

1-1-2015

Access to Justice & Tribal Water Rights

James Tilton

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

James Tilton, Symposium Notes, Access to Justice & Tribal Water Rights, 18 U. Denv. Water L. Rev. 479 (2015).

This Symposium Notes is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Access to Justice & Tribal Water Rights

the location in question. To Justice Hobbs, context was always of critical importance. In all of Justice Hobbs's work, the deep history of the land and people in question, the profound sense of that place, was the necessary foundation for understanding the questions at hand.

Finally, she described Justice Hobbs's love of neighbors, friends, and family, and his commitment to a diverse and inclusive community in Colorado. She revealed that the Court's recognition of law firms committed to pro bono work was Justice Hobbs's brainchild. She also talked about how Justice Hobbs recently took his grandson on a college tour, and is currently taking a creative writing class with his granddaughter. To Justice Hobbs, the ethic of place is rooted in the land, and integrates a profound appreciation of family and friends.

Justice Eid closed by observing that Justice Hobbs is an accomplished author, traveler, historian, and poet. Although he will be retiring from his position on the bench, he will doubtlessly continue in his other "jobs," tirelessly committed to history, community, and his ethic of place.

Following Justice Eid, Chief Justice Nancy Rice shared her thoughts and reflections on nearly two decades of working with Justice Hobbs. As Supreme Court Justices, the seven members of the Court spend a great deal of time together, often sitting, talking, and waiting for things to happen. To Chief Justice Rice, Justice Hobbs represents one-seventh of her life, her conversation, and her work; accordingly, she will greatly miss his camaraderie and friendship.

Of special importance to Chief Justice Rice is the learning center at the Ralph Carr Judicial Center. She described how a committee, which included Justice Hobbs, met regularly for two years in order to create the center, and she believes that the learning center represents one of Justice Hobbs's greatest legacies.

The Chief Justice's final story involved Justice Hobbs convincing the other justices to perform a play in commemoration of the founding father John Adams and his wife Abigail. Justice Hobbs played John Adams, and Chief Justice Rice played Abigail Adams. To the delight of the crowd, Chief Justice Rice brought pieces from her costume to share, and reenacted a particular scene where she threw her bonnet in frustration at John Adams's failure to give women the right to vote in the US Constitution. The play is one of her favorite memories of her time with Justice Hobbs, a representation of the fun, humor, and intellectual curiosity that he brought to the Court.

Chief Justice Rice finished by thanking Justice Hobbs for his friendship, his many contributions to the Court, and his many contributions to the state of Colorado.

Katy Rankin

ACCESS TO JUSTICE & TRIBAL WATER RIGHTS

Professor Lucy Marsh, a professor at the University of Denver Sturm College of Law dedicated to pro bono work for elderly and low-income tribal clients, was the moderator for the opening panel at the *University of Denver Water Law Review's* eighth Annual Symposium. Professor Marsh introduced three esteemed speakers: Retired New Mexico Supreme Court Justice Patricio

Serna, Chairman of the US Indian Law and Order Commission Troy Eid, and Professor Sarah Krakoff of the University of Colorado School of Law. All three panelists spoke on a topic that is dear to Professor Marsh's and Justice Gregory Hobbs's hearts—the rights of Native Americans and other underserved groups and Justice Hobbs's enduring contributions to the protection and advancement of those rights.

Retired Justice Serna served fifteen years on the New Mexico Supreme Court. He was a District Court Judge for eleven years before that. Justice Serna is still active as a member of the Emeritus Board of Directors for the National Consortium on Racial and Ethnic Fairness in the Courts. Justice Serna began the panel speaking about how important the past is to Navajo people and how a group of Navajo awarded him with his own bolo tie. The bolo tie is a trademark of Justice Hobbs, who is rarely seen without one. According to Justice Serna, the bolo tie represents for Navajo people their philosophy that people are to be “in harmony with nature.”

Justice Serna spoke of the New Mexico tribal state judicial consortium. He explained that the consortium is composed of individuals who are appointed by the New Mexico Supreme Court to represent the twenty-three recognized tribes and pueblos in New Mexico. Justice Serna noted that the consortium was established to facilitate communications between the courts and the tribes. The consortium succeeded by creating tribal courts with their own tribal judges. Further, he explained that the tribal judges are given authority by the state to make rulings, and that these courts are unique in that each tribal judge sits in tandem with a state judge. Justice Serna then spoke of his personal experiences with the tribal courts, his appreciation for the tribal court judges, and the effective work he has done to improve the livelihood of tribal members.

Next, Justice Serna shared an Indian water law case that has been ongoing since 1966, *New Mexico ex rel. State Engineer v. Aamodt*. The case was filed in 1966 in the United States District Court for the District of New Mexico and is the longest running water law dispute in New Mexico. The case is adjudicating the water rights in the Rio Pojoaque System of both pueblo and non-pueblo peoples of New Mexico. The pueblo peoples include the Nambe, Pojoaque, Tesuque, and San Ildefonso. Further proceedings in the case were stayed in August 2000. The parties still have not reached a settlement agreement and the case remains open today. Justice Serna concluded his presentation by reading an poem by Justice Hobbs, “An Oath as Good as Fry Bread.”

Troy Eid presented next. Eid is a principle shareholder in the Denver office of the law firm of Greenberg Traurig LLP. He also teaches as an adjunct professor at both the University of Denver Sturm College of Law and the University of Colorado School of Law. He has worked as a US Attorney for the District of Colorado and is recognized for his passion for improving the lives of Native Americans. Eid gave a glimpse into Justice Hobbs's life before being a Colorado Supreme Court Justice. Justice Hobbs was once a boy scout. He excelled at that, as he has many things in his life, and earned an Eagle Scout Badge to show for it. Justice Hobbs also served in the Peace Corps with his wife, Bobbie.

Eid also shared that Justice Hobbs revolutionized water law here in the West through his work in the judiciary. The role of reclamation, as a princi-

ple of water management, has changed over the years. During this change, Justice Hobbs has helped people understand water law, steering the discussion by issuing educational decisions on water law throughout his career as a justice. Justice Hobbs's reputation only grew when he became the focal point in a 2009 primary election. In that primary, Congressman Scott McGinnis was accused of plagiarizing an article written by Justice Hobbs. This incident was, according to Eid, Justice Hobbs' love for "water, personified in the state."

Eid, like Justice Serna, also had stories to share of times when Justice Hobbs served the Native American community. Justice Hobbs, together with Mike Welsh, obtained a two million dollar grant to set up a workshop for Navajo teachers on tribal sovereignty. The goal of the program was to equip the Navajo teachers with the skills needed to develop a curriculum and to share their own history with others. Eid concluded his speech by commending Justice Hobbs for his involvement in educating the public of the importance behind Governor Hickenlooper's formal apology to the Cheyenne and Arapahoe tribes for the Sand Creek Massacre. The massacre occurred on November 29, 1864, when Colorado Territorial militia slaughtered between two hundred and four hundred tribal people. Those murdered were mostly women, children, and elders. It was not until December 3, 2014, that Governor Hickenlooper apologized to the descendants of these tribes, the first formal apology of the massacre from a representative of the State. Justice Hobbs played a large role in making the apology happen. Justice Hobbs gave a speech at the State Capitol that day, and Eid quoted one of the Native American leaders who was present for the ceremony. That leader said of Justice Hobbs, "That judge sure told the truth."

The panel concluded with a presentation by Professor Sarah Krakoff, who is well-renowned in the areas of American Indian law and natural resources law. Krakoff started the American Indian Law Clinic at University of Colorado School of Law, and before that she lived on the Navajo Nation for three years while working for DNA People's Legal Services. Today, Krakoff regularly takes students to work with traditional farmers in the San Luis Valley. Krakoff and her law students work pro bono for low-income farmers engaged in traditional irrigation techniques that use "acequias." Connecting this work to Justice Hobbs' ultimate respect for indigenous traditions, even when they are contrary to the western doctrine of water law, she presented her work on "The Acequia Project" as "a Hobbsian Trifecta."

The Acequia Project is a trifecta of three values that are dear to Justice Hobbs: access to justice, scholarship and scholarly writing, and western water law. Krakoff commended Justice Hobbs for all the work and contributions he has made, as an attorney and as a judge, in the realm of water law. Krakoff explained how the Acequia Project benefits the land and farmers of Costilla County, Colorado. Many of the farmers in Costilla County are descendants of original Spaniard settlers.

Next, Krakoff provided some light on why her work is termed the Acequia Project. She explained that acequias are used in irrigation. The water is diverted in a canal from the river, with smaller ditches running off of the canal to provide water to the fields that it flows by. When water is scarce, the acequia families and community determine how to prioritize the water from the acequia for irrigation. This method of irrigating, and the equitable division

of water, is counter to Colorado's water law doctrine, which recognizes first in time, first in right. Colorado has chosen to recognize acequias as a form of irrigation and assisted these farmers by passing Colorado Revised Statutes section 7-42-101.5. This legislation gives the farmers in the valley the ability to establish bylaws similar to conventional ditches that, among other things, may give acequia members the right of first refusal when a member seeks to sell their water rights.

After providing all this background, Krakoff spoke of the other parts of the trifecta. A couple of the students on the Acequia Project have done extensive research and drafted an acequia handbook. There is also a scholarship in place for those participating in the program. The majority of the work done has been by the students of the project, along with collaborators.

Krakoff ended her presentation of the Hobbsian Trifecta with a fourth commitment of Justice Hobbs, one that all of the speakers recognized—his poetry. Krakoff delivered a brief five-line poem, known as a cinquain, she wrote herself in honor of Justice Hobbs. The poem ended by honoring Justice Hobbs as “one of Colorado's sages.”

The final part of the presentation was a question and answer session. Professor Marsh asked Justice Hobbs to explain the case of *Archuleta v. Gomez*, a case the Colorado Supreme Court considered twice, most recently in 2012. Having written both opinions, Justice Hobbs explained how the Court determined that a person may adversely possess a water right after diversion through a headgate if the adverse possessor beneficially uses the water right. As Justice Hobbs related, he had considered this legal concept before and discussed the possibility of water right adverse possession with the late Joseph Sax while at the University of California-Berkeley School of Law, but before *Archuleta* the issue was unresolved in Colorado.

James Tilton

WATER LAW AND THE HISTORY OF DEVELOPING THE WEST

As part of its one-day annual Symposium, the *University of Denver Water Law Review* hosted a three-member panel discussing the importance of water law history and its relationship to Justice Hobbs's tenure on the Colorado Supreme Court bench.

The first speaker and the host of the panel, Professor Tom Romero of the University of Denver, relayed the importance of history, its effect on the law, and its utility in arriving to consistent legal conclusions. Historical and legal traditions are often linked, as most judges are trained similarly to historians. Judges describe all sides of the issues with which they are presented, even if those sides are socially unpopular. History also plays an important role in legal jurisprudence around issues including free speech and claims of reverse discrimination. Professor Romero also stated that history is necessary for legal context, something that Justice Hobbs incorporated extremely well into his legal analysis and conclusions as a justice. Lastly, Professor Romero mentioned that history plays a vital role in water law, using the example of how determinations of historical consumptive use require close inspections of historical patterns.