

## *The Network Note* October 2016

### **DTW Mediator Referral Service Webpage Now Available**

*Dividing the Waters* has identified several members as possible mediators/neutrals for resolving water disputes. They include both active and retired judicial officers. The service now offers members in Arizona, California, Colorado, New Mexico and Washington. Availability in other states may develop in the coming months. Information about this new program can be found on the [DTW website](#).

### **SCOTUS: Jurisdictional Determination is Final**

The US Supreme Court held, in *Army Corps of Engineers v Hawkes*, that an approved “jurisdictional determination” (JD) as to whether a property has “water of the United States” is a final agency action, subject to judicial review. Such a JD makes the land/water subject to the Clean Water Act (CWA).

Peat mining companies planned to mine peat on their land in Minnesota, for golf courses. In the course of their seeking a Clean Water Act permit, the Army Corps of Engineers (Corps) issued an approved JD stating that the property contained “water of the United States” because its wetlands had a “significant nexus” to the Red River of the North, located some 120 miles away. That JD made peat mining subject to the CWA and its civil/criminal penalties for violations.

The companies challenged the JD in district court, which dismissed, holding the JD was not final agency action. The 8<sup>th</sup> Circuit reversed, and the Supreme Court granted *cert*.

Applying the *Bennett v Spear* analysis, the Court concluded that an approved JD fulfilled conditions that define final agency action under the Administrative Procedures Act. The JD marks “the consummation of the agency’s decisionmaking process,” which the Corps did not dispute. In addition, the “definitive nature of approved JDs also gives rise to “direct and appreciable legal consequences,” thereby satisfying the second prong of *Bennett*.” The Court noted the risk of substantial fines and criminal sanctions arising out of violating the CWA, in rejecting the Corps’ alternative of challenging the JD in the enforcement phase.

### **New Approach on DTW Funding Travel**

In past years, *Dividing the Waters* has been fortunate to have foundation funding to pay for all judges to travel. Next year, the Program plans to ask judges to pay their own travel, but will offer scholarships for travel costs to those with need.

### **2017 Texas Conference:**

### **Last Week of October??**

#### **In Focus:**

#### **Justice Jan Patterson (TX)**

Like any good Texan, Senior Texas Court of Appeals Justice Jan Patterson has long held an interest in water. Born and raised in Austin, she grew up on the Highland Lakes of the Central Texas Hill Country, along the lower Colorado River (the *other* Colorado River). Her father served at the Lower Colorado River Authority. Her grandfather was a rancher. Drought and water issues were a frequent topic in her life and her link to the water community started early.

Patterson’s professional career, however, did not lead directly to water in the West. Instead, after getting her JD from the University of Texas, she headed to New York City for a clerkship and to work for Sullivan & Cromwell. In order to develop her trial skills, she joined the US Attorney’s Office, where she prosecuted organized crime. Eventually she returned to Austin, where she continued prosecuting for the US Attorney. After time in private practice and as a special prosecutor, Texas voters elected her to the appellate bench.

In 12 years on the 3rd District Court of Appeals, Patterson heard a wide range of cases, including water disputes, which she found fascinating. While the 3rd District covers 24 counties in Texas, it also hears all administrative appeals from the Commission on Environmental Quality (TCEQ) and the PUC. Patterson, for example, heard the City of Waco challenge TCEQ approval of the expansion of upstream agriculture, due to the City’s concern for the effect on Brazos River drinking water quality. The Texas Supreme Court also appointed Patterson to the Commission on Judicial Conduct.

*Dividing the Waters* came to Patterson through Justice Greg Hobbs, who she met at NJC. She attended her first DTW conference in Santa Fe in 2006. But the conference she recalls most vividly was the 2007 Science for Judges workshop at the Scripps Institute in California. “Hearing and talking directly to hydrologists and biologists gave me the tools I needed to understand and ask questions about the many water science issues that come before judges, even appellate judges.”

Patterson has taught at the University of Texas and received an MA in Judicial Process from the University of Virginia. Today, she serves as Justice-in-Residence at the Baylor law school, and continues to serve as a senior judge by appointment of the Texas Supreme Court.

**Recent court decision? Something to share? [ALFIII@sbcglobal.net](mailto:ALFIII@sbcglobal.net)**