

## The Network Note December 2021

### Justice Ron Robie Proposes CA Judicial Ed Program

This year's CA State Budget, in response to intense drought and growing water conflict, authorized funding for judicial education on water conflicts. In response, Justice Ron Robie has proposed a program for judicial education on water. He has developed a legislative proposal to allow the Chief Justice to assign water cases and provide resources to judges who adjudicate them. The CA Judicial Council has a long-standing policy against specialty courts, so this proposal would chart a middle path, building the water expertise of general jurisdiction judges.

### SCOTUS: Aquifers and Equitable Apportionment

The US Supreme Court held, for the first time, that the equitable apportionment doctrine provides the sole judicial remedy for disputes over interstate aquifers, in *MS v. TN*.

The Middle Claiborne Aquifer underlies portions of 8 states in the Mississippi River Basin: AL, AK, IL, KY, LA, MS, MO, and TN. In 2005, MS sued the City of Memphis for taking its groundwater, by wells in TN. After the trial court dismissed the case for failure to join the State of Tennessee, the 6th Circuit affirmed and held interstate aquifers are comparable to interstate rivers and subject to equitable apportionment. The Supreme Court denied *certiorari*.

In 2015, the Court allowed MS to file a new complaint against TN and the City, for "wrongful taking" of water. MS claims absolute ownership to all water beneath its surface and rejects equitable apportionment as a basis for adjudication. It alleged that the City's drinking water wells "forcibly siphoned" state-owned water from nearby MS. The Special Master, Senior Circuit Judge Eugene Siler, rejected MS arguments. He concluded that the Aquifer was an interstate resource, subject to equitable apportionment. Siler recommended that the Court dismiss the complaint with leave to amend.

The Court affirmed the Special Master's conclusions, holding that the Aquifer was subject to the equitable apportionment doctrine. The Court applied the doctrine to interstate aquifers after a comprehensive analysis and comparison with flowing surface waters. It rejected MS' reliance on the 2013 *Tarrant* decision that did not allow TX to go into OK to access shared water. It noted that Memphis wells were in TN and the *Tarrant* case had applied an interstate compact, not the common law of equitable apportionment. The Court dismissed the MS case, but without leave to amend.

### In Memoriam: Greg Hobbs

#### By John Thorson, DTW Founder

Joining his family, friends, and fellow judges and attorneys, we mourn the death of Greg Hobbs, a giant in western water law and a longstanding Convener of *Dividing the Waters*.

Many long-practicing attorneys remember a series of Great Debates at 1980s water law conferences. I first encountered Greg when he and Professor Charles Wilkinson argued the merits of the Prior Appropriation Doctrine. At the time, Greg represented a large regional water purveyor and I thought he wore the black hat for the occasion. Several of us in the public rights corner conceded the match was a draw.

Greg's life and career were all about the public interest. It took me a decade to realize I had mistaken Greg's vigorous advocacy for narrow beliefs. By that time, Greg had joined the CO Supreme Court, enhancing the Court's professionalism in addressing important environmental, water, and natural resource issues. His investiture freed him to analyze legal questions independently, write carefully and eloquently, and imprint his opinions with wisdom gained from life experience.

And those life experiences were many.

Growing up in an often-relocated military family, study for the priesthood, study at Notre Dame and graduate work at Columbia, service in South America with the Peace Corps, law school in Berkeley, a move to Colorado with his love and life-partner Bobbie to work in that state's environmental agencies, starting his own law firm, courageously resigning from the board of a national association because of its policies for gay members. That just scratches the surface.

Greg loved the written and spoken word, whether rendered as a brief, opinion, historical article, speech, or poem. And when words did not suffice, he resorted to photography—waterfowl and grandchildren especially—and maps. Maps of the American West telling the story of indigenous people, explorers, settlers, water development, and our region's future.

Greg brought to *Dividing the Waters* an exceptional background in water, honed by his years on the Court and his great appreciation for nature and the people on the land. He was an enthusiastic supporter of our work and a good friend. What he leaves us more than anything is his optimism: a contagious faith that, with well-conceived law as our guide, we can solve our social problems and do so humanely and respectfully. Go in peace, Greg. Go in peace.

**Ideas for Network Note? Court Decision on Water? Contact [ALFIII@sbcglobal.net](mailto:ALFIII@sbcglobal.net)**