

## *The Network Note* January 2017

### TEXAS CONFERENCE DATES CONFIRMED

**November 1-4, 2017**

Set your calendars now to join your colleagues at Baylor.

#### **2<sup>nd</sup> Circuit Upholds EPA Water Transfer Exemption**

The 2<sup>nd</sup> Circuit Court of Appeals, in *Catskills Mountains Chap of Trout Unlimited et al. v. U.S. EPA* upheld the US EPA “Water Transfer Rule” that exempts transfers between water bodies from the National Pollution Discharge Elimination System (NPDES) permitting requirements. The NPDES requires permits for discharges of pollutants to US waters.

New York City gets its drinking water supply from distant watersheds in the Catskill Mountains. The system includes a tunnel from Schoharie Reservoir to Esopus Creek and then it moves water through the Catskills Aqueduct closer to NYC.

Since the 1972 passage of the Clean Water Act (CWA), EPA has not required an NPDES permit for transfers between water bodies. Starting in the 1990’s, challenges to this practice led to a previous 2<sup>nd</sup> Circuit *Catskill* decisions and the Supreme Court’s *Miccossukee* decision (2004). In 2008, EPA adopted a Water Transfers Rule exempting water transfers from NPDES permitting requirements. Plaintiffs sued and the district court held that the Rule represented an unreasonable interpretation and therefore was contrary to CWA requirements.

The Circuit reversed, applying the *Chevron* rule for deference to federal agency decisions in finding the Rule a reasonable interpretation of an ambiguity in the CWA. It offered a comprehensive review of CWA jurisprudence as it rejected plaintiff arguments, on both prongs of *Chevron*, that CWA did not allow the Water Transfer Rule. The Circuit agreed with the district court on the first prong of *Chevron* analysis – the Act was ambiguous as to transfers between water bodies.

The Circuit’s analysis differed with the trial court on the second prong of whether the 2008 rule was a reasonable interpretation of the ambiguity. It concluded that “the EPA’s interpretation of the Clean Water Act is reasonable and neither arbitrary nor capricious. Although the Rule may or may not be the best or most faithful interpretation of the Act in light of its paramount goal of restoring and protecting the quality of U.S. waters, it is supported by several valid arguments interpretive, theoretical, and practical.”

#### **California Urban Water Use Standards?**

With the drought easing, Governor Brown directed his water agencies (including the Water Board) to develop new [urban water use targets](#) as part of a permanent framework.

#### **Mitchell Foundation Likely to Fund Texas Conference**

Recent discussions with the Mitchell Foundation have been positive, for funding this year’s *Dividing the Waters* general conference at the **Baylor law school** in Waco, Texas. While Mitchell may not provide complete funding, it is likely to fund a significant part, allowing the Conveners to commit to hold the November conference. Program staff and supporters will continue seeking funding from other sources as well.

#### **Justice Eid to Speak at ABA-SEER Conference in LA**

DTW Convener and Colorado Justice Allison Eid will speak at the ABA Section of the Environment, Energy & Resources Spring Conference in **Los Angeles on March 30, 2017**. In another step to build the DTW-ABA relationship, Eid will speak on “The View from the Bench.” DTW ED Alf Brandt will moderate the panel discussion with other judges.

#### **ID Sup. Ct Justice Jim Jones Publishes Snake River Book**

Retired Idaho Supreme Court Justice Jim Jones has just published *A Little Dam Problem!* about the 1980’s conflict over Snake River water rights between the State of Idaho and Idaho Power Company. That conflict led to the Snake River Basin Adjudication (SRBA) that DTW Convener Eric Wildman completed in 2014. The first SRBA Judge Daniel Hurlbutt co-founded the Program with John Thorson in 1993.

Jones’ book describes a critical period in Idaho water history when the Idaho Supreme Court ruled that Power Co. could claim upstream water rights on the Snake River, because its 1952 water right subordination agreement did not apply to its dams upstream from Hells Canyon. It’s a good read!

#### **Trial Judge Gail Andler (Orange County CA) Retires**

Judge Gail Andler retired from the Orange County Superior Court, after more than 23 years on the bench. As one of the court’s “Complex Civil Litigation Panel” judges, she heard water rights cases. She decided *Delaware Tetra* cases on water rights to groundwater in the Mojave Desert. See *DTW Network Note*, May 2016. She has joined the Orange (CA) JAMS office as a mediator, arbitrator and special master, hearing cases nationally, and plans to remain active in DTW.

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