### The Network Note
#### June 2015

**October 14-17 Conference: Agenda Now Available**
The *Dividing the Waters* Conveners have arranged this year’s conference to address the most pressing challenges for judicial officers with complex water litigation. You can now find the 2015 *Established Water Rights, Changing Conditions* conference agenda at: [http://www.judges.org/dtw/conferences/](http://www.judges.org/dtw/conferences/)

**CO: Supreme Court Allows Use of Water and Ditch**
In a case of first impression, the Colorado Supreme Court affirmed, on a 5-2 vote, a 2010 conditional right to use water and the ditch related to an 1890 water right for non-consumptive power-generaton use, in *Frees v. Tidds*.

The Tidds own land in the San Luis Valley. The Frees own an easement across the Tidds’ property for Garner Creek Ditch No. 1. The Frees use the ditch to convey a 6.4 cfs irrigation water right with a priority date of 1890. Except during occasional high water conditions, this water right diverts the entire flow of Garner Creek from the Garner Creek Ditch No. 1 headgate during the irrigation season. In 2010, the Tidds applied for a 0.41 cfs conditional water right for non-consumptive hydropower use, using the Frees’ ditch to divert water to their hydropower facility. The water court granted the conditional right, with diversion at the Frees’ headgate.

The Supreme Court affirmed the water court, relying on Colorado’s long-established policy to maximize the beneficial use of waters of the state. It allowed the Tidds to use the water on its way to the Frees’ irrigation use and divert water from the Frees’ ditch. The Court rejected the Frees’ argument that there was no water to appropriate, holding that the Frees’ had only a right to use, not the actual molecules. It noted that the Water Right Determination and Administration Act of 1969 sought “to foster a multiplicity of non-injurious uses. In light of over-appropriation of stream systems, flexibility in the appropriation and use of the public’s water resource concurrently and in succession, without injury, is a fundamental goal of the 1969 Act.”

The dissent accepts the Frees’ argument that there is no water to appropriate, because the Tidds’ 2010 right depends on actually diverting pursuant to the Frees’ 1890 priority. This “piggyback” situation allows the junior appropriator to gain an overvalued water right by diverting under an earlier priority date. What happens if the Frees move their point of diversion?

**October 14-17 Conference REGISTER TODAY**

**ABA-SEER Year in Review Now Available**
The American Bar Association Section of the Environment, Energy & Resources has again provided *Dividing the Waters* with copies of the water resources and water quality chapters from the its *Year in Review* publication. You can get your copy from our NJC Program Attorney Christal Keegan, at Keegan@judges.org.

**In Focus: DTW Science Advisor Ben Harding**
More than 40 years ago, Ben Harding started building a career in water, in water quality as a “sanitary engineer.” Even as an undergraduate at the University of Colorado, Harding joined in research on advanced waste treatment processes to produce potable water. He ran a pilot-scale advanced waste treatment plant that served to prototype processes now in use at Denver Water’s operational water recycling plant.

A growing passion for whitewater kayaking introduced Harding to the complex policy and political dimensions of water resources in the West. He reinvented himself as a water resources engineer. This move from dirty water to clean water made it easier for his mother to explain what he did for living. He began his water resources career as the token engineer at the Natural Resources Law Center at the University of Colorado School of Law.

In the early 1980’s, Harding helped form what would become Hydrosphere Resource Consultants, where his practice focused on the design, development, and use of hydrologic, water quality and water resource models. He put innovation into practice, including the use of paleo-hydrologic, stochastic hydrology and quantitative estimates of projected future hydrology and water demands based on climate model output.

Along the way, litigators drafted Harding as an expert witness on transport of contaminants in a water distribution system. He ended up testifying in eight large toxic tort cases. When Dan Luecke retired from *Dividing the Waters*, the Conveners selected Harding, in part on Dan’s recommendation. But Harding’s work with the Program had to wait for four months, so Harding could do field work in Antarctica, where he measured stream flows in the McMurdo Dry Valleys. Upon his return, the Conveners set him to work developing the “science for judges” segment of this year’s conference. He now is working with two university professors to develop a hypothetical on groundwater and instream flows, which will provide the basis for a mock hearing and decision by conference participants.

**Profile on you? Recent court decision? Something to share?** [ALFIII@sbcglobal.net](mailto:ALFIII@sbcglobal.net)

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