Conference at UC Davis a Success
Participants in the 2012 conference once again hailed the conference as one of the best Dividing the Waters programs yet, and the number of participants neared record levels. The conference took place at the UC Davis King Hall School of Law, the first time DTW has convened at a law school. UC Davis rolled out the red carpet, and the judges had generally positive comments about being back in the law school environment.

The Making the Connection: Surface and Groundwater program offered training on both substantive and procedural issues in water litigation, with a particular focus on science. One of the highlights was the spirited discussion of the use of experts in water litigation, including ethical perspectives offered by University of Montana law school Dean Irma Russell.

This year’s field trip took judges to the Sacramento-San Joaquin Delta, to take a first-hand look at California’s ground zero for water conflict. The “Day in the Delta” included a discussion with Delta operators from the state-federal water and fishery agencies and a discussion of the role of the judge in water management.

DTW Goes East: Fracking Workshop
For the first time, DTW took its program east of the Mississippi, to Pittsburgh, to help judges in the Marcellus Shale region (PA, NY, OH, WV) understand the connection between “fracking” and water resources. This program, which originated in a request from a Pennsylvania judge, included training on both eastern water rights and water quality law. At the judges’ request, the luncheon program included a conversation with the Executive Branch as to how the federal and state governments are regulating fracking to protect water resources. Science experts with opposing views on whether fracking affects water also offered presentations and responded to questions from the judges.

Water Law Update
By next June, the United States Supreme Court will once again address water issues, in two stormwater quality cases. In Georgia-Pacific West v. Northwest Environmental Defense Center, the Court will address whether runoff from logging roads conveyed in ditches and culverts require a stormwater permit. In LA County v. Natural Resources Defense Council, the Court will consider whether a discharge permit is required for contaminated water that flows from a river through a concrete stormwater channel and back into the river.

The Ninth Circuit Court of Appeals recently rejected two challenges by environmental groups seeking to use the ESA to curtail water flows to irrigators in central California. Natural Resources Defense Council v. Salazar, 686 F.3d 1092 (9th Cir. 2012). The court upheld two decisions by former federal Judge Oliver Wanger. The Ninth Circuit held the environmentalists lacked standing, and that the Bureau of Reclamation’s contract renewals were not discretionary, which meant that ESA consultation was not required.

In Focus: DTW Founder John E. Thorson
When John Thorson and Dan Hurlbut talked about creating a forum for water judges in 1992, they did not imagine that, two decades later, the forum would be as diverse, durable and vibrant as Dividing the Waters has become. At the time, Thorson served as Special Master for the Arizona general stream adjudications and Hurlbut was presiding judge for Idaho’s Snake River adjudication. Together, they secured an initial grant for the project from The Ford Foundation and convened the first conference in Scottsdale.

Moving to San Francisco in 2000, Thorson joined the California Public Utilities Commission as an administrative law judge, eventually serving as assistant chief judge for water, enforcement proceedings and the ADR program. Retiring to western Montana in 2008, Thorson was appointed federal water master for the Lummi Decree (U.S.D.C, E.D. Wash.), a position he still holds.

Thorson has worked on water law and policy issues in every major river system in the American West. He has used his abilities as a judge, attorney, mediator, teacher, and scholar to resolve inter-jurisdictional disputes, better utilize science, and improve water management. Beginning in 2007, he co-chaired a committee to convene the congressionally chartered Missouri River Recovery Implementation Committee and, once established, served as the initial chair of the 70-member, sovereign-stakeholder MRRIC.

Thorson continues to serve one of the DTW’s conveners – the six judges who provide ongoing direction to the project. Asked to identify some of the factors of DTW’s success, Thorson indicated, “We’ve been able to respond to the changing needs of the judges as they confront complex, water-related litigation. We’ve also had the support of those who believe in our mission: a series of generous foundations; the Arizona Supreme Court, NJC and the Federal Judicial Center; executive directors Carolyn Brickey and Alf Brandt; and many other judges, faculty and staff.”

Next Year?
As the Conveners develop plans for next year, your ideas are welcome. We are considering developing a workshop on the latest in water technology and its use in adjudication. We may work with US Geological Survey and the NASA water center to demonstrate the technology. The workshop also could include discussion about how to incorporate the latest technology, information and adaptive management into judgments. What do you think?

Share your thoughts with us, at ALFIII@sbcglobal.net.