



A resource for judges resolving water conflicts

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THE NATIONAL
JUDICIAL COLLEGE

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The Network Note January 2019

2019 Conference: Allocating Water in a Drought

The next conference will address the challenging problem of allocating water sustainably during drought, including how:

- deficiencies in CA water rights law impaired the State's ability to manage water during the 2011-15 drought.
- CO, ID and NM addressed conflicts between surface water diverters and groundwater pumpers.
- CA recently addressed its historic failure to address the interconnectivity of ground and surface water.
- legal tools can protect environmental flows and watershed health during times of shortage.

The conference will include a day in the field on the Monterey Peninsula, at a desalination facility and a dam-removal site.

CA Supreme Court Upholds SWRCB Water Fees

Rejecting constitutional and statutory challenges, the CA Supreme Court affirmed lower courts and upheld water discharge permit fees charged by the State Water Resources Control Board (SWRCB).

In 2011, a 2-member majority of SWRCB members adopted a fee schedule to pay for the costs of its water quality programs, pursuant to statute. Prop 13 (1978 voter initiative) amended the CA Constitution to limit State authority to "tax," requiring a 2/3-vote. Prop 26 (2010) narrowed the definition of allowed "fees." The CA Building Industry Association (CBIA) challenged the 2011 fee schedule as violating the Constitution and the statutory requirements for approval. Both the trial court and the appellate court rejected the challenges.

The Supreme Court affirmed the lower courts. Noting that SWRCB temporarily had only 3 members, which constituted a quorum, the 2-member vote was valid pursuant to common law and statute. The Court also rejected claims that SWRCB collected more than it needed, as provided by the fee statute. It explained that, while one part of the program collected more, the revenue needed for all the programs was not exceeded. Finally, the Court noted that the fee statute pre-dated Prop 26 and plaintiffs had not met their burden to show the fees were a tax that paid for more than the regulatory program.

NM: Not Enough Groundwater for Development

The December 2018 *Network Note* profiled Judge Shannon Bacon, noting her pending decision on groundwater for a new development. Since then, Judge Bacon decided the case, rejecting the groundwater application based in part on effects from climate change. In bigger news, Governor Grisham appointed Bacon to the NM Supreme Court.

2019 Conference: REGISTER NOW!

This year's conference, on April 10-13, is just around the corner, so registering now offers great benefits. Palo Alto hotels are expensive, and the lower conference hotel rate (at Creekside Inn) expires March 20. Tuition is \$699 and scholarships are available, but only so long as funding remains available. [Register now.](#)

In Focus: Presiding Justice Vance Raye (CA)

Growing up in Muskogee, Oklahoma, Vance Raye did not expect to become a leading jurist on California water law. Today, Raye serves as Presiding Justice for California's 3rd District Court of Appeal, which regularly decides appeals in water cases arising out of state agencies in Sacramento. He recently authored *Environmental Law Foundation v. State Water Resources Control Board* (SWRCB), on public trust.

Like other *Dividing the Waters* judges, Raye's career path did not lead naturally to water. After getting a JD from University of Oklahoma, he joined the Air Force JAG Corps, which took him to Beale Air Force Base in CA. After his military service, Raye joined the CA Attorney General's Office in 1974. He served as senior assistant attorney general until 1983, when he moved with his boss, George Deukmejian, into the Governor's Office, to serve in the legislative unit and legal affairs. Governor Deukmejian appointed him to the trial court in 1989 and to the Court of Appeal, where he took office in 1991. Governor Schwarzenegger appointed him PJ in 2010.

While Raye does not consider himself a "water judge," he has heard water cases for decades. He finds CA water history "incredibly rich and complex and interesting." Among his most memorable cases, *Planning & Conservation League v. CA DWR* (2000) stands out, for recognizing that "hopes and dreams upon which the entitlements are based do not create a greater annual supply of water." Land-use planning must rely on "reasonable forecasting." He finds his recent public trust decision, while narrowly applying to groundwater that affects a surface stream, "unassailable." The decision labels efforts to distinguish between diversions and pumping "irrelevant."

DTW Convener Ron Robie serves with Raye and has invited him to the upcoming Stanford conference. Raye will consider the invite, especially the conference's focus on groundwater. The 3rd District can DWR and SWRCB evaluate the 2020 "sustainable groundwater management plans" pursuant to the CA Sustainable Groundwater Management Act.

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