The Network Note
April 2016

Texas Interest in 2017 Dividing the Waters Conference
As the Program explores the possibility of holding its next general conference in Texas, the state’s water leaders have shown interest in bringing the Program to their state. Texas completed its surface water adjudications by the 1980’s, but groundwater and other water litigation continues.

WA: First-in-Time Applies to Exempt Groundwater Wells
The WA Court of Appeals held, in Fox v. Skagit County, that the Appropriation Doctrine’s priority system applies to new groundwater wells exempt from the state’s permitting system.

In 2014, the Foxes applied for a building permit for a single-family residence near a small Washington town. Skagit County did not issue a building permit because the Foxes had not shown access to an adequate and reliable source of water. The Foxes offered a new domestic well that was exempt from state water right permitting requirements but was hydraulically connected to the Skagit River. The state’s 2001 Skagit River instream flow rule curtails exercise of junior water rights, including groundwater, when instream flow is insufficient.

The Foxes filed a petition for a writ to require the County to issue a building permit or show cause. The trial court required the County to show cause and allowed the WA Department of Ecology and the Swinomish tribe to intervene. The trial court ultimately denied the writ, agreeing with Ecology that the instream flow rule applied to permit-exempt groundwater wells with hydraulic continuity to the Skagit River.

The WA Court of Appeals affirmed the trial court and rejected plaintiff arguments that exempt domestic wells were not subject to the priority system under WA law. The case turned on the 1945 statute that exempted domestic wells drawing less than 5000 gallons a day. The statute provided that a well:

To the extent that it is regularly used beneficially, shall be entitled to a right that is equal to that established by a permit issued under the provisions of this chapter.

Another statute made clear that the rights of senior surface water appropriators remain “superior.” The Court of Appeals held that “superior water rights may limit the rights to withdraw water via a permit-exempt well.” WA law established the 2001 instream flow rule as a superior right, as reiterated in the 2013 Swinomish decision.

Save the Date for the Fundamentals Course – November 14-15, 2016 (Still Tentative)

ABA-SEER Invites DTW Judges to Fall Conference
In an effort to build its relationship with Dividing the Waters, the ABA Section of the Environment, Energy and Resources has invited Program judges to participate in the Section’s Fall Conference in Denver. The Friday (October 7) agenda offers the most relevant content – 2 panels on water, a plenary session on the next generation of environmental litigation, and the ethics of using experts. Stay tuned for more information!

In Focus: Judge Harold D. Clarke (WA)
Washington Judge Harold D. Clarke joined Dividing the Waters after learning a general water adjudication for the Spokane River would be authorized in the near future. He flew down to Reno to take the “fundamentals” course at NJC. He describes the course “as a great starting place for information you could build on.” But Clarke never got to build on that course. The adjudication never got started.

As the court discussed preparations for the adjudication, the judge in the chambers next door suggested Clarke take the case. Judge O’Connor had worked on WA water law reform, including limits on affidavits of prejudice. Expecting Judge Clarke to serve another decade, O’Connor deemed Clarke a good choice. Clarke and his Court Administrator set about preparing for the case. “It’s best to know something about water before the case hits the door.” But the Legislature never appropriated money to start the adjudication.

Clarke nevertheless appreciates the help Dividing the Waters has offered him. He has come to know Judge Eric Wildman, the DTW Convener who is adjudicating the eastern part of the Spokane River basin in Idaho. Clarke participated in last fall’s Spokane conference and brought younger judges with him, anticipating that they might one day preside over the Spokane River case. He continues to read the monthly Network Note, hoping one day to pass on his Dividing the Waters materials and relationships to the next Spokane River judge.

Like many members, Clarke had done little in water before taking the bench. He had practiced general civil litigation in his own Spokane firm. For a long-standing client, he took one water rights case before the WA Department of Ecology. He grew up in Spokane, went to college at Washington State University, and returned to Spokane to attend the law school at Gonzaga University. His father served on the Spokane court for 21 years, retiring before Clarke took the bench. He continues to live with his family in Spokane.