The Network Note
February 2015

October Conference: State and Interstate Adjudication
Drawing on experience of Dividing the Waters judges and advisory networks, the Conveners have begun shaping the agenda for the Program’s October 14-17 conference. With Convener Eric Wildman recently initiating the Coeur D’Alene basin adjudication, the program will address fundamentals of “getting started” in a water case. Interstate connections will provide the opportunity to consider resolution of interstate, and even international (with Canada), water conflicts.

4th & 6th Circuits: Clean Water Act & Mining Selenium
Relying on differing state regulation implementing the Clean Water Act, the 4th and 6th Circuit Courts of Appeal came to different results in assessing the effect of the “permit shield” on selenium drainage from mines. The 4th Circuit denied the shield, while the 6th Circuit affirmed the shield’s protection.

The critical difference was how each state applied the Clean Water Act (CWA) to mining selenium. The 4th Circuit noted that the State of Virginia required discharge permit applicants to submit data to document whether selenium existed in the mine’s waste stream. The 6th Circuit noted that the State of Kentucky issued a general mining permit and required additional study when selenium was discovered.

The two circuits analyzed the CWA’s “permit shield,” which insulates permit holders from liability for discharges of certain pollutants that the permit does not explicitly mention. Both circuits applied Chevron deference to USEPA’s interpretation of the CWA permit shield provision, due to its ambiguity.

The statutory framework relies on states to issue discharge permits, so how each state applied the CWA led to different outcomes. The 4th Circuit concluded that the permit shield did not apply because the company had not submitted evidence on existence of selenium, as required by Virginia’s application rules. The 6th Circuit affirmed the permit shield, because Kentucky, which had no affirmative evidence requirement, acted once it learned of the existence of selenium.

Board of Advisors: Water and Mitigation Plans
The Dividing the Waters Board of Advisors met this month to address a question that the Conveners posed – how judges should assess “mitigation plans.” In recent years, the concept of mitigation related to water rights has arisen in several contexts in different states. In the coming months, the Board will produce a white paper that shares experiences and advice on issues to consider in assessing proposals for mitigation.

Profile on you? Recent court decision? Something to share? ALFIII@sbcglobal.net
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Invite a Colleague to Join Dividing the Waters
If one of your colleagues on the state or federal bench has been assigned a water case, please encourage them to join the Program. Or the Executive Director can welcome them and invite them to the conference in Spokane.

In Focus: Johnnie B. Rawlinson (9th Cir.)
Ninth Circuit Judge Johnnie B. Rawlinson did not expect her experience at the U.S. Army Corps of Engineers before and during law school to help her as a judge on the 9th Circuit Court of Appeals. Before law school, she interviewed and hired scientists and engineers at the Corps in North Carolina. During law school she worked in the Sacramento District office. “Little did I know that, years later, I would be deciding cases involving that very region.”

Rawlinson has reviewed and written opinions on California water disputes for more than a decade. Most of those cases came up from the Eastern District of California in Fresno. The 1989 ESA listing of winter-run salmon and the 1992 passage of the Central Valley Project Improvement Act led to numerous cases disputing how the Federal Government manages water, especially in the Sacramento-San Joaquin River Delta. As those cases have gone up to the 9th Circuit, Rawlinson has served on several panels over the years.

Most recently, Rawlinson served on the panel that upheld the Fish & Wildlife Service’s biological opinion on operation of the state and federal water projects in the Delta. See 3/14 Network Note. In December, the Supreme Court refused to hear that case, allowing the 9th Circuit decision to stand.

Drawing on both her work with the Corps and her judicial experience, Rawlinson has spoken on the connection between science and the law, including at Dividing the Waters programs. In March, she will speak at the 2015 ABA Super Conference on Environmental Law, in San Francisco, on how to make a complex environmental case understandable to judges, who may not have background in science. Justice Ron Robie, a DTW Convener, will join her on that panel.

Before her 1998 appointment to the federal District Court in Las Vegas, Rawlinson practiced criminal law, in the District Attorney’s Office. She served as the Chief Deputy and Assistant D.A. Born in Concord, North Carolina, Rawlinson graduated summa cum laude from North Carolina A&T with her B.A. in 1974, and in 1979, received a J.D. with distinction from the University of the Pacific’s McGeorge Law School.