



A resource for judges resolving water conflicts

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## *The Network Note* March 2019

### **Pre-Conference Groundwater Webinar**

**FRIDAY, April 5 at 10 am PDT**

Don't miss the upcoming pre-conference webinar on groundwater law, presented by University of Montana Law Professor Michelle Bryan. **ALL judges are invited to participate.** Bryan will explore how groundwater and surface water laws have become more integrated, as scientific understanding of their connection has grown. Register [HERE](#).

### **Judges and Waters of the United States (WOTUS)**

The recent ABA-SEER water/environmental law conferences in Denver had two panels address the Clean Water Act term "Waters of the United States," or "WOTUS." The WOTUS controversy arises both in the upcoming SCOTUS hearing on the *Maui* case involving polluted groundwater discharging to the ocean and in the recent federal proposal to change the regulatory definition for WOTUS.

Judges (and justices) have played a central role in defining and applying WOTUS to specific conditions, with groundwater discharge offering the latest case. Federal judges and appellate courts have often ruled on whether WOTUS includes wetlands and other waters beyond traditional "navigable" waterways. The 2015 EPA/Corps of Engineers definition relied on Justice Kennedy's "significant nexus" test in his 2004 concurring opinion in *Rapanos*. In contrast, the new federal proposal relies on Justice Scalia's plurality opinion in *Rapanos*, which required a relatively permanent flow or a continuous surface water connection for the Clean Water Act to apply.

Panelists debated the necessity of Congressional action to further define WOTUS, in light of both the Executive Branch effort and the *Maui* case. They relied on a range of statutory language and judicial decisions as to whether judges had enough direction for interpreting WOTUS in the wide range of hydrological conditions across the nation.

### **Judges and "Citizen Science" for Water/Environment**

An ABA-SEER plenary panel on science and environmental enforcement raised the issue of "citizen science" going to judges. Environmental monitoring technology has advanced in recent decades, reducing costs and allowing anyone to assess conditions like water quality. That access now requires judges to assess the sufficiency of such science. When asked who was best able to set standards for scientific sufficiency, panelists agreed that judges will continue to play the critical role of adjudicating science, applying the *Daubert* principles to determine what scientists have widely accepted.

### **Adjudicating Groundwater Bench Book Widely Available**

As judges have begun using the new bench book on science and modeling of groundwater, *Dividing the Waters* has sought to make the book widely available to water communities across the West. NJC provides hard copies to judicial officers, and the book's distribution network provides digital or hard copies to everyone else. The Water Foundation provides hard copies to state water agencies. If you get requests for copies, you can refer requesters to the [book's webpage](#) or just tell them to Google "Adjudicating Groundwater."

### **California Here We Come!**

With *Dividing the Waters* returning to California for the first time since 2012, you may see more CA judges at Stanford. Recent changes in CA law and judicial practice have expanded the CA judicial audience for water law discussions.

The CA Rules of Court allow the Chief Justice to assign a "complex case" to a specific court with a complex litigation department that has experience in that type of case. Rule 3.400 designates environmental cases as provisionally complex cases. Recent statutory changes, including the CA Sustainable Groundwater Management Act (SGMA, a term you'll hear at Stanford), designate water cases as complex and bar groundwater adjudications from being heard by the county superior court where it arises. Anticipating more water cases in the years ahead, as SGMA takes effect, courts with complex litigation units have chosen to send judges to Stanford.

### **CA conditions make participation by judges from other states that much more important.**

Other states have experience adjudicating some of CA's emerging issues, like groundwater or the urban/ag transition. Interstate sharing of judicial experience gave the impetus for creating *Dividing the Waters* in 1993. The need for that sharing continues growing.

### **Wednesday Kickoff – Reception/Keynote Lecture – 5 pm**

This year's conference starts at 5 pm Wednesday (4/10) at the Stanford Law School, with a reception and keynote lecture by our host, Stanford Law Professor Barton "Buzz" Thompson (Supreme Court's Special Master for *Montana v. Wyoming*) on *Emerging Water Management Issues in the United States*.

### **Thursday: Field Day on Monterey Peninsula**

DTW conference participants will enjoy a day seeing the water supply challenges of the Monterey Peninsula, which has some of CA's most expensive drinking water. Stops may include a desalination facility, dam removal site, and groundwater storage injection site. SEE YOU IN PALO ALTO!!

**Recent court decision? Something to share? Contact the Network Note Editor at [ALFIII@sbcglobal.net](mailto:ALFIII@sbcglobal.net)**