



A resource for judges resolving water conflicts

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## The Network Note

### April 2022

#### **Justice Greg Hobbs Remembered**

This month, *Dividing the Waters* remembered the life, work and love of the late CO Supreme Court Justice Gregory Hobbs. In an online ceremony, *DTW* convened Hobbs' former colleagues, law clerks, and family for stories and poetry from his life. The sharing showed how committed Greg was to his communities, the public's water, and his family. Each story glowed with the love that Greg and the participants shared for each other. For more on Greg Hobbs, visit [this NJC webpage](#).

**SCOTUS: Stays State Clean Water Certification Rule**  
The US Supreme Court, through its "emergency docket," kept in place a Trump Administration rule on how states certify water quality compliance under Clean Water Act Section 401. In *Louisiana v. American Rivers*, SCOTUS stayed a ND Cal. court order remanding the 2020 rule. Justice Kagan dissented.

The case pits states against states, with some states arguing that other states "Abuse Their Section 401 Certification Authority." Section 401 requires federal agencies to obtain state certification that their discharges comply with water quality standards and allows states to impose conditions on the federal agency action. US EPA issued regulations on Section 401 in 1971. Pursuant to a 2019 Presidential Executive Order, EPA revised the regulation in 2020, to subject states to waiver of their authority to impose conditions on federal projects.

States, tribes and environmental groups sued. In 2021, EPA moved for remand without vacature. In a detailed decision, ND Cal Judge William Alsup addressed standards for remand and granted EPA's motion. Opposing states appealed.

Those states and the petroleum industry then submitted an application for a stay to Justice Elena Kagan, the Circuit Justice for the 9<sup>th</sup> Circuit. They argued that some states took advantage of EPA regulatory ambiguities to veto federal projects, such as a natural gas terminal, and, without a stay, important projects would stop. Kagan referred the application to the full Court, which issued the stay the same day.

Justice Kagan's dissent asserted that the applicants had failed to meet their burden of showing irreparable harm. Quoting *Nken v. Holder*, Kagen observed "A stay is an intrusion into the ordinary processes of administration and judicial review." She noted that the applicants had not identified a single project that a state had obstructed. She observed that "the Court goes astray," and would have denied the application.

#### **THE NEXT DTW CONFERENCE: November 30-December 3 in Santa Fe, NM Focus: Colorado River, Climate & Drought**

**Webinar Series: Managing Ground & Surface Water**  
*DTW*'s next online program will use the Upper Rio Grande as a case study on conjunctive management of groundwater and surface water. **Part 1 of this four-part series begins June 16 at 10:00 PDT.** Registration available in next *Network Note*.

**In Focus:** **Judge Gary Fairman (NV)**  
Growing up in Reno, 7<sup>th</sup> District Judge Gary Fairman did not hear much about water conflicts. The US, CA, NV and the Pyramid Lake Paiute Tribe may have disputed the use of the Truckee River on which Reno depends, but the conflicts remained in federal court, not in Reno newspapers. When he moved to Ely, NV after law school, however, he found water rights law played a significant role in the community's life.

Fairman went to college at the U. of KY, where he met his wife. He then went to law school in San Diego, at CA Western School of Law. The town of Ely drew Fairman's interest when he got a clerkship with long-serving Judge Merlin Hoyt in 1978. He stayed in Ely, to start as both a local prosecutor and partner in private practice with the DA. After prosecuting for 3 years, he had a small-town general practice. His work included water rights cases for local farmers, including the 1998-99 Meadow Valley Wash Adjudication. Governor Brian Sandoval appointed him to the bench in 2013.

As a judge, he has found water cases fascinating, as water cases reflect the region's historical development and its hydrological conditions. He has had 5-10 water cases, but the Diamond Valley groundwater adjudication cases are his most significant. He recently rejected the NV State Engineer's groundwater management plan, on judicial review. He found it "contrary to Nevada water laws," including the Appropriation Doctrine. Separately, he recently completed the evidentiary hearings for the vested rights claimants in Diamond Valley.

The NV Supreme Court appointed Fairman to its commission on water adjudication. He advocates minimum standards for judicial education on water, particularly for water sciences (hydrology and geohydrology.) He has used *DTW's Adjudicating Groundwater bench book* and found it helpful in his Diamond Valley cases. He considers *independent* court water experts potentially helpful, but they may be hard to find in NV, given that most water experts already work for parties.

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