

MINUTES
of the
LEGAL COMMITTEE
Doubletree by Hilton Sonoma Wine Country
Rohnert Park, California
June 28, 2017

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MEMBERS AND ALTERNATES PRESENT

ALASKA	David Schade
ARIZONA	Einav Henenson
CALIFORNIA	Jeanine Jones
COLORADO	John Stulp Patrick Pfaltzgraff
IDAHO	Jerry Rigby
KANSAS	Tracy Streeter
MONTANA	Jan Langel
NEBRASKA	Jim Macy
NEVADA	Roland Westergard
NEW MEXICO	Greg Ridgley
NORTH DAKOTA	Jennifer Verleger
OKLAHOMA	Jennifer Wigal
OREGON	Tom Byler
SOUTH DAKOTA	Kent Woodmansey
TEXAS	Jon Niermann
UTAH	Norm Johnson Eric Millis
WASHINGTON	--

WYOMING

Pat Tyrrell
Steve Wolff
Chris Brown (via phone)

GUESTS

David Moon, The Water Report, Eugene, OR
Rod Walston, Best, Best and Krieger, Walnut Creek, CA
Dave Mitamura, U.S. Army Corps of Engineers, Austin, TX
Christopher Estes, Chalk Board Enterprises, Anchorage, AK (via phone)
Mike Gallagher, Washington State Department of Ecology, Olympia, WA
Gary Lippner, California Department of Water Resources, Sacramento, CA
Amardeep Singh, California Department of Water Resources, Sacramento, CA

WESTFAST

Roger Pierce, Federal Liaison, Murray, UT
Roger Gorke, U.S. Environmental Protection Agency, Sacramento, CA (via phone)

STAFF

Tony Willardson
Michelle Bushman
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

Jennifer Verleger, Chair of the Legal Committee, called the meeting to order, and requested introductions be made around the room.

APPROVAL OF MINUTES

The minutes of the meeting held in Nebraska City, Nebraska on April 13, 2017, were unanimously approved.

U.S. ARMY CORPS OF ENGINEERS WATER SUPPLY RULE

Jennifer noted that the WSWC comment letter in Tab Q was submitted to the Corps. The comment period was extended to August 19, but most of our states have already submitted comments. The National Water Supply Alliance sent out an email today that it has been formally created. For anyone interested in joining, the membership fees are \$5,000 for full members, and affiliate members are \$2,500. NWSA has been good to work with. There aren't many states involved, more local water supply entities, but it's good to get more than just western states involved in this issue. We'll wait and see what happens with the proposed rule when the comment period deadline actually closes.

AGUA CALIENTE CASE: RESERVED RIGHTS TO GROUNDWATER

Rod Walston, Of Counsel, Best, Best and Krieger, provided an update on the *Agua Caliente v. Coachella* case, regarding the 9th Circuit's "interesting" application of the reserved water rights doctrine. The Aqua Caliente Indian Tribe, located on a checkerboard reservation created in the 1870s, brought a suit claiming that it has a reserved right to groundwater. The Supreme Court has never applied reserved water rights to groundwater. In 1976, the Supreme Court faced the question in *Cappaert v. United States* over the Devil's Hole Monument, but declined to apply the doctrine to groundwater.

The reserved water rights doctrine initiated with *Winters v. United States* (1908). The Fort Belknap Tribe in Montana had no source of water because all the water was appropriated in a prior appropriations system. The Court assumed that Congress intended to set aside enough water for the tribes when it set aside the Indian reservations to fulfill the purposes of the reservation. The Supreme Court expanded the federal power under the reserved rights doctrine to include all federal lands in *Arizona v. California* (1963). In 1978 the Supreme Court limited the scope of the doctrine *U.S. v. New Mexico*, to only apply to the primary purposes of the reservation. Secondary purposes must obtain a state-based right.

In addition to holding that the tribe now has a reserved right to groundwater, the 9th Circuit also went beyond New Mexico's requirement that the water be necessary to fulfill the primary purposes, looking instead at whether a reservation purpose envisions the use of water. This is a very broad standard, which could give every federal reservation an automatic reserved water right to surface and groundwater, because every reservation can envision the use of water to accomplish its purposes. It is beyond the limits of any other court decision.

The water districts are preparing to file a petition for a writ of certiorari by July 5, and amicus briefs will be due 30 days later. Rod noted some potential amicus filers that the states could sign on if interested. As far as he knew, WGA was not planning on filing anything, but he thought the Western Attorneys General were working on an amicus brief.

Norm Johnson: When are the briefs due? The western states will likely want weigh in.

Rod: The date will show up on the court's website, but will be due 30 days after the petition is docketed. The case has a particular impact in the West.

Chris Brown: I suspect it will not be WAGLAC, but Michaeline from NV is working on drafting a brief. We have talked about how to come up with a uniform position. WY is considering the effort with NV. We are also considering a state specific brief.

Michaeline (NV): It is not WAGLAC, but NV is circulating an amicus brief through NAG to find out if states are interesting joining the amicus. We're trying to keep the lane narrow. We hope to circulate our draft brief before the Aug 4th deadline.

Roland: In the past we have had each Council member from each state join in the amicus process. He personally would urge support in participation in the amicus and reach out to their respective attorneys general.

The Pacific Legal Foundation and the National Water Resources Association are also seriously considering filing amicus briefs.

WATER RIGHTS PROTECTION ACT

Tony read from the last paragraph of the Tipton bill, included in Tab R, which essentially says that the federal agencies cannot condition federal permits on the transfer of water rights. There may be differences between our member states on this issue. This will be a topic during the workshop at our next meeting. Some questions and concerns have been raised among federal agencies about the impact of this bill.

Chris Brown commented on a couple of alternatives, one to address the ski resort areas, and another to address the by-pass issue. A more robust version was in large part to address that concern. But there was not consensus. Greg Ridgley also spoke about the ski resort areas, and John Stulp clarified the basis for the Forest Service decision.

WOTUS LITIGATION UPDATE

Jennifer gave an update on WOTUS. The parties have been briefing the NAM case before the Supreme Court, on whether the 6th Circuit's decision that it has jurisdiction should stand, and oral arguments are scheduled for October.

DISCUSSION: GROUNDWATER RECHARGE AND STORAGE PROJECTS

Jeanine led off this discussion as she had received a request for information from a representative from Texas. The WSWC prepared a couple of reports in partnership with the

Bureau of Reclamation on groundwater recharge and storage projects. Norm Johnson started this report in the early 1990s, and it was updated in 1998, after more projects were initiated in several states. It would be worth updating how the states are handling aquifer storage and recovery twenty years later. This is also included in the Water Resources Committee work plan, but we're interested in updating the legal aspects of these projects and how each state handles them. Jeanine pointed out that this is not limited to ASRs, but other groundwater recharge projects both large and small in scale. There was a pretty wide variation in the statutes and restrictions between the Western states. For example, with the unique hydrology and geology of each state, how did the states allow recharge projects to account for the water when it was later withdrawn? Does it count as a beneficial use of water?

WSWC/NARF INDIAN WATER RIGHTS SETTLEMENT SYMPOSIUM

The Symposium on the Settlement of Indian Reserved Water Rights Claims will be held on August 8-10, in Great Falls, Montana. The agenda is under Tab T.

WSWC/WESTFAST FEDERAL NON-TRIBAL WATER CLAIMS WORKSHOP

Roger Pierce talked briefly about the upcoming workshop that the workgroup is planning in conjunction with the Albuquerque meetings in October. We're looking at the implementation phase and how the states and federal agencies are handling the administration of quantified water rights.

LEGISLATION AND LITIGATION UPDATE

Michelle provided an overview of several new pieces of litigation. The New Mexico Drought Act (S. 1012) would reauthorize the Secure Water Act. The House Subcommittee on Water, Power, and Oceans held hearings on a discussion draft of the Water Rights Protection Act, which would prohibit federal agencies from conditioning permits on the transfer of privately-held water rights. The House Natural Resources Committee looked at draft legislation on the Reclamation Title Transfer Act, for transferring eligible dams and other federal infrastructure to States and other non-federal entities. The Senate unanimously passed S. 140, which contains clarifications on rural infrastructure construction for the White Mountain Apache Tribe water rights.

She summarized a nitrate pollution case in Iowa, *Board of Water Works Trustees of the City of Des Moines, Iowa v. Sac County Board of Supervisors as Trustees of Drainage Districts* (U.S. District Court Northern Iowa, 5:15-cv-4020). She also provided updates on several ongoing cases. The 10th Circuit requested briefings from the parties on the BLM Fracking Rule, which BLM is planning to rescind, rather than indefinitely staying the case, *Wyoming et al. v. Zinke*, #16-8068. As she provided an update on the various New Mexico and Navajo Nation cases relating to

EPA and the Gold King Mine spill, it was noted that the U.S. Supreme Court just dismissed the *New Mexico v. Colorado* case. The U.S. Court of Federal Claims also dismissed the *Crow Creek Sioux Tribe v. U.S.* case for lack of standing and ripeness for the tribe's water rights takings claims.

FY2017-2018 WORK PLAN

Jennifer reviewed the workplan. Tab F has both the clean version and the marked-up version. Under the redline version for non-tribal water rights, we just cleaned-up some of the language and updated it to where we are now. The Clean Water Act Jurisdiction was also updated. We will just see what happens since that issue is still evolving, seemingly daily. The Reserved Indian Water Rights had slight changes, nothing too big. We did have some discussion via email about whether or not to get rid of the USFS proposed groundwater directive. For now, we've decided to get rid of it, but we can always bring it back. The WSWC was very helpful in getting that rule pulled back. The language will be kept for use in the future, if needed. The next one, on Corps policies and the surplus water rulemaking, just a couple updates there. Just like WOTUS, it's an evolving issue.

We did add a section on groundwater. With the *Agua Caliente* case, we think that groundwater is going to become a much more of a hot topic in the next couple of years while this workplan is being implemented. Tony and Jeanine added some details on groundwater recharge and ASR. We incorporated some of the comments the Committee made by email.

With no further discussion, Jeanine Jones made a motion, Norm Johnson seconded and the workplan was unanimously approved.

OTHER MATTERS

There being no other matters, the meeting was adjourned.