

The Network Note June 2016

Dividing the Waters Will Continue Serving Judges with Water Cases

Thanks to the leadership of the *Dividing the Waters* Board of Advisors, the Program succeeded in raising enough money for the Program to continue operating – at a reduced level of service – to the end of this year. Contributions to the Water Justice Fund will allow *DTW* to continue its mission to provide training and information resources to judges overseeing complex water litigation. The Conveners remain committed to their mission, especially for judges new to water conflicts. Discussions with Texas foundations indicated tentative interest in funding the next general conference in 2017 in Waco, Texas, at Baylor University. The water law and science fundamentals course, previously slated for November, will be postponed until adequate funding can be secured.

Idaho: Curtailing Groundwater to Protect Surface Rights

In a series of decisions this year, styled *Rangen v. Idaho Department of Water Resources* (IDWR), the Idaho Supreme Court broadly affirmed IDWR's discretion in curtailing groundwater pumping and approving pumper mitigation plans to protect senior surface water rights.

Rangen operates a fish research and propagation facility on a surface stream in eastern Idaho. Just upstream, water emanates from springs out of a canyon wall and a tunnel constructed high on the canyon rim, extending 300 feet into the canyon wall. Water from the springs and tunnel originates in the Eastern Snake Plain Aquifer (ESPA).

In 2011, Rangen filed a petition for a delivery call, alleging that junior ground water pumping was injuring its 1962 water right. IDWR held hearings on the petition and accepted scientific evidence as to the extent of the connection between the surface stream and the ESPA. In its rulings, IDWR: 1) recognized Rangen's right to divert only at the tunnel (not the springs or the surface stream); 2) curtailed groundwater pumping only within a specified ESPA area delineated by a "Great Rift trim line;" 3) approved a mitigation plan to divert water from a different spring and pumping it to Rangen; and 4) rejected an application for new water rights to mitigate the injury to Rangen's water rights.

In reviewing IDWR decisions, the district court upheld many IDWR decisions. It, however, rejected IDWR's "trim line" limitation on curtailment and overturned IDWR's rejection of the application for a new water right.

The Supreme Court generally affirmed the district court's decisions and IDWR discretion. It approved IDWR limiting curtailment to the specified area, but affirmed the district court overturning IDWR's rejection of the water right application.

Fundamentals Course: *Postponed*

In Focus:

Nathan Bracken (Utah)

Board of Advisors member Nathan Bracken recognized the value of *Dividing the Waters* while serving as General Counsel at the Western States Water Council (WSWC). In 2014, the Executive Director and retired Montana Chief Water Judge Bruce Loble made a presentation on the Program to WSWC, which represents western state water agencies. A few months later, Bracken worked with colleagues to get approval of a WSWC resolution advocating the importance of *Dividing the Waters* and encouraging others to provide funding.

Bracken's first "professional" water experience came as a white-water rafting guide on the Potomac and Shenandoah rivers in Harpers Ferry, not far from where he grew up in Maryland. His interest in water grew when he came west for college at Brigham Young University and law school at the University of Utah. A couple of years after law school, Bracken joined WSWC as its attorney, and his water work expanded. He represented state engineers and water quality administrators from 18 western states, and led many of its legal efforts on water.

In recent years, Bracken has spoken on water issues across the country and testified in Congress. He has addressed topics that often arise in cases adjudicated by *Dividing the Waters* members – exempt wells, water transfers, and tribal water rights. At WSWC, he led multi-stakeholder initiatives to influence federal legislation/policy involving the Clean Water Act, groundwater, and tribal/federal reserved water rights.

In 2015, Bracken left WSWC to join the Salt Lake City firm of Smith Hartvigsen, where his practice focuses on water rights, water quality, energy, public policy, and government relations. Drawing on his training and experience as a mediator, Bracken continues to practice alternative dispute resolution for his clients. He serves in leadership in the ABA Section of the Environment, Energy & Resources, where he currently chairs the 2017 ABA Water Law Conference.

Recent court decision? Something to share? ALFIII@sbcglobal.net