Dividing the Waters Co-Sponsors Colorado ADR Program

The Program is leveraging its limited operating funds by co-sponsoring, with the Colorado Bar, a one-day course on alternative dispute resolution in water conflicts, on October 5 in Denver. The idea arose, in part, out of February meetings with Colorado water law leaders. Justice Greg Hobbs helped organize the course and CA Justice Ron Robie will speak.

9th Circuit: Tribal Fishing Rights & Fish Passage

In a long-running tribal treaty fishing rights case, US v State of Washington, the Ninth Circuit held that tribal treaty fishing rights barred the State of Washington from building or maintaining highway culverts that prevent salmon from migrating up or down the state’s rivers.

In the 1850’s, the Federal Government negotiated treaties with western Washington Indian tribes to acquire tribal lands and waters. The treaties’ “fishing clause” guaranteed “the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory.” For the last century, the tribes and the State have litigated over the scope of these fishing rights, leading to conflicts in the 1960’s.

The United States and the tribes sued the State to enforce the treaties’ fishing rights in 1970. The 9th Circuit previously held that the tribes had a right to 50% of the harvestable salmon, but rejected a general “environmental servitude” to protect fishery habitat. The court left open the possibility that specific facts may lead to state duties to protect tribal fishing rights. In 2001, the tribes asked the court to determine that the state could not impair fish passage to tribal fishing grounds by maintaining highway culverts, which led to this 2016 decision.

Relying on the Supreme Court’s 1908 Winters decision and its own 1983 Adair decision on tribal water rights, the 9th Circuit highlighted the need to consider the treaties’ underlying purpose to protect the tribes’ fishing rights in determining whether the treaties require removal of the culverts. The court rejected the state’s “remarkably one-sided view of the Treaties,” as well as its other arguments on high costs and the Federal Government’s duty to fix its culverts first.

The Circuit affirmed the district court’s order and injunction requiring the State to fix the culverts blocking salmon passage, concluding that fixing the culverts is the “highest priority for restoring salmon habitat” and protecting tribal fishing rights.

October DTW Seminar at Utah Judicial Conference

Requests from Utah judges have led Dividing the Waters to work with the Utah Judicial Educator to develop a half-day seminar on water for the state’s annual Judicial Conference. Convener’s Thorson, Wildman and Joseph-Taylor are working with University of Utah Law Professor Robin Craig to craft a seminar that combines water law and science. This project offers a glimpse into the Program’s future, offering states specialized programs, while maintaining the general conference that brings together judges from many states.

In Focus: Judge Pattie Swift (Colorado)

Colorado District Judge Pattie Swift started judging before she finished law school at the University of New Mexico in 1989. As a resident of Costilla County, she qualified as a county court judge under the Colorado Constitution, without need for bar membership.

After three years at St John’s College in Maryland, Swift had moved west and finished college at the Santa Fe campus. She met and married a native plant seed producer who had deep roots in Costilla County. She moved to Jaroso, Colorado, and a water case followed not long after. Before she heard her first water case as a judge, Swift applied to the water court to change her family’s conditional water rights.

Swift moved up to the state district court in 2003, but her career as a water judge had to wait. Sadly, the catalyst for her doing water cases came with the 2009 death of a close colleague, the district court water referee. The next year, she accepted duties as the water referee, when a budget crunch did not allow hiring of a successor. In 2011, Chief Judge John Kuenhold (also a DTW member) retired and Swift succeeded him as Chief Judge and the Water Judge in Alamosa, where she now lives with her husband.

Swift has participated in several Dividing the Waters programs and appreciates the opportunity to understand how other states adjudicate water. “The Program is invaluable to my work, not so much for hearing from other Colorado judges, but for the broader perspective on how other states adjudicate water conflicts. I’ve been surprised by how much we share. We may have different water law, but the conflicts often raise similar issues.” She takes that broader perspective back to Colorado, where the Supreme Court has affirmed her recent opinions on groundwater management and small hydropower.