

The Network Note January 2022

MT: Only Public Agency Water Quality Objections

The MT Supreme Court has limited water quality objections to new water rights to the MT Department of Environmental Quality (MDEQ). In *Clark Fork Coalition v. MT Dept. of Natural Resources and Conservation* (DNRC), the Court held that the MT Water Use Act (MWUA, the water rights law) requires MT Water Quality Act (MWQA) compliance review of a new water right only if MDEQ objects to the water right.

The case arose out of a water right permit granted to a mining project in the Cabinet Mountain Wilderness. The permittee's predecessor started the federal and state process to establish a mine in 1987. After almost 30 years of regulatory review and litigation on a range of issues, DNRC preliminarily concluded that water was physically and legally available, which would allow a water right for 857 acre-feet of groundwater that would flow into the mine instead of into nearby streams.

Environmental groups, called "Objectors," appealed the DNRC decision, administratively and judicially. The hearing examiner affirmed DNRC's decision, but the district court reversed and remanded the decision for review of water quality compliance. Objectors appealed and argued that the decision violated MWQA by reducing flows to protected streams. They also argued, in the alternative, that the decision violated their right, in the MT Constitution, to a "clean and healthful environment." DNRC appealed to the MT Supreme Court, which reversed the district court.

The Court rejected both of the Objectors' arguments. The opinion provides a detailed recitation of the facts dating back to 1985. The Court concluded that the statutory requirement to consider "legal demands" before issuing a water right did not include water quality requirements, which the Court described as a "secondary purpose." Only MDEQ or a local water quality district could file a "valid" water quality objection to the water right. The Court also rejected the constitutional argument, because the Legislature had provided an adequate remedy through MDEQ's authority to "administer" water quality laws.

The dissent rejected the Court's division of water rights and water quality laws as "mutually exclusive." The dissent asserted that MWUA required DNRC to consider protection of "outstanding resource waters" in wilderness areas as part of the legal availability analysis.

NV: Commission Considering Water Judges

The NV Supreme Court's Commission on adjudicating water cases has made progress. Commissioner John Schlegelmilch, a Lyon County judge and a DTW Convener, proposed that the NV Chief Justice appoint certain district judges as water judges with statewide authority. The Commission believes judicial education on water will be critical, so it has appointed a subcommittee to develop a water education program.

Adjudicating Groundwater Bench Book Still Available

Dividing the Waters' bench book, *Adjudicating Groundwater*, remains available through the [NJC-DTW website](#).

In Focus: Judge Thomas Anderle (CA)

Santa Barbara County Judge Thomas Anderle did not start out in CA water, but his path to the middle of one of the state's big groundwater adjudications started years ago. He grew up in Michigan and graduated from the University of Michigan. Then he joined the US Navy in the Pacific, which set his path to California and water.

After the Navy, Anderle went to Loyola Law School in Los Angeles. In 1965, after clerking, he moved up the coast to join the Santa Barbara County Counsel's Office. Three years later, he went into private practice, and he hung his own shingle in 1977. His practice included water law. He served the Calleguas Water District, which imported water from the Colorado River but now imports its water from Northern CA. He served as president of Santa Barbara's Bar Association, its Legal Aid Foundation and the County Board of Education.

After Governor Wilson's appointment, Anderle took the bench in 1998. Water cases, often related to the CA Environmental Quality Act, showed up on his docket occasionally. Twenty years later, however, after the Legislature reformed the groundwater adjudication statute, he got assigned one of the first big adjudications, from neighboring Ventura County, *Las Posas Valley Water Rights Coalition v. Fox Canyon Groundwater Management Agency*.

Dividing the Waters first came to Anderle's attention when asked whether he would allow his profile to appear in this *Network Note*. He then heard about the Program and received a copy of the *Adjudicating Groundwater* bench book. He acknowledged that, given the complexity of his water case, additional resources would be helpful for his work.

Ideas for Network Note? Court Decision on Water? Contact ALFIII@sbcglobal.net