

**MINUTES
of the
LEGAL COMMITTEE
Bluemont Hotel
Manhattan, Kansas
October 8, 2015**

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MEMBERS AND ALTERNATES PRESENT

ALASKA	David Schade
ARIZONA	--
CALIFORNIA	--
COLORADO	--
IDAHO	Jerry Rigby
KANSAS	Tom Stiles David Barfield
MONTANA	--
NEBRASKA	Jeff Fassett Jim Macy
NEVADA	--
NEW MEXICO	Greg Ridgley John Longworth
NORTH DAKOTA	Jennifer Verleger
OKLAHOMA	--
OREGON	--
SOUTH DAKOTA	--
TEXAS	Robert Mace

UTAH

Eric Millis
Walt Baker
Norm Johnson

WASHINGTON

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WYOMING

Pat Tyrrell
Chris Brown
Kevin Frederick

GUESTS

Ginger Harper, Kansas Water Office, Topeka, KS
Andy Ziegler, U.S. Geological Survey, Lawrence, KS
Carmel Walters, U.S. Forest Service, Washington, DC
Jason Armbruster, U.S. Forest Service, Washington, DC
Paul Blanchard, Northwest Pipe Company, Vancouver, WA
Laura Chartrand, Western Governors' Association, Denver, CO
Robert Large, Kansas Department of Agriculture, Manhattan, KS
Wendy Grady, Kansas Department of Agriculture, Manhattan, KS
Shaun McGrath, U.S. Environmental Protection Agency, Denver, CO
Millie Heffner, MT Dept. of Natural Resources and Conservation, Helena, MT

WESTFAST

Patrick Lambert, Federal Liaison, Murray, UT
Jean Thomas, U.S. Forest Service, Washington, DC
Anita Thompkins, U.S. Forest Service, Washington, DC

STAFF

Tony Willardson
Michelle Bushman
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

Jennifer Verleger, Chair of the Legal Committee, called the meeting to order.

APPROVAL OF MINUTES

The minutes of the meeting held in Stateline, Nevada on July 9, 2015 were moved for approval, seconded and passed unanimously.

SUNSETTING POSITION

Postion No. 348 – regarding states’ water rights and natural flows. Norm moved for re-adoption. There was a second and it passed unanimously.

On a related note, Lewis Jones from Georgia has been putting together a workgroup of people interested in water supply issues with the Corps of Engineers projects. We can send out more information. They are trying to hold this meeting the first week in December. We will know more as the time draws closer. Let us know if you are interested and want information.

Jennifer Verleger asked that she and J.D. Strong be kept in the loop, and Kent Woodmansy expressed interest as well.

U.S. FOREST SERVICE UPDATE

Anita Thompkins, Assistant Director for Watershed and Aquatic Resources, U.S. Forest Service (FS) provided an update on the withdrawn proposed groundwater directive.

When the proposed directive was published for public comment in May 2014, without collaboration, and in the political environment of EPA’s water of the United States rule, there was a perception that the Forest Service’s proposed directive was a federal water grab. Based on comments from Decemeber 2014, the FS Chief did a re-proposal of that groundwater directive, and the Forest Service went back to the drawing board in an effort to collaborate. We were trying to understand what the issues and concerns were, what language we were using that triggered concerns for the states. The WSWC met with the FS in Denver in February 2015, and put together a red-lined version of the comments on the withdrawn groundwater directive. In June 2015, the FS withdrew the directive to do more collaboration with external stakeholders and to better explain the FS intent.

She referred to Laura Chartrand’s earlier idea of creating a template that the federal agencies could use to communicate with each state, to assist the agencies in involving the appropriate people on behalf of each state.

An internal FS group went through all of the comments from the states and other entities, collaborating internally to dissect information and understand how best to propose a new directive. They put together an iternal strawman document that started out at 44 pages long and has since been reduced to 33 pages. They are continuing to work on the document, running it by

R&D and the lawyers, making sure that the document still meets the internal intent of the FS. From that point the FS will do external outreach on the strawman draft to see if there are any concerns. This would not be a Federal Registry process, and could take several months. Then the document will go to senior FS management for approval, which may depend in part on the political climate at the time the new proposed groundwater directive is sent up to senior management. If approved, the proposed directive would then be published for comment in the Federal Register.

She thanked the members for letting the FS know that they needed to listen to the states, and what specific language triggered concerns.

Norm Johnson: A lot of people in Utah really appreciate your taking this directive back for more work, and that you listened.

Jerry Rigby: I also wanted to say thank you, especially since our meeting in Denver. If those comments were well received and incorporated into the development of the new document, I am encouraged.

David Schade: We have two forests in Alaska. The FS staff were already quoting the proposed groundwater directive document, even though it was still a proposal, before it was withdrawn. We appreciate the withdrawal. If you don't understand what we said, please feel free to contact me to ask questions.

Jean Thomas, National Water Rights Leader, Forest Service next provided an update on the ski area water rights clause.

Possessory interest regulations for activities permitted on FS lands, such as land permits for grazing and other programs that someone else has a permit to run, usually require the FS to have the water rights in the name of the United States. Ski area water rights have not been managed that way for a long time. There are different situations that require different permits, such as water rights that have a point of use diversion outside the ski area boundary, or points of use with some use on non-FS lands that are owned or leased and they get water from wherever they can get it.

For many years the FS had acquired some water rights, or had contracts, leased water rights, or held joint ownership of water rights. Recently, the FS attempted to write a water rights clause in the permit. APA requires the FS to publish its regulations and directives in the *Federal Register*. When they released the FS clause for ski areas, it was the first time a permit clause had been published for comment. In addition to receiving many comments, the FS was sued by ski area associations. The ski area associations were concerned about a requirement to get a water right specifically for the FS permit, and limiting the use of the right for FS ski areas, which would drive down the value of those water rights. The FS went back to work on how they could have water rights on the national forest lands and talk about how they should be handled on the forest without talking about the water rights.

For a ski area permit, the permittee must assure that: (1) they have access to water rights for operation within the boundary of the ski area on FS land; and (2) there is a sufficient quantity of water to run the ski area. If the diversion is on NFS lands, it has to be primarily for the ski area. If they have a permit that is for condos or for other purposes, it is not related to the ski area program and requires a different permit. They are not talking about water right ownership anymore in their clause, or saying who has to have the water right. But they need to know if water rights are used for the ski area. There is language about if there is a different permittee running a ski area, the new permittee has the right of first refusal. The FS agreed on selling the water rights at market value.

The final clause is entirely different than when it first came out. The conversations were occurring daily. The Chief really wanted to get this done due to the threat of Tipton's Water Protection Act; the FS wanted to control the terms and conditions. The last couple of months, the clause was handled by the Chief, the recreation director and the lawyers. Jean understands that this has now gone to the Office of Management and Budget so it can be published in the Federal Register.

WSWC/NARF SYMPOSIUM UPDATE

Michelle Bushman, WSWC Legal Counsel, provided an update on the the WSWC/NARF Symposium on the Settlement of Indian Reserved Water Rights Claims held in Reno, Nevada in August.

The Pyramid Lake Paiute Tribe hosted the symposium following recent legislation passed regarding the transfer of ranch water rights. One of the topics discussed was the Truckee River Operating Agreement, P.L. 101-618. Jason King, the Nevada State Engineer noted that the settlement process took 102 years. The state, tribe, and federal parties have monthly meetings to make the TROA implementation work smoothly, particularly so the water can be diverted to where it is needed at the right times.

In February 2015, Representative Rob Bishop of Utah sent a letter to DOI and DOJ regarding information that must be submitted to Congress to provide a pathway to settlement authorization following the 2010 ban on earmarks. Briefly, if the agencies show compliance with the Criteria and Procedures (55 FR 9223). Kiel Weaver, Majority Staff, House Natural Resources Subcommittee on Water, Power and Oceans attended the symposium and reviewed the letter. He acknowledged that each of the settlements are unique, and indicated that the letter was a set of guidelines with some wiggle room that could accommodate the practicalities of different settlements. The impact of the Bishop letter on the settlements process was addressed by several of the presenters, noting that the dynamics of settlement authorization have changed, meaning that settlement legislation will probably need to be introduced in the Senate first and then go to the House, and Congressional/Administrative support may need to be enlisted closer to the front end of the settlement process. The Bishop letter also effectively gives OMB veto power, which raised concerns from several of the presenters.

The presenters who had already been through the settlement process shared the knowledge and wisdom they gained through the sometimes painful process. They emphasized collaboration, and the importance of bringing everyone to the table, even if they don't have water or money to contribute. This way they cannot say they were never contacted nor allowed to contribute. With respect to congressional authorizations, they recommended developing coalitions with non-traditional groups and industries with overlapping interests (for example, drought). On the technical support for settlements, they suggested identifying the scope of the settlement from the beginning, because a lot of time and resources can be wasted when everyone has to start over because the scope of the settlement changes. Ongoing education and public relations are very important. There are many members of Congress that are unaware of the widespread concerns over unquantified senior tribal water rights across the West, that this is more than just a local problem, and that we have 3rd world conditions for tribes (videos of the Navajo Water Lady and the Tule River Tribe) living within our nation's borders without access to adequate water. The education process must be an ongoing one given the high rate of turnover.

There are 566 tribes, and only 33 settlements completed so far. Not all of the federally-recognized tribes are located in areas where federal reserved water rights are a concern. There are 19 active Indian water rights settlement negotiations going on right now. There are three settlements pending authorization before Congress right now: Blackfeet (S.1125), Pechanga (S.1983), and Klamath (S.133). Legislation for the completed Utah-Navajo settlement is expected to go before Congress in the near future.

Tony passed around a copy of a letter sent to the President requesting permanent funding in the 2017 budget. The letter was copied to OMB, CEQ, and the White House.

Tony mentioned this was one of the Secretary's Legacy requests. We are hoping and expecting that his list will include permanent funding for settlements. Norm is working with Senator Hatch's office. We hope to get enough support that it will be in the President's FY17 request.

WSWC/WESTFAST FEDERAL NON-TRIBAL WATER RIGHTS WORKGROUP

Pat Lambert, WestFAST Liaison, provided an update on the Non-Tribal Water Rights Workgroup. One of the action items from the 2014 meeting in Helena was to create a clearinghouse. There are about 40 documents from the various states and federal agencies now placed on a Google drive. We need to make that data set searchable, so we are pulling out searchable words.

Jean introduced Jason Armbruster, who is a Presidential Fellow who will be helping out with the effort of the data and making the documents searchable.

At the Helena meeting we identified issues and topics for additional focus for a webinar series. On November 10, WSWC and WestFAST will host a McCarran Amendment webinar that

will include speakers from both state and federal sides, including the Utah Attorney General's office and the Department of Justice. The McCarran Amendment has been a point of confusion for many folks on the state and federal sides as they bring their varying view points to negotiations.

WOTUS LITIGATION UPDATE

Committee Chair Jennifer Verleger discussed the Waters of the United States (WOTUS) rule, which was released the end of June, and the many subsequent cases challenging the rule that were filed in various federal district and circuit courts. The multi-jurisdictional panel should rule fairly quickly on whether to consolidate the various district court cases. At the district court level, several judges have deferred to a decision by the circuit courts on whether they have jurisdiction. The North Dakota District Court has ruled that it has jurisdiction and issued a stay for the 13 states that are part of its case. At the appellate court level, where many of the cases have been consolidated, the 6th Circuit is expected to make a decision on whether it has jurisdiction, with oral arguments scheduled for the beginning of December. The 11th Circuit may rule before the 6th Circuit rules.

Question/Answers:

Walt Baker: Which judge ruled whether it is a permitting issue or not.

Jennifer: The appellate court

Walt: I'm interested in the 404 permitting program. If there was not a permit involved, there is probably no reason for anyone to be interested.

Jennifer noted that Wyoming has been very helpful on this issue.

ENDANGERED SPEICES ACT LITIGATION UPDATE

Tony Willardson provided some background for the Endangered Species Act, 16 U.S.C. Section 1531(2)(c)(2), which declares the policy that "federal agencies shall cooperate with state and local agencies to resolve water resources issues in concert with conservation of species." WSWC was instrumental in getting this language included in the Act in 1982, although the language WSWC drafted was ultimately reversed, as WSWC wanted to emphasize the greater importance of water resource issues over endangered species conservation. In 1982, ESA issues and water rights conflicts was a lively issue with a lot of discussion. The inclusion of this policy position helped NOAA and others to work through the U.S. Fish and Wildlife Service.

Michelle Bushman reviewed a recent 9th Circuit case, *Bear Valley Mutual Water Co v. Jewell*, where petitioners are seeking amicus briefs in support of certioran from the Supreme

Court. The case deals with critical habitat designations and an interpretation of whether ESA section 2(c)(2) is merely a non-operative statement of policy. The petitioners are arguing a circuit split based on the decisions in *Catron County v. FWS* (10th Cir. 1996) and *Cape Hatteras v. DOI* (D.C. Cir. 2004). Amicus briefs are due by October 26, 2015. Interested states may contact David R.E. Aladjem via email: daladjem@downeybrand.com.

We believe this case ought to be important to the WSWC.

Chris Brown: WY does not like the 9th Circuit decision. We like the 10th Circuit decision. There's a concern that if we advocate for the 10th Circuit decision, we might lose and be stuck with the 9th Circuit ruling, which doesn't currently apply to us. Right now we will probably just watch.

Tony: We had an inquiry from AZ as to whether they are writing a brief.

Greg Wilkinson: Pacific Legal Foundation will offer a brief.

They are hoping for three amici briefs. They are not sure of what the stand of the California AG's office is. Tony noted that the Council helped on the Rock Creek Case.

WATER TRANSFERS LITIGATION UPDATE

Michelle Bushman provided a summary of the 9th Circuit's recent *ORNC Action v. Reclamation* decision. Rather than addressing the EPA's water transfers rule (40 CFR 122.3(i)), the 9th Circuit affirmed the lower court's decision on separate grounds. It held that the Bureau of Reclamation was not required to obtain CWA 402 permit for waters transferred through a drain as part of the Klamath Irrigation Project by determining that the "meaningfully distinct" test applied because "no pollutants are added to a body of water when water is merely transferred between different portions of that water body," citing *South Florida Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 112 (2004), *L.A. County Flood Control Dist. v. NRDC*, 133 S. Ct. 710, 713 (2013).

LEGISLATION AND LITIGATION UPDATE

Michelle Bushman highlighted some of the notable legislation and litigation developments since our last meeting in Tahoe. The New Mexico Navajo Water Settlement Technical Corrections Act (S. 501) was signed into law on 9/30/15, Pub. L. 114-57. The House passed the Western Water and American Food Security Act (H.R. 2898) on 7/16/15, which acknowledges longstanding authority of states and prohibits agencies from interfering with rights and obligations of states in "evaluating, allocating, and adjudicating" waters of the state, surface/groundwater, including water flowing from land owned or managed by the federal government.

New legislation introduced since the last update includes the Yakima River Basin Water Enhancement Project Phase III Act (S. 1694), which amends Pub. L. 103-434, regarding water management improvements in Washington; the Drought Recovery and Resilience Act (S. 1837) (Sen. Boxer-CA); and the California Emergency Drought Relief Act (S. 1894) (Sen. Feinstein-CA)

In *Catskill Mountains v. EPA*, regarding the EPA Water Transfers Rule, oral arguments scheduled for December 1. In *Wyoming et al. v. BLM*, regarding the BLM Hydraulic Fracturing Rule, a nationwide preliminary injunction issued September 30. By request at the last meeting, *Texas v. New Mexico* and *Aransas Project v. Shaw* were added to the Legislation-Litigation Update table, with no new developments in either case since our last meeting.

OTHER MATTERS

David Schade mentioned an Alaska National Interest Lands Act lawsuit about Mr. Sturgeon driving a hovercraft on state lands, the state-owned Nation River in the Yukon-Charlie. It has been appealed from the 9th Circuit to the Supreme Court, #14-1209. There is a nexus issue argument about state v. federal ownership and control of the water. Certioran has been granted, and both Sturgeon and the State of Alaska are briefing the issue. Sturgeon was a state forester who knew how to not get into trouble, so he handled every step correctly when he was stopped by the Park Service.

Tony asked, given the Council's interest in ESA section 2(c)(2), is there any interest in filing an amicus brief in support of the petition for cert for the *Bear River Valley Mutual Water Company v. Jewell* case. There was no affirmative response.

There being no other matters, the meeting was adjourned.