

## *The Network Note* December 2016

### **Baylor Football Schedule = Tentative Date CHANGE**

Baylor University released its football schedule showing a home game the same week as the next *DTW* conference. Waco hotels said that rooms would not be available. The Program therefore **rescheduled** next year's conference to **November 1-4, 2017** at Baylor – *if funding develops*.

### **WA: Counties Have Duty to Protect Water Resources**

The WA Supreme Court held, in *Whatcom County/Hirst v. W Wash. Growth Mgmt. Hearings Bd.*, that counties have a duty to protect water supplies in land-use plans. It affirmed a state growth management board decision, holding that Whatcom County's "comprehensive plan" did not satisfy state law requirements to protect water availability.

After a 2009 Supreme Court decision, Whatcom County revised its land-use plan and policies to address land-use effects on water supply and quality. Its policies relied on WA Department of Ecology regulations, to allow new development to rely on permit-exempt wells in any area where Ecology had not closed groundwater to new wells. In essence, it assumed water availability if the state had not closed the basin.

Hirst appealed the County's plan to the Western WA Growth Management Hearings Board, alleging that the County's plans and regulations did not protect surface and groundwater resources, as required by the Growth Management Act (GMA). The Board held that the County had violated the GMA because the County – not Ecology – had responsibility to determine the adequacy of water in its land-use decisions and a duty to protect water. The Court of Appeals reversed the Board, holding that it had erroneously interpreted GMA.

The WA Supreme Court reversed the lower court, concluding "the County's comprehensive plan fails to provide for the protection of water resources," as required by the GMA. Reviewing WA water law, including its instream flow rules, the Court held that the County's assumption of available water could impede minimum instream flows. Recognizing links between land-use and water laws, the Court held that both Ecology and Counties had duties to protect water resources.

Three justices dissented, arguing that the majority opinion would require each building permit applicant to prove water availability, which the GMA does not require. Also, requiring counties to determine water availability contradicts state law requiring Ecology to decide on water rights statewide.

### **Preliminary Focus on Texas Groundwater**

In order to invite advice from the *Dividing the Waters* Board of Advisors and the Law School Network, the Conveners recently developed a list of possible topics for next year's conference. The topic list, emphasizing groundwater, can be obtained from the *DTW* Executive Director, [Alf W. Brandt](#).

### **In Focus:**

### **Daniel Birch (CO)**

Not all water adjudicators are lawyers. Colorado Water Court Referee Dan Birch shows that water engineers can effectively resolve water conflicts, as an adjudicator or mediator. Since his 1992 appointment in Steamboat Springs, he has adjudicated nearly two thousand water rights claims.

Birch's career did not start in water. After graduating in geology from University of Colorado and facing the economic downturn in the early 1980's, he returned to school in geotechnical engineering. But he found water much more interesting and got an MS in water resources engineering. A few years after he moved to Steamboat Springs to manage the City's water utility, Water Court Judge Rebecca Kourlis appointed him as Water Referee. Kourlis wanted an engineer, as Yampa River water cases turn more on facts than law.

Colorado's water court referees often require only a part-time commitment, responding as water conflicts arises. Birch developed his referee position to focus on mediating disputes, to simplify and reduce the cost of water conflicts. "Because referee rulings can be protested by any party with the case then going before the judge, I've always looked to enter rulings to which all parties can agree."

While he works a "day job" at the Colorado River Water Conservation District, Birch finds his passion evolving more toward dispute resolution. In the next year, he will transition toward his mediation duties. "I look forward to devoting my complete time and energy helping people resolve water disputes, and in mutually acceptable ways."

While his district Water Court Judge Michael O'Hara regularly participates in *Dividing the Waters*, Birch has not yet attended a conference. "With the change of my focus, I look forward to attending future conferences, meeting people, and sharing in the exchange of ideas and knowledge." He has followed the Program since its inception. Given his mediation experience, Birch signed up to serve, as soon as he read about the mediator referral project in the *Network Note*.

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