Dividing the Waters Network Note
November 2013

Fracking/Water Webinar – in 2 Parts – December 12
Since last year’s workshop on hydraulic fracturing and water quality in Pittsburgh, debate over fracking has continued to develop. Some states have passed new laws or adopted regulations, with litigation following thereafter. Part of the controversy arises out of fracking’s connection to water. In order to keep the DTW network current, the Program will offer a 2-part webinar on fracking and water quality.

This year’s workshop offers a brief, but comprehensive, look at fracking and water – suitable for all network members, without regard to participation in last year’s workshop. Jim May, a Widener University law professor, provides the basics of what fracking is and what laws apply.

- The first part provides background, through a pre-recorded webinar, on the facts and law of fracking, available now for review at members’ convenience.
- The second part will give participants the latest information on the law of fracking and offer an opportunity to get their questions answered.

To participate in this program, please contact Rebecca Bluemer@judges.org for more information.

MT Supreme Court Affirms Standard for Abandonment
In Heavirland v. Montana, the Montana Supreme Court affirmed the Montana Water Court’s finding of sufficient evidence to overcome a presumption of water right abandonment. The court affirmed use of 79 Ranch (1983) as the standard for determining facts for abandonment, even for rights confirmed by the 1973 Montana Constitution.

The Weist family started irrigating their farm with water from Muddy Creek in 1913. In 1962, however, due to difficulty with flood irrigation, the family stopped using Muddy Creek water. It was not until 1982 that the Weist family again used Muddy Creek water, after installing electricity and a center pivot irrigation system. Weist irrigated the land until 1991 when he sold the land to Heavirland.

In reviewing the Weist/Heavirland claim in the Montana General Stream Adjudication, the Water Master reviewed the abandonment issue and concluded that claimant had failed to meet its evidentiary burden to overcome the presumption based on a long period of non-use. The Water Court overruled the Water Master and found that Heavirland had met the evidentiary burden. The State appealed. While rejecting Heavirland’s arguments against 79 Ranch, the Court affirmed the Water Court’s finding that Heavirland had met his evidentiary burden to overcome a presumption of abandonment based on non-use. The 79 Ranch standard is: “To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope.”

Save the Date: May 14-17, 2014 – University of Oregon
Plan now for next year’s general conference at the University of Oregon in Eugene. If you have ideas, contact Alf Brandt.

In Focus: Oregon ALJ Joe Allen
In law school, Oregon Senior Administrative Law Judge Joe Allen did not dream of adjudicating one of the West’s most complex and controversial water rights cases. But, last year, he completed the Klamath water rights adjudication for the Oregon Water Resources Department (OWRD). Judge Allen now continues his work in water, contemplating the possibility of new water right adjudications in other Oregon watersheds.

Judge Allen started out his legal career at Woodson and Allen in Southern California. Unable to pass up an opportunity to gain valuable experience and judicial perspective, Judge Allen joined the Office of Administrative Hearings in August 2007. He was assigned to the Klamath adjudication, first as a motions judge, and later with primary responsibility for all remaining Klamath cases. Allen is one of only four ALJ’s assigned complex water cases. In addition to presiding over water rights adjudications, Judge Allen manages a general jurisdiction administrative law docket for public agencies.

Dividing the Waters invited Judge Allen to the 2011 conference. “When Alf Brandt called me, I was surprised to learn that the National Judicial College had a program that so perfectly fit my needs,” Judge Allen commented. “Since then, I have found that DTW offers me and my colleagues the resources and training we need, without the advocacy for one side or the other that some CLE conferences present.”

Born and raised in Southern California, Judge Allen earned his JD from Trinity Law School in Orange County and his BA in Business Administration from the University of La Verne. He lives with his wife and three young children in Portland, where he has easy access to camping and hiking trails which he enjoys in his spare time, but only in fair weather.