

**MINUTES
of the
LEGAL COMMITTEE
Holiday Inn Conference Center
Helena, MT
July 17, 2014**

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MEMBERS AND ALTERNATES PRESENT

ALASKA	David Schade
ARIZONA	Bill Staudenmaier
CALIFORNIA	Betty Olson Jeanine Jones Tom Howard
COLORADO	Trisha Oeth
IDAHO	John Simpson
KANSAS	Greg Foley
MONTANA	Jay Weiner Alice Stanley Tim Davis John Tubbs
NEBRASKA	Jim Schneider
NEVADA	Roland Westergard
NEW MEXICO	Scott Verhines
NORTH DAKOTA	Jennifer Verleger
OKLAHOMA	J.D. Strong
OREGON	Racquel Rancier
SOUTH DAKOTA	Kent Woodmansey

TEXAS

Carlos Rubinstein
Toby Baker
Curtis Seaton

UTAH

Walt Baker
Eric Millis
Norm Johnson

WASHINGTON

Stephen Bernath
Buck Smith

WYOMING

Pat Tyrrell
Chris Brown
Kevin Frederick
Philip Stuckert

GUESTS

Alf Brandt, National Judicial College, Reno, NV
Hon. Bruce Loble (ret.), Bozeman, MT
Jim Pena, USDA Forest Service, Washington, DC
Rob Harper, USDA Forest Service, Washington, DC
Carlee Brown, Western Governors' Association, Denver, CO
Larry Kramka, Houston Engineering, Fargo, ND
John Hagengruber, U.S. Forest Service, Helena, MT
Doug Kluck, National Oceanic and Atmospheric Administration, Kansas City, MO
Veva Deheza, NOAA/NIDIS, Boulder, CO

WESTFAST

Lee Koss, Bureau of Land Management, Washington, DC
Jean Thomas, U.S. Forest Service, Washington, DC
Becky Fulkerson, U.S. Bureau of Reclamation, Washington, DC
Eric Stevens, WestFAST Liaison, Salt Lake City, UT
Patrick Lambert, U.S. Geological Survey – Incoming WestFAST Liaison, Salt Lake City, UT

STAFF

Tony Willardson
Nathan Bracken
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

Norm Johnson, Vice-Chair welcomed those in attendance at the meeting.

APPROVAL OF MINUTES

The minutes of the meeting held in Arlington, Virginia in April, were moved for approval. The motion was seconded. The minutes were unanimously approved.

SUNSETTING POSITION

Sunsetting Position No. 331, Opposing Preemption of State Water Law in Federal legislation was moved to be readopted, seconded and approved for re adoption.

PROPOSED RESOLUTION ON FEDERAL RULES, REGULATIONS, DIRECTIVES, ORDERS & POLICIES

The Committee discussed a proposed policy statement urging early state consultation in the development of federal rules, regulations, directives, orders, and policies. The resolution responds to the lack of state consultation in the development of recent federal policies and rules, including but not limited to the groundwater directive from the U.S. Forest Service and the Clean Water Act (CWA) jurisdiction rule from the Environmental Protection Agency and the U.S. Army Corps of Engineers. WSWC staff developed the initial draft at the request of the Executive Committee, but not until after the WSWC had provided its members with the 30-notice outlining the proposed that would be considered at the meetings. Therefore, under the WSWC's rules of organization, unanimous consent would be required for the WSWC to consider the policy.

A motion to consider the resolution was made, a second was offered, and the motion passed unanimously.

Pat Tyrrell of Wyoming noted that his governors' office had requested a number of edits to shorten and condense the policy. Norm Johnson of Utah also noted that Wyoming's edits only reference the Clean Water Act and that the policy should be broadened to include other acts. Pat suggested taking out the relevant "WHEREAS" clause. Racquel Rancier from Oregon agreed.

Chris Brown with Wyoming also mentioned that the 2nd "WHEREAS" clause should have an "and" after the semicolon; that the 5th "WHEREAS" clause should capitalize "states;" and the last "WHEREAS" clause should state: "water quantity and management."

Tony noted that the original draft included language regarding WestFAST that Wyoming's edits had removed. The Executive Committee had originally requested this language in order to support WestFAST as a means of furthering state-federal collaboration. It stated:

“WHEREAS, a Western Federal Agency Support Team (WestFAST) now comprised of twelve water-related federal agencies was created pursuant to a recommendation of the Western Governors' Association and Western States Water Council to foster cooperation and collaboration between the federal agencies and States and state agencies in addressing water resource needs; and

Pat said Wyoming did not have any objection if the language was included. The other WSWC members agreed.

A motion to recommend that the WSWC adopt the policy with the requested edits was made, a second was offered, and the motion passed unanimously.

U.S. FOREST SERVICE GROUNDWATER MANAGEMENT DIRECTIVE

Jim Peña, Associate Deputy Chief of the National Forest System (NFS), discussed the Forest Service's proposed Groundwater Management Directive. Jim said the directive is not a rule or a CFR and is intended to be an internal guidance document that will create a comprehensive direction for the agency's management of groundwater on NFS lands.

Jim then made a few clarifications. First, he said the directive does not seek to interfere with state groundwater allocation. Instead, the Forest Service will inventory uses and monitor effects. The agency oversees a number of activities that impact surface and groundwater, such as proposals to develop geothermal sources. As a result, the directive is intended to ensure the agency has control over activities on NFS lands.

Second, he said the directive will not change or expand Forest Service authority over surface water users. Instead, the directive is intended to provide consistency regarding existing activities. The Organic Act established the National Forest Service and delegated broad powers to the Secretary of Agriculture to protect surface resources on NFS lands. It is the Forest Service's responsibility to manage these resources in the public interest. When someone seeks permission to do something on NFS lands, that is an occupation of NFS lands, which has led to lawsuits that have been filed against the agency that have for not carrying out its Organic Act authority to protect federal resources. A water right is not a right to occupy federal lands and the federal government has not ceded all of its authority to the states. There is some overlap.

Third, Jim said the directive does not impose new conditions on oil and gas development, noting that some of the concerns that have been raised on this point refer to hydraulic fracking. He explained that states and other federal agencies regulate many of the aspects associated with oil and gas activities, but that the Forest Service does need to analyze oil and gas scenarios, which may include an analysis of possible impacts to groundwater.

Fourth, Jim said that it was a coincidence that the directive came out around the same time as the proposed CWA rule, noting that the Forest Service has been developing the directive since 2007.

Next, Jim discussed language in the directive that would instruct the agency to assert reserved rights claims to groundwater in state general stream adjudications and other state administrative proceedings. Jim said that not every state recognizes the Forest Service's reserved rights but said the agency has affirmative responsibilities to manage groundwater. Moreover, he said the NFS lands serve as a source of drinking water for one of every three Americans. Part of the ecosystem cycle on NFS lands is groundwater.

Jim then explained that the directive is intended to help the Forest Service do the best job it can but that the agency cannot fulfill its mission without the partnership of the states and others. For instance, he states have the ability to do things the agency cannot with respect to water quality, particularly mining. He also urged the WSWC to read through the directive and not just the *Federal Register* notice, stating that the directive has more nuance.

Lastly, Jim addressed the states' concern about not being consulted before the directive was published for public comment, explaining that it is a proposal and that the agency has a fair amount of latitude and can make chances. While public comments on the directive were originally due on August 4, Jim said the Forest Service extended the public comment period by an additional 30 days. In addition, he said the Forest Service is working on a response to a letter the Western Governors' Association sent the agency in June, which requested answers to a series of specific questions regarding the directive.

Pat Tyrrell said the WSWC has been frustrated with the number of federal actions that have been developed and proposed without significant state involvement and consultation, which treats the states as commenters rather than as sovereigns. Pat also said Wyoming does not understand the legal basis and need for the directive's instruction that the Forest Service comment on water rights applications that pertain to non-federal lands that are adjacent to NFS lands. Pat explained that it is unclear under Wyoming law how the Forest Service would receive notice and what the standard of review would be, thereby raising concerns that the directive is "casting lines" into the state's business. Lastly, Pat noted that Wyoming has a memorandum of understanding with the Forest Service, which could be a model for the agency to follow in addressing its needs with other states given the states differing laws.

James said other western states do have notification processes and that the federal government would like to be involved, "just like any other landowner." Currently, the agency has an inconsistent process that they would like to make more consistent.

J.D. Strong asked why the Forest Service consulted with the tribes, but did not consult with the states, noting that consultation that takes place after a proposed policy has been published is not relevant. James explained that they began consulting with the tribes when the Forest Service published the rule for public comment and that the agency is willing to speak with the states.

J.D. also expressed concern with language in the directive, as well as other federal policy proposals, which state that the directive will not impact states and therefore do not trigger state consultation under Executive Order 13132.

James explained that the Forest Service does not believe that the directive will impinge on state authority and asked for examples.

J.D. explained that Oklahoma regulates groundwater and surface water separately, but that the directive could create potential conflicts by presuming that groundwater and surface water are connected unless proven otherwise. J.D. also asked if the Forest Service would make the assumption when evaluating uses on adjacent lands.

James said that the assumption would not matter for adjacent land determinations because those decisions would be made pursuant to state authority.

Norm Johnson asked if the Forest Service envisions any situations in which the agency would condition or withhold a special use permit because it has a different perspective than the state administrative body. Norm also indicated that this is a concern that has been expressed in Utah.

James said the directive does not create any new authority and that the Forest Service makes these types of determinations now, noting that a water right does not automatically grant access to federal lands.

Tony asked about how the directive would address situations in which the water rights precede the creation of a National Forest, similar to an in-holding.

James explained that these eventualities are not covered by a manual in every instance and create the potential for litigation. He also said that these uses were created during a different time and that the Forest Service needs to evaluate these uses in the context of today's reality. Consequently, he said that both states and the Forest Service will be "better off" if they can collaborate on these types of issues.

Stephen Bernath said Washington's water quality and water quantity staff have reviewed the directive and see it as an opportunity to work closer with the Forest Service.

Lastly, James said Forest Service Chief Tom Tidwell wants to finalize the directive but that they agency has only heard so far from those entities that oppose the proposal. The Forest Service has not heard from the environmental community.

DISCUSSION OF POSSIBLE WSWC COMMENTS REGARDING FOREST SERVICE GROUNDWATER MANAGEMENT DIRECTIVE

Nathan explained that the WSWC had prepared a “strawman” letter setting forth possible comments for the WSWC to submit on the directive. The draft letter is based on comments provided by the WSWC’s member states as well as congressional testimony that Pat gave earlier during the summer before the House Agriculture Committee. However, since the WSWC knew that the Forest Service would speak at the Legal Committee meeting regarding the directive, it was agreed to wait until after that presentation to discuss the letter.

In addition, Nathan explained that the draft asks the Forest Service to withdraw the rule and to work with the WSWC and its states to address the agency’s water needs. However, he noted that the WGA sent its letter to the Forest Service after he had prepared the draft. As a result, Nathan questioned whether the WSWC could send a letter requesting the directive’s withdrawal when the WGA is still awaiting answers to its questions.

After some discussion, the Committee decided to continue consulting with the Forest Service and wait until the agency responds to questions the WGA has raised about the directive before taking action on the proposal.

DIVIDING THE WATERS INITIATIVE

Alf Brandt gave an overview of the Dividing the Waters Initiative (DTW), where he serves as Executive Director. The Initiative provides training and resources to judges who preside over complex water litigation. Alf also noted that the Initiative’s funding source is set to expire in the next few years and urged WSWC members to consider ways to help support the program.

Former Montana Water Judge Bruce Loble joined Alf in discussing the value of the Initiative for judges.

Alf then asked member states about their recent experience.

Tom Howard testified about the value of DTW, saying that other states would find it very useful.

Norm noted that Utah’s district court judges handle a range of cases, which means that some understand water and others do not. He also noted that he submitted the name of a judge last year and found the Initiative to be “incredibly helpful.”

Chris Brown described a recent experience with a special master who understood water, but did not understand the evidentiary rules given a limited amount of litigation experience.

Alf suggested that the WSWC consider having a discussion at the next quarterly meeting to discuss whether there is something it can do to help the DTW secure the funding it needs to continue so that it does not go away.

The Committee agreed to discuss possible action regarding DTW during its fall meetings in Scottsdale, Arizona, on October 8-10.

FY 2014-2014 WORKPLAN

Nathan Bracken discussed the Committee's proposed workplan for 2014-2015. He reported that the Committee had discussed an earlier draft at the WSWC's spring meetings in Arlington, Virginia, and that the WSWC would need to adopt the workplan at this meeting. He also noted that two sections of the workplan had been left black pending the results of a workshop on federal-non-tribal water rights claims that the WSWC and WestFAST held earlier in the week before the WSWC's meetings. In light of the workshop, Nathan suggested that the workplan be revised to state:

The Committee will work to carry out the recommendations and next steps that emerged from the workshop. Namely, the Committee will work with WestFAST to develop a workgroup of state and federal experts to guide the development of the clearinghouse. Under the direction of the Committee, the workgroup will hold calls on a quarterly basis to discuss the development of the clearinghouse and to serve as a forum for information sharing and relationship building. The Workgroup will also advise the Committee about potential future actions the WSWC and WestFAST may take to address federal water needs and may hold webinars on specific topics of interest, where appropriate.

Next, Nathan noted that the workplan included a "placeholder" for Committee action on the U.S. Forest Service's proposed groundwater directive. In light of the Forest Service's earlier presentation on the directive, Nathan suggested that this portion of the workplan include the following directive:

The Committee will review and monitor this issue, developing comments for the WSWC to consider where appropriate, and working to support the WGA's efforts. The Committee will also work to support any comments or positions the WSWC may adopt.

A motion to adopt the workplan as amended was made and a second was offered. The motion passed unanimously.

MONTANA INDIAN WATER RIGHTS SETTLEMENT UPDATE

Jay Weiner agreed to forego his presentation for the sake of time.

U.S. ARMY CORPS OF ENGINEERS SURPLUS WATER UPDATE

Jennifer Verleger provided an update on the U.S. Army Corps Engineers's surplus water rulemaking efforts. She mentioned that Nathan prepared a summary of the WSWC's and WGA's actions on this issue, which is located under Tab U of the briefing books.

Jennifer said Lewis Jones, an attorney with King and Spaulding in Atlanta who is working on issues involving Lake Lanier, has contacted the WSWC about the possibility of identifying common areas between the eastern and western interests regarding the rulemaking. Lewis is particularly concerned about the possibility that the rulemaking may affect state water allocation decisions, which is also an issue in Atlanta.

Nathan mentioned that several Council members participated in a recent conference call with Lewis, and that there do appear to be some areas of common interest, particularly with respect to the need to ensure that the rulemaking does not impair state water allocation authority. Nathan asked if there were any concerns if the Committee continued having discussions with Lewis to better understand the eastern issues at stake. No objections were raised.

LEGISLATION AND LITIGATION UPDATE

Nathan agreed to forego the update for the sake of time and referred the Committee to his written update in the briefing books.

OTHER MATTERS:

There being no other matters, the meeting was adjourned.