



A resource for judges resolving water conflicts

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Judges Give Stanford Conference Positive Ratings

The recent survey of participants in last year's *Dividing the Waters* conference at Stanford showed that judges found the conference helpful to their work. The lectures and panel discussions tied for the highest ratings, with off-line talks just one response lower. All respondents reported that the conference improved their competence as a water judge.

Waters of the United States – Final Rule

USEPA and the Army Corps of Engineers issued the Final Rule for defining "Waters of the United States" (WOTUS) as used in the Clean Water Act. In 2006, SCOTUS divided 4-4-1 on the definition in *Rapanos*, with Justice Scalia writing the court opinion and Justice Kennedy writing the concurring opinion. The new rule relies on the Scalia opinion, while 2015 WOTUS rule relied on the Kennedy opinion.

The new rule narrows Clean Water Act protection to territorial seas and traditional navigable waters; perennial, intermittent tributaries that contribute surface water flow to such waters; certain lakes, ponds, and impoundments; and wetlands that abut those waters. It specifically excludes groundwater, ephemeral waters, diffuse stormwater runoff, non-navigable ditches, and prior converted farmland.

NM: Court Holds State Engineer Liable for Costs

NM District Judge Clay Campbell reaffirmed his order to NM State Engineer and Aquifer Science to *jointly* pay protestants' expert witness fees of \$379,854.05 in the *Aquifer Science* case. As reported here and discussed at Stanford, a previous judge denied an application to appropriate groundwater for development due to impacts on existing groundwater rights. The *Santa Fe New Mexican* reported that Campbell found that "the State Engineer was not a neutral party advocating for the protection of New Mexico's precious groundwater and the best interest of the people of New Mexico."

CA Groundwater Plans Submitted; Judging Begins

The 2014 Sustainable Groundwater Management Act (SGMA) required agencies representing 19 "critically over-drafted" groundwater basins to submit plans, by January 31, to achieve sustainable groundwater management. SGMA provides for the Department of Water Resources and the State Water Resources Control Board to collaborate in judging the sufficiency of the new plans. If a plan is deemed inadequate, the Board may put the basin on probation and impose additional requirements.

Adjudicating Groundwater Bench Book Still Available

You may get your own copy of the Program's bench book on groundwater science, by visiting the NJC/DTW webpage: <https://www.judges.org/dtw/adjudicating-groundwater/>

In Focus: Judge Eugene Siler (Sup. Ct. Special Master)

Supreme Court Special Master Eugene Siler's roots in water date back to his boyhood. He grew up in Kentucky playing water sports – boating, fishing, and swimming. His love for water attracted him to the US Navy, for active duty and then 26 years in the Navy Reserve. That water connection, however, did not lead to a career in KY water law.

Siler's appointment in the *MS v. TN* groundwater case came 52 years after he started practicing law. He started his career as a litigator and a prosecutor. He served as County Attorney and the US Attorney for the Eastern District of KY. President Ford appointed him to a joint seat for the Eastern and Western Districts of KY in 1975. He became the Eastern District's Chief in 1994, where he served until President Bush appointed him to the 6th Circuit in 1991. Siler took senior status a decade later, but continued serving as an appellate judge.

Judge Siler accepted the appointment in the *MS v. TN* dispute over a groundwater aquifer the two states share after a 2015 call from the Supreme Court's Clerk. This case differs from the common interstate water dispute, where states seek an apportionment. Instead, Mississippi seeks to stop Tennessee from pumping that draws Mississippi groundwater across the border. In his first three years, the parties litigated defendant motions on the pleadings and summary judgment. Siler denied the motions and set the case for an evidentiary hearing on the nature of the groundwater for May 2019.

Judge Siler participated in the 2019 *Dividing the Waters* conference at a critical time in the litigation, just before the evidentiary hearing. He particularly appreciated the opportunity to engage with the other Supreme Court special masters at the conference, including Stanford's Buzz Thompson. "*Dividing the Waters* offers a unique opportunity for judges with water cases, which are unusual in my part of the country, to share knowledge and experience. I hope we'll meet again." The Program's groundwater bench book, *Adjudicating Groundwater*, provided a valuable resource during the evidentiary hearing the next month. Siler holds closing arguments next month, in February 2020.

Recent court decision? Something to share? Contact the *Network Note* Editor at ALFIII@sbcglobal.net