The Network Note
September 2014

2015 Conference Date Set: October 14-17
The Dividing the Waters Conveners have set the dates for the 2015 General Conference, which will take place in Coeur D’Alene, Idaho. Convener Eric Wildman has commenced the Coeur D’Alene adjudication and will host the 2015 conference for his colleagues in the DTW judicial network. This new adjudication will address a wide range of issues that his colleagues in other states have heard — instream flow, tribal rights and interstate waters. Plan now to join us in Idaho.

WA:  Instream Flow Protection/Role of Hearings Board
In another instream flow case from the State of Washington, the Pollution Control Hearings Board (“the Board”) left open the possibility that the Department of Ecology may condition new water rights on protecting instream flow with “out-of-kind mitigation” (i.e., money). Okanogan Wilderness League (OWL) v Dept. of Ecology.

In 1980, Ecology issued a regulation protecting instream flow in the Columbia River upstream from John Day Dam (on the OR-WA border). These rules provided the conditions under which Ecology would issue subsequent water rights while protecting instream flow in this reach. In 1991, a landowner applied for water rights for a well field hydraulically connected to the Columbia River. In a 2003 decision, the Board reversed Ecology’s prior water right permit decision for failure to consult with Indian tribes. In 2011, Ecology began consulting with the tribes. It issued a water right permit conditioned on the applicant paying for Ecology’s fish habitat mitigation projects, labeled “out-of-kind mitigation.”

OWL, an environmental group, appealed the water right permit, alleging that Ecology’s failure to impose the 1980 instream flow conditions and allow out-of-kind mitigation violated state law, citing last year’s WA Supreme Court Swinomish decision. Ecology responded that the Board lacked jurisdiction because OWL’s appeal, in effect, challenged Ecology’s 1980 Instream Flow Rule, which only a court may review and overturn.

The Board denied summary judgment to both sides on whether the permit complied with state law. While recognizing limits on its jurisdiction to review the regulation, the Board held that the appeal presented factual questions of whether Ecology’s conditions adequately preserved instream flow values. It ordered the appeal to hearing, to consider the adequacy of Ecology’s conditions, including out-of-kind mitigation.

Big Horn and Snake River Adjudications Completed
In the last month, Dividing the Waters Conveners Eric Wildman and Ramsey Kropf completed two of the West’s longest standing water rights adjudications – on the Snake River and the Big Horn River. Congratulations!

In Focus: Felicia Marcus (California)
This year alone, Felicia Marcus has presided over some of the biggest controversies in the history of California’s State Water Resources Control Board – drought response and enforcement, groundwater management legislation, drinking water regulation and stormwater management.

Marcus is not new to change and controversy. She started her career in water in 1985, as a Center for Law in the Public Interest attorney for environmental and social justice groups. She engaged in litigation with the city, state and federal governments over Los Angeles’ discharges into Santa Monica Bay, ultimately helping craft a consent decree. In 1989, LA Mayor Tom Bradley appointed her to lead the Board of Public Works, which operates the waste treatment plants that discharge into the Los Angeles River and Santa Monica Bay.

Marcus went on to serve as the Regional Administrator for US EPA in San Francisco during the Clinton Administration, followed with service at NGOs – The Trust for Public Land and the Natural Resources Defense Council.

Governor Schwarzenegger appointed her to the newly created Delta Stewardship Council in 2010, where she participated in developing the plan for the Sacramento-San Joaquin Delta, which is now in litigation. Since Governor Brown appointed her to the lawyer spot on SWRCB in 2012 and as chair in 2013, the Board has pursued important initiatives for California water – in both water rights and water quality.

Marcus learned about Dividing the Waters when she attended the 2012 conference at UC Davis. She was impressed at the participants’ vast experience in water reflected and the frank discussion. “It was an amazingly rich opportunity to learn about vast differences in water rights management between California and other western states and to learn from leaders with extraordinary expertise and talent,” commented Marcus.

Marcus graduated from Harvard College and earned her JD from New York University School of Law in 1983. She lives in Emeryville, works in Sacramento, and travels the state talking and listening to Californians about water.

Profile on you? Recent court decision? Something to share? ALFIll@sbglobal.net
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