

## *The Network Note*

### August 2016

#### **ABA Invites *Dividing the Waters* Judges to Fall Conference**

The ABA Section of Environment, Energy & Resources has extended an invitation to *Dividing the Waters* members to participate in this year's Fall Conference in Denver, October 5-8. On Friday (October 7), the Conference will feature four segments of interest to Program members, on environmental litigation, water quality, federal-state water disputes, and the ethics of experts (featuring our own CO Justice Gregory Hobbs). If interested in attending, contact the Executive Director, who chairs this year's Conference.

#### **TX v. NM: Sup Ct Special Master Rejects NM Motion**

After more than a year of hearing preliminary motions in the *Texas v. New Mexico* case of original jurisdiction regarding the Rio Grande, the Supreme Court's Special Master has recommended denying New Mexico's motion to dismiss.

In a 241-page decision, the Special Master exhaustively described the history of western water law and policy, interstate negotiations, and the terms and implementation of the 1938 compact on sharing water in the Rio Grande.

In 2013, Texas filed a motion for leave to file a complaint against New Mexico for violating the 1938 Compact and depriving Texas of its equitable apportionment of water. The Rio Grande flows from Colorado/New Mexico to El Paso and on to the Gulf of Mexico, forming the nation's border with Mexico in Texas. Texas alleges that New Mexico violated the 1938 Compact by allowing the diversion of surface water and pumping of groundwater downstream of the Elephant Butte Reservoir, where New Mexico is required to deliver water.

New Mexico moved to dismiss the case for failure to state a claim. It argued that the Compact required only that it deliver water to Elephant Butte Reservoir, and it has no duty to limit post-1938 development below Elephant Butte. Texas and the Federal Government opposed New Mexico's motion.

The Special Master concluded that the Compact was not ambiguous, apportioning water among the states and requiring New Mexico to "deliver" and relinquish all control over water once it reached Elephant Butte Reservoir. Under FRCP 12(b)(6), the Special Master accepts as true Texas' allegation that New Mexico is intercepting water from the Reservoir, which creates sufficient basis for Texas to pursue its claim. The Special Master also recommended that the Supreme Court exercise its discretion to allow the U.S. to pursue its claims.

#### **Interested in Acting as Neutral in Water Case??**

In preparation for the October ADR program in Denver, the Conveners are considering whether the Program might offer referrals of experienced water judges who are willing to act as neutral mediators or arbitrators. The neutrals may be sitting or retired judicial officers. This idea is in the formative stages, with many questions remaining. The Conveners would like to know if members have interest in serving as a neutral. If you do, please contact the Executive Director.

#### **In Focus: Eric Garner (CA Board of Advisors)**

The relationship between today's *Dividing the Waters* and Board of Advisors member Eric Garner (CA) dates to before the Program started in 1993. In one of their first water cases, Garner and *DTW* Executive Director Alf Brandt served together as counsel in a mutual water company dispute before the CA Public Utilities Commission. They won.

Today, more than 25 years later, Garner has built a career as one of California's leading water lawyers, at Best, Best & Krieger. As Managing Partner, he now leads one of the state's top water law and public agency firms. For the past two decades, he has worked extensively on groundwater matters. He was involved in the Mojave Groundwater adjudication, starting in 1990, and represented the lead parties in the Santa Maria and Antelope Valley groundwater adjudications in the last decade. Leading lawyer publications have recognized his work with "best water lawyer" accolades.

Garner has led water law discussions for more than just clients. He played a role in drafting the 2014 Sustainable Groundwater Management Act. He co-authored two books on water law, *California Water* and *California Water II*. Garner serves today as an adjunct law professor at the University of Southern California Gould School of Law. His work has taken him to South Africa, Trinidad and Pakistan, to draft water laws for nations struggling to allocate limited water supplies like California and he was the first American to chair the International Bar Association's Water Law Committee.

Garner grew up in North Carolina and went to Earlham College in Indiana for his undergraduate work. Garner moved on to law school at the University of Michigan, just before legendary water law Professor Joe Sax retired and moved to UC Berkeley, where Alf Brandt learned water law from Sax. Garner now lives in Los Angeles in a home with no grass and multiple rainwater capture devices.

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