conference Materials on NJC Cloud

Conference papers and presentations are available now to *Dividing the Waters* judges via the NJC Cloud. If you wish to review these materials, please contact the [Executive Director](#). Materials will be available soon on the DTW webpage.

SAVE THE DATE!
May 17 & 18, 2018

***Dividing the Waters* Workshop on
Fundamentals of Water
@NJC, Reno, Nevada**

With funding from the State of Nevada and California Department of Water Resources, *Dividing the Waters* has set the date for its 2-day workshop on the fundamentals of water law, science and adjudication. If you or a judicial colleague are new to water, join experienced water judges to gain a better understanding of the fundamentals of water. If you know a judicial colleague with a new water case, invite them to join the Program at this workshop.

Recent court decision? Something to share? ALFIII@sbcglobal.net

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