The Network Note
April 2015

2015 Conference: Courts Respond to Changing Conditions
Responding to changing water management in Washington State, the Dividing the Waters Convenors have chosen to focus this year’s conference on Established Water Rights: Changing Conditions. In states across the West, water managers are developing creative solutions to respond to rapidly changing conditions, whether drought, continued development, or stress on fisheries, but in the context of established water right systems. Litigants call on courts to adjudicate whether those changes comply with the law, as Texans did below.

Texas Court Upholds “First in Time” Principle
Upholding the principle of “first in time, first in right,” the Texas Court of Appeals rejected “Drought Rules” from the Texas Commission on Environmental Quality (TCEQ) that would have exempted junior urban users from suspension of their diversions from the Brazos River. The appellate court affirmed the district court, which held the rules invalid.

The Texas Legislature, in 2011, enacted a statute that allowed TCEQ to administer water rights in times of drought. The next year, TCEQ adopted “Drought Rules” that allowed its Executive Director (ED) to suspend junior water rights, but also allowed the ED “not to suspend certain junior rights—e.g., those held by cities and power generators—based on public health, safety, and welfare concerns.” TCEQ then required those exempted from suspension to report their daily use and show it had taken steps to find alternate supplies and identify long-term additional or alternative supplies.

In TCEQ v Texas Farm Bureau et al., the trial judge ruled, on summary judgment, that the Drought Rules were invalid because TCEQ had no statutory authority and its police power to protect health and safety did not allow it to exempt junior rights from water right priorities.

The Texas Court of Appeals held that the statute’s language was clear and refused to defer to TCEQ’s interpretation. The “plain meaning” of the drought statute required TCEQ to act “in accordance with the priority of water rights.” The court also dismissed TCEQ’s argument that the trial court’s decision was “unreasonable because it renders the statute meaningless and incapable of execution.” It explained that “it is not the court’s role to examine microscopically the Legislature’s intent when interpreting a clear statutory command.” Finally, the court rejected TCEQ’s claim of police powers to enforce the Drought Rules, as inconsistent with the statute.

DTW Resources Offer Enduring Value
Since joining the National Judicial College in 2007, Dividing the Waters has expanded its educational offerings to its member judges, regardless of their level of experience. The webinars that are still available for watching include the recent Responding to Drought series and the fundamentals of water law. The Program’s publications include the Hydrological Modeling Benchbook and the Layperson’s Guide to Water Law (CA). If you wish access to these resources, please contact Christal Keegan@judges.org.

In Focus: Board of Advisors Co-Chairs
Sarah Klahn and Adam Gravley
The Dividing the Waters Board of Advisors recently chose two leading water lawyers to chair the Board – Sarah Klahn (CO) and Adam Gravley (WA).

Klahn got her start in water in science. After graduating college in Biology and getting a masters in chemical ecology, she briefly managed a network of precipitation sampling stations that collected baseline data on acid rain. She then taught science and math at inner city schools in Denver. After reading Cadillac Desert on a ski trip and talking to her fluvial geo-morphologist friends, water law piqued her interest.

In law school at the University of Wyoming, Klahn did an institutional analysis to assist USFWS professionals trying to mediate the Klamath Basin dispute. The summer after law school, she joined the Denver law firm of White & Jankowski. Now, almost 20 years later, she is managing partner, with a water rights and water quality practice that takes her across the Rocky Mountain West.

Gravley has spent almost 25 years in Seattle, building a diverse water law practice. He represents a range of business, local government, and individual clients in regulatory, litigation, transactional, legislative, and strategic planning matters. One of his career highlights was representing the Washington Water Utilities Council in Lummi Indian Nation v. State, a constitutional challenge to Washington’s 2003 Municipal Water Law.

Gravley started out in the Midwest, going to Kalamazoo College, followed by a master’s degree from Brown University and a JD from Georgetown.

INVITE A COLLEAGUE to join Dividing the Waters.

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