WA Justice Debra Stephens Joins the Conveners

After helping plan and participating in the recent Dividing the Waters conference, WA Supreme Court Justice Debra L. Stephens accepted the Conveners’ invitation to join them. Justice Stephens impressed the Conveners with her help in organizing the conference and her interest in helping judges apply science to their decisions. Stephens and CO Justice Eid join as some become “Conveners Emeritus,” including Justice Gregory Hobbs, John Thorson (DTW founder) and Kathy Mix.

WA Court Bars Mitigation Plan for Instream Flow

Following up on its 2013 Swinomish decision, the Washington Supreme Court rejected the Department of Ecology’s grant of a water right based on a mitigation plan that would minimize impacts on a senior instream flow and improve habitat.

The City of Yelm applied for a municipal water right for its growing population. Because the new appropriation would impair minimum flows, the WA Department of Ecology conditioned the right on an “extensive mitigation plan.” The mitigation included both in-kind (existing rights retirement) and out-of-kind (habitat restoration).

Ecology claimed authority to impair minimum flows based on the “overriding consideration of the public interest” (OCPI) exception to the statute requiring instream flows. On appeal, the Pollution Control Hearing Board concluded that the mitigation plan would clearly benefit fish and wildlife habitat, and approved the permit. The reviewing trial court affirmed.

In Foster v Ecology, the WA Supreme Court reversed, holding that Ecology had exceeded its authority. It concluded that the OCPI exception does not allow Ecology to grant a water right that would impair the base instream flow, even with a mitigation plan. The Court distinguished the statutory term “withdrawal” from “appropriation.” The first is a temporary, physical removal of water from a stream, while the second is a permanent water right. It concluded that the OCPI exception allows temporary removal, not a “permanent impairment.”

The Court rejected the mitigation plan as the “extraordinary circumstances” that allow application of the OCPI exception.

The dissent rejected the majority’s distinction between “withdrawal” and “appropriation,” citing use of “withdrawal” in the groundwater law and rejecting the majority’s reliance on its use in the emergency drought law. The dissent also disputed the majority’s characterization of the facts of Yelm’s water right and mitigation plan.

DTW Board of Advisors Issues White Paper on Mitigation

In response to a Conveners request, the Board of Advisors has issued a white paper comparing how different western states allow or require mitigation for water rights or use. This paper arrives at a critical time. Both Nevada and Washington courts recently issued decisions on mitigation. The paper provides an overview of mitigation-related issues and some state-specific case studies. Get your copy on the Board’s webpage.

In Focus: Special Master Ted Booth (ID)

Idaho Special Master Theodore Booth has deep roots in the Snake River Basin in Idaho, growing up in Idaho Falls, where he frequently availed himself of many hunting and fishing opportunities offered by the River.

After returning from the University of Utah with his JD, it was only natural that Booth would eventually join the Snake River Basin Adjudication (SRBA) team. He serves the Idaho water court as Special Master in the Coeur d’Alene-Spokane River Basin Adjudication. He currently acts as settlement moderator for the objections filed to the reserved water right claims of the Coeur d’Alene Tribe, whose Reservation is near the area where the Dividing the Waters visited on its field day.

Booth joined the SRBA in 1999 as a law clerk for SRBA Presiding Judge Barry Wood, and clerked for Wood’s successor, now-Justice Roger Burdick. After clerkships, Booth worked in a small-town private practice in Gooding, ID. While he appreciated the diversity of small-town law practice, Snake River right debates attracted him. Booth was delighted when the opportunity arose to rejoin his former SRBA team as hearing officer for contested water right claims.

Booth has participated in Dividing the Waters conferences since 2000, when he joined his SRBA colleagues in Vail, Colorado. Booth has appreciated the opportunity to hear the perspectives of judges from other states with equally complex and contentious water cases. “It is not uncommon to hear issues of first impression. Dividing the Waters conferences provide an opportunity to see how other states handle similar issues. This helps tremendously, to see how all the pieces fit together and avoid unintended consequences.” Booth was proud to host his colleagues in Coeur d’Alene recently, so they could hear some of the story of his life as a Special Master.

Booth left the Snake River Basin in 1981 to go to the University of Utah, where received both his BA (political science) and his JD. He now lives in Twin Falls, Idaho.