Dividing the Waters Network Note
March 2014

Convene in Eugene: Changing Land, Changing Water
Dividing the Waters convenes at the University of Oregon’s law school in Eugene on May 14-17, 2014. This year, the Conveners have organized a program that will give you the information and experience on the increasingly critical connection between land and water. The conference combines the law and the practice of adjudicating land-water disputes. For additional information, including the agenda and registration, go to the 2014 DTW Conference Page.

CA Delta: 9th Cir. Deference to Agency/Court on Science
After exhaustive review of a district court decision on a Fish & Wildlife Service (FWS) biological opinion (BiOp) for water project operations in the CA Delta, the 9th Circuit concluded the trial court had failed to give the agency’s judgment sufficient deference. The trial court overstepped its bounds in admitting additional declarations from parties’ experts.

On the merits, the Circuit upheld the BiOp, in light of the BiOp itself, evidence from the record FWS considered in making its decision, and testimony of four experts the district court had appointed. In reviewing FWS choices as to scientific models, the Circuit noted: “Our deference to agency determinations is at its greatest when that agency is choosing between various scientific models.”

The Circuit also rejected the cross-appeal by the water users. Judge Bybee authored the court’s opinion, while Judge Arnold and Judge Rawlinson issued “partial dissent” opinions.

CA Delta: Pre-Condemnation Investigation = Taking
Wading into the controversy over the CA Delta, the state Court of Appeal held that the CA Department of Water Resources (DWR) could not do preliminary study on private lands without going through the eminent domain process. It struck down a state statute allowing pre-condemnation entry.

DWR is studying possible tunnel routes to convey water from the Sacramento Valley to water export pumps on the Delta’s south side. The trial court denied access for geological studies, but had allowed environmental studies, pursuant to statute. The Court of Appeal did not allow entry for either purpose without DWR exercising its eminent domain authority in “strict conformity to constitutional protections and procedures.” It affirmed and reversed the trial court, holding that the studies constituted a temporary taking, requiring DWR to complete the full condemnation process.

Pre-Conference Fundamentals Webinar – April 30
If you or your law clerk (or attorney) is new to water adjudication, then Dividing the Waters offers just what you need to prepare for the upcoming conference—a webinar on the fundamentals of western water rights law. To sign up, contact Rebecca Bluemer@judges.org.

In Focus: Chad Schmucker, New NJC President
The National Judicial College’s new President, Judge Chad C. Schmucker, arrived at the beginning of the year with a history of solving problems. During his 20-year judicial tenure in Michigan, he assisted in starting four problem-solving courts, including felony drugs/alcohol, domestic violence, family dependency, and mental health. Judge Schmucker also co-chaired the national state court administrator/chief justice organization’s Problem Solving Court Committee.

Schmucker brings this same problem-solving approach to NJC and Dividing the Waters. He arrives with a fresh perspective on water law and conflicts. Michigan judges encounter relatively less conflict over water, surrounded on 3 sides by freshwater lakes. In 2008, Congress approved the Great Lakes Compact, which implements an agreement with neighboring Canadian provinces on sustainable Great Lakes management.

During his 20 years as a circuit court judge (1991-2011) in Jackson, Michigan, Schmucker served on many judicial committees, related to criminal justice and the underground economy, and chaired the Technology Committee for the Michigan Judges Association. As Michigan’s state court administrator since 2011, he oversaw management of the state’s 246 trial courts. Schmucker implemented a Michigan version of trial court performance measures, and developed a plan for court governance to promote cooperation and efficiency among courts.

Schmucker received his bachelor’s degree from the University of Michigan and Juris Doctor from Wayne State University Law School. After graduation from law school, he entered private practice, specializing in personal injury and insurance defense litigation.

U of MT Seeks New Law School Dean: Your Next Step?
Interested in a new opportunity? The University of Montana seeks a new law school dean, to succeed Irma Russell, who serves on the DTW Board of Advisors. Take a look: http://www.umt.edu/law/about/openings.php