MINUTES
of the
LEGAL COMMITTEE
Virtual Fall Meeting
(due to COVID-19)
October 15, 2020

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MEMBERS AND ALTERNATES PRESENT

ALASKA	--
ARIZONA	Trevor Baggiore Ayesha Vohra Kyle Miller Kelly Brown
CALIFORNIA	Jeanine Jones
COLORADO	Rebecca Mitchell
IDAHO	Jerry Rigby John Simpson
KANSAS	Tom Stiles Kenneth Titus
MONTANA	Tim Davis Jan Langel Jay Weiner
NEBRASKA	
NEVADA	Jennifer Carr Micheline Fairbank
NEW MEXICO	Greg Ridgley John D'Antonio
NORTH DAKOTA	Jennifer Verleger
OKLAHOMA	Sarah Gibson Julie Cunningham
OREGON	Tom Byler

SOUTH DAKOTA	Kent Woodmansey
TEXAS	Jon Niermann
UTAH	Erica Gaddis Norm Johnson Todd Stonely
WASHINGTON	Buck Smith Mary Verner
WYOMING	Chris Brown Kevin Frederick Steve Wolff

GUESTS

Keith Shaw, Utah
Mark McCluskey, CDM Smith
Steve Snyder, Dividing the Waters
Elizabeth Ossowski, NOAA/NIDIS
Tracy Streeter, Burns & McDonnell
Mike Mathis, Continental Resources
Avra Morgan, Bureau of Reclamation
Mike Gremillion, University of Alabama
Susan Lee, Bureau of Land Management
Aimee Betts, Bureau of Land Management
Susan Smith, Willamette University - LAW
Stephen Bartell, U.S. Department of Justice
Ward Scott, Western Governors' Association
Sue Lowry, Interstate Council on Water Policy
Christopher Estes, Chalk Board Enterprises, LLC
Indrani Graczyk, NASA Jet Propulsion Laboratory
Subhrendu Gangopadhyay, Bureau of Reclamation
Jack Bowles, U.S. Environmental Protection Agency
Jamie Piziali, U.S. Environmental Protection Agency
Jennifer Wendel, Idaho Department of Water Resources
Doug Woodcock, Oregon Water Resources Department
Earl Lott, Texas Commission on Environmental Quality
Andrea Lauden, Washington State Department of Ecology
Jill Csekitz, Texas Commission on Environmental Quality
Kelly Mills, Texas Commission on Environmental Quality
Catalina Oaida, NASA Western Water Applications Office

Kim Nygren, Texas Commission on Environmental Quality
Mark Davidson, NASA Western Water Applications Office
Gregg Easley, Texas Commission on Environmental Quality
Robin Cypher, Texas Commission on Environmental Quality
Lori Hamilton, Texas Commission on Environmental Quality
Kathy Alexander, Texas Commission on Environmental Quality
Amy Settemeyer, Texas Commission on Environmental Quality
Brooke McGregor, Texas Commission on Environmental Quality
David Waterstreet, Wyoming Department of Environmental Quality
Brad Crowell, Nevada Department of Conservation and Natural Resources
Nakaila Steen, South Dakota Department of Environment and Natural Resources

WESTFAST

Mike Eberle, USDA Forest Service
Mindi Dalton, U.S. Geological Survey
Roger Gorke, U.S. EPA-Office of Water
Patrick Lambert, U.S. Geological Survey
Lauren Dempsey, United States Air Force
Robert Boyd, Bureau of Land Management
Christopher Carlson, USDA Forest Service
Deborah Lawler, WestFAST Federal Liaison
Forrest Melton, NASA Western Water Applications Office
Heather Hofman, USDA Natural Resources Conservation Service

STAFF

Tony Willardson
Michelle Bushman
Cheryl Redding
Jessica Reimer
Adel Abdallah
James Ryan

WELCOME AND INTRODUCTIONS

Chris Brown, Chair of the Legal Committee called the meeting to order.

APPROVAL OF MINUTES

Chris mentioned that Michelle Bushman sent out some minor changes to the minutes of the virtual Legal Committee meeting held on July 22, 2020. Jen Verleger motioned to approve. Jon Niermann seconded. The minutes were unanimously approved.

SUNSETTING POSTION

Chris noted three sunsetting positions (412, 415 and 416), each with proposed changes for the Committee to consider.

Position No. 412 supports Indian water rights settlements. Greg Ridgley had some suggested edits. The first change, located in the third Whereas clause, replacing the word "quantification" (which appears twice) with "resolution" and "the final determination of Indian water rights" is not intended to be particularly substantive, but the point New Mexico wanted to make is that settlements do more than just quantify Indian water rights. This language is suggested to allow the possibility that the value of settlements are the full determination of Indian water rights, including elements beyond the amount of water. The other edits delete references to the settlement of land claims, which struck me as out of place in this particular position supporting Indian water rights claims.

Chris agreed and stated it does seem misplaced.

Tony Willardson: I do not recall the reason for land there. There have been a number of settlements that included both land and water rights and so that may have been the reason, but I agree, I think it is good to just leave it with water rights.

There being no further discussion with regard to the proposed edits, Chris motioned to recommend that this position be moved to the Full Council for consideration for readoption with the amendments. Motioned second and approved.

The Committee considered Position No. 415, regarding supporting the Dividing the Waters Program, after Steve Snyder's update on the program. Chris said he believed the initial resolution was primarily to support the DTW program in its efforts solicit funds from foundations and such things. There are some suggested edits to the existing resolution. Because the Steven Bechtel Foundation is no longer a funder, the changes to the fourth Whereas clause are to clean that up. Micheline Fairbanks in Nevada requested an additional resolution clause to encourage judges to attend DTW courses. Chris asked whether the Committee wished to consider any additional edits, particularly in light of Steve's presentation.

Chris noted from his perspective that he is certainly not adverse to discussing the idea of encouraging the judicial branch in each of our states to consider providing funding, or providing some sort of support for the DTW program, but he would need to discuss this with his clients. He

has no authority to suggest Wyoming support additional general fund appropriations, especially when the governor is asking for an additional 20% in cuts.

Mary Verner stated that she is very interested in this matter because Washington is currently working with their Administrative Office of the Court, and they hope to initiate a couple of adjudications in the upcoming biennium. She felt it would be worthwhile to spend a bit more time to think through what the Council's position could be in a way that is supportive of the education and training for judges. This would allow time to think about how to phrase that support to be most helpful. She suggested putting this on a future agenda or assigning to a subcommittee. She would be willing to help, but she is not sure that the Council is quite ready yet to endorse specific language.

Tony: I think given the changes that have been made, we could still adopt this resolution at this point, and then move forward with further discussions among our states and with Steve about possibilities of helping to find some funding. I think that adopting the resolution does keep it in place, and might assist us in some of those discussions.

Norm Johnson spoke with his clients some months ago. It is a tough time to seek additional funding, given the state of affairs with budgetary matters generally. He suggested passing the resolution as is and wait for another opportunity to add any more specific language to it.

Chris: Having heard what folks have said, and perhaps we can talk more about it with others that might be interested in trying to come up with some language, how about we take this in two pieces: (1) we will consider the edits that are in front of us today; and (2) we will take up a motion to consider working on some language that would endorse some of the financial support that Steve has talked about. Chris brought forward a motion to recommend this position to the Full Council. Jennifer Verleger moved and Greg Ridgley seconded. There were no objections to move this to the Full Council. Michelle will initiate an email to the subcommittee to get the ball rolling on consideration of additional language.

Position No. 416, with regard to the federal government's role in expediting state, general stream adjudications. Micheline and Greg have both suggested some edits.

Micheline Fairbank: My recommendation was to include both filing fees and costs, because in Nevada, not only do we have a fee associated with the submission of a proof of claim, but we also have provisions within our statutes for the reimbursement of costs associated with adjudications. This change would be inclusive of all those expenses that are associated with the adjudication process, not only in Nevada, but also as I understand it, within our other western states.

Under the sixth resolved clause, she suggested the addition of the language "or are divisive to community needs and interests." That is just going back to the "ask" that there be consultation with the states prior to the assertion of those water rights claims, because past experience suggests that some of those issues that can be addressed and discussed in a way that

won't create such contentious challenges between those communities and the federal agencies for those claims.

Finally, the last one under the seventh resolved clause is aimed at minimizing the filing of questionable or non-compliant claims. There are certain statutory requirements for water rights claims in Nevada, and sometimes there are federal claims that just are not compliant with the state law or the state's interpretation of the law, so the addition of "non-compliant" is just rounding out that paragraph.

Greg: In the first whereas clause I am suggesting changing "quantify" to "determine." I think adjudications, of course do more than just quantify water rights, they define elements of water rights, not just the amount of water. The change in the third whereas clause would make it consistent with the phrase in the first whereas clause. The first and fourth resolution clauses are to make the position consistent with the phrase state "court" adjudications.

Chris: With regard to your insertion of the state court adjudications. I think that it is true in certain instances. Some of these adjudications started more of an administrative level. I believe it is also true that the federal government has recognized those as proper adjudications for them to participate as well. I am wondering if adding the word "court" might preclude those sorts of proceedings?

Greg: I would say that is an excellent point and I would be certainly be comfortable taking those out. I think we ought to make sure that we do not use "state court" elsewhere in the document. Then the fifth resolution clause, I thought was a little antagonistic, where it says "leadership and staff of federal agencies often have an incomplete understanding." I tried to rephrase it to say where they have an incomplete understanding this can result in problems.

Chris: If there is no additional discussion, I would entertain a motion to recommend that this position be re adopted by the Full Council with the edits we have discussed here today. A motion and a second was made.

Stephen Bartell: From our perspective on at the federal government, I think it would be wonderful if the government would pay its fair share of cost, because it is a tremendous burden on the states. The problem is, we do not think there is a waiver of sovereign immunity to allow us to do it, it does not seem discretionary. So it would make sense to make that language even tighter, to somehow urge a clarification from Congress, if that were possible.

Chris: One thought I have with regard to Steve's comments is that we do encourage the federal agencies as a choice to pay fees and costs. I think what Steve is saying is that perhaps they feel as if they cannot, and that comes from the McCarran amendment itself. Should we consider adding a resolution clause which would encourage Congress to amend the McCarran amendment to allow or the federal agencies to pay fees and costs in general adjudications? Not sure we have time to draft something here now for consideration in just an hour or two and in front of the Full Council, but it is something that certainly is worth considering.

The Committee circled back to this position at the end of the meeting and considered an additional resolution clause. Tony suggested: "Be it further resolved, that the Congress consider and enact legislation necessary to allow federal agencies to pay a fair share of fees and costs associated with federal claims as part of general state stream adjudications, providing a limited waiver of sovereign immunity as needed."

Chris: I might suggest that we say something more mandatory. Something like "that the Congress consider and enact legislation necessary to require federal agencies to pay a fair share," as opposed to just authorize them to do so.

Hearing no further discussion, Chris entertained a motion to recommend this position be forwarded to the Full Council for readoption with the amendments discussed. Got a motion and a second. Hearing no objections that Motion passes.

Tony noted that the WSWC might write a letter seeking Congressional action.

CERCLA AND STATE WATER PERMITS

Kenneth Titus, Chief Counsel, Kansas Department of Agriculture, gave a PowerPoint Presentation on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and state water permits. North of Wichita is a Superfund site that is a pretty large operation. They have a plan that calls for two extraction wells, pumping at 300 gallons a minute and they would be running constantly, resulting in about 1000 acre-feet per year of groundwater withdrawn. Those who work in water appropriations can see how 1,000 acre-feet a year could have a pretty big impact on area groundwater users, especially in an area that is already pretty highly appropriated.

EPA and their contractor have been working with the coordinating agency, Kansas Department of Health and Environment (KDHE), which has recommended seeking a groundwater permit. The contractor refused due to CERCLA §121(e)(1) – 42 U.S. Code § 9621: "No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out no federal state or local permit shall be required for the portion of any removal or remedial action conducted entirely on site where such action is selected, carried out..."

I have been searching for answers for how we might deal with this water withdrawal permit. I have not found any interpretive case law on point. A 1992 EPA memo essentially says it is their position not to get any permits. Kenny then talked about "Applicable" or "Relevant and Appropriate" (ARAR), but compliance is related to pollution and water quality rather than water supply. There is nothing about applicable or relevant and appropriate for anything not directly related to the remediation standards. Presumably, they are not going to do anything that moves the pollution around.

The only real answers I found was from an old paper put together I think that Norm Johnson wrote. See reference to WSWC Letter between Arizona Department of Water Resources to Norm Johnson (1988), in Tab P. The Superfund site manager ultimately voluntarily agreed to apply for an ADWR groundwater withdrawal permit. Based on the actions of the site manager in Kansas, the only way to get compliance is if the site manager chooses to cooperate. Other Superfund sites in Kansas have voluntarily cooperated with groundwater permitting in the past.

Kenny brought this to the group for discussion and to see if there were any other thoughts. He raised some general questions for the Council to consider, as it is not clear right now where the lines are. What is the scope of Superfund activities are not subject to state regulation? EPA takes the position that permits are not required for on-site remedial actions. Does this include the withdrawal of groundwater? Does this include the discharge of water either directly or indirectly offsite? Does the discharge relate to the withdrawal as far as determining whether an action is on-site?

Norm Johnson: This was an issue in Utah long ago. It seemed like we had some kind of backup from EPA to encourage compliance with state law. So we did that. I do not have much more memory than that. I am sure that all the people who were doing that are long gone.

Greg Ridgley: In New Mexico, for Superfund or groundwater clean-up activities, contractors routinely applied for permits. We have never litigated it. Maybe we have just been lucky that no contractors have ever pushed the issue. I think the argument you would make is the CERCLA provision you shared with us is probably intended to address whether state *environmental clean-up* permits are required and we are talking about a permit from a different regulatory agency, to regulate the appropriation and beneficial use of the state's groundwater. The different permitting scheme, I think you could argue was not intended to be excluded by that language and CERCLA.

Kenny: We do have a remediation permit, so we are similar to you. They are out there. This particular contractor is just being stubborn for some reason.

Chris Brown: In Wyoming we had an abandoned missile site, where there was some groundwater contamination. There were some special rules because it was DOD. The process they incorporated did not result in consumptive use. They objected to the $75 fee, and Wyoming waived it.

DIVIDING THE WATERS

Steve Snyder, Executive Director, Dividing the Waters (DTW) Program described the educational program for water judges. It is run by water judges, but administered by the National Judicial College. Alf Brandt spoke to the WSWC in 2014, when you adopted a resolution supporting the DTW, which we appreciate very much.

The DTW was founded in 1993 by John Thorson, who was attending a conference met a fellow from the Ford Foundation. At the time, John was the Special Master for the Arizona Stream Adjudication. John bemoaned the fact that adjudications were strange animals and the judges who were presiding over them had no one to talk to, to brainstorm with. One thing led to another. The Ford Foundation held a conference in Scottsdale of general stream adjudication judges. What made the conference particularly successful was that it gave the judges an opportunity to find out how other states were handling the situation. They also heard from people who were not judges. It was not the typical water law, or Continuing Legal Education (CLE) type conference.

Because the conference was so successful, the Ford Foundation continued to finance DTW for several years, and more programs. At that time, the administrative part of DTW was run by the Arizona Administrative Office of the Courts. As the conference developed, the DTW programming changed. It went beyond general stream adjudications. It took on any water litigation matters, and there was more of an emphasis on the water science, water policy, and how water law fit into that. Eventually, the Ford Foundation had other non-profit interests and passed our funding over to Hewlett and then to the Bechtel Foundation. This was the only source of funding, which also helped to get judges to the conferences because at the time, most states would not reimburse the judges for their time to attend the conferences. The reasons for this vary from state to state, but had a lot to do with bureaucracy and restrictions on out of state travel and the fact that water law was not a high profile compared to the law of evidence. It was really only with foundation support that we could get the judges there without them having to go into their own pockets. Hewlett passed the funding over the Bechtel foundation and about the same time, the Administrative Office of the Courts in Arizona turned the administration of the program over to the National Judicial College. We have had a great relationship with the judicial college since that time. As some of you may know, the judicial college is the largest provider of CLE for judges throughout the country. In 2017, if I have the year correct, the Bechtel Foundation said the DTW Program needed to become self-sufficient because they were spending down our assets and were generally now interested in programs that have measurable results or projects, and continuing education and conferences do not provide that. That made funding the program more difficult.

The DTW Program developed a strategy to keep going, which involve creating a tax-exempt fund called the Water Justice Fund that people could donate money to. We solicited contributions from the water bar, the western states, some law firms and individual lawyers. Individual contributions were not enough keep the program sustainable, though. We solicited contributions from more local fund foundations, or whatever the interest in the water law issues in whatever state we were going to be in. We could afford a conference, but really could not do much more than that. Then the States of California and Nevada's Water Resources Departments gave generous contributions. Without those contributions, I might not be sitting here today. That is where we were with funding when the COVID crisis hit.

Water education for judges is important because most judges that hear water cases are general jurisdiction judges. They may never have heard of hydrology. This DTW program helps judges become educated. In 2017, we had a program on consumptive uses of water verses

environmental flows. In 2018, our program was basically introductory water law for judges. Also, in that year, we held a conference in Texas, at Baylor Law School, dealing with new approaches to groundwater management in Texas. The last conference was held in 2019 at Stanford Law School in Palo Alto, California, which was quite successful. What make these conferences unique is a field trip. Each conference, the judges go to see water infrastructure, things they may hear about in the courtroom, but do not get to see the physical reality. Most judges do not leave the bench to do this kind of thing. Occasionally we get a judge from the east, but mostly it is Western judges that attend. At the Stanford conference, we had 30 state judges from 12 different western states and we also had seven federal judges. Of those seven federal judges, three were special masters appointed by the Supreme Court and their state stream litigation. The roster or these conferences, is really quite impressive.

A conference was scheduled to be held this year on the Colorado River in Salt Lake City, Utah, but due to COVID the conference was shutdown. We have scheduled a virtual conference in November titled Race, Federal Indian Policy and Access to Water. We expect to draw a lot of interest because of the talk about racial inequality.

The other thing that DTW does is publish documents for the judges to help them with some of the case management and technical issues. Our most recent publication by Alf Brandt and the Idaho General Stream Adjudication Judge Eric Wildman, called a Groundwater Management for Judges was on groundwater modeling and groundwater hydrology. This also is what makes us our program unique.

Due to the pandemic, we are now doing webinars because of the Judicial College's willingness to provide its resources without charge. The faculty people that participate volunteer their time without charge. Even the executive director is donating his time right now. State budgets in all areas, including traditional education have been cut back severely and even the National Judicial College is on lean times. As far as the DTW is concerned, we are not sure what direction we are going to go, but have been looking around for funding. With some exceptions, states have not given any financial contributions. It seems it would be ideal if the states could contribute something. He encouraged each state to find a way to provide some financial support. All states have a judicial budget for CLE. Mr. Snyder would encourage the state judiciaries to pay to the National Judicial College for the DTW.

Chris Brown commented that he has used some of the materials that DTW has published. He noted that certain states are probably positioned to take advantage of the DTW program. The rights in Wyoming are all adjudicated. Different states are situated differently. I fully understand that the states are the beneficiary of the program. The states are undergoing budget cuts, and agencies are not considering asking for additional funds.

Micheline stated that the program is valued in Nevada and they have provided some funding. How do we get our judges to participate? How can the WSWC be supportive of the program and to have the judges participate and to learn perspectives.

Julie Cunningham asked whether "we" should fund the judicial education program? Chris noted that if WSWC was used to contribute funds to DTW, that would probably mean a corresponding increase in state dues.

Steve Snyder commented that he was open to brainstorming ways DTW could be funded.

COLORADO RIVERBEDS: UPDATE ON *HILL V. WARSEWA*

Scott Steinbrecher, Colorado Attorney General's office provided an update on the *Hill v. Warsewa* lawsuit. The core of this case is whether a member of the public can assert, on behalf of the state, whether a river was navigable for title at statehood, and also assert whatever associated public rights of access might go along with a finding of navigability. This case stems from a long-running dispute between a fisherman and a landowner on the Arkansas River in Colorado. In Colorado, we only have one very small stretch of the Colorado River that has been declared navigable. The landowners hold title either to the center, or all the way underneath the river depending on how their plot is drawn. The fisherman has a favorite fishing spot that is on land that is held by a private landowner. The two have been fighting for years. The landowner has thrown rocks at the fisherman, threatened the fisherman, and even shot at the fisherman. I think at one point he pled guilty to some criminal charges associated with all of that.

Eventually the fisherman became fed up and hired a civil rights attorney who filed a case in federal district court claiming that the river was navigable for title and therefore belonged to the state and the landowner could not exclude the fisherman. The landowner never responded to the lawsuit, and we became aware of the case right before the court would have entered a default judgment. We had some concerns about the precedent that might be set if a private party was allowed to assert title on behalf of the state when the state was not a party to the case. We intervened and filed a motion to dismiss saying that the claims were barred by sovereign immunity under the 11th Amendment. The fisherman and his attorneys agreed and withdrew the federal case. Shortly after, they re-filed in state court, and this time the landowner participated and immediately removed the case back to federal court. So there we were, again, in federal court.

The landowner and the state moved to dismiss the case on a number of grounds. Eventually, the federal court dismissed the case for lack of prudential standing. We had argued that the fisherman was asserting the rights of a third party (the state), which is barred under the concepts of prudential standing because he was asserting the state's title in the river and not his own interest. The federal court also found that he was asserting a generalized grievance, because any right that he was claiming was a right of the public in general and not a right specific to himself.

The fishermen appealed, and we argued the case before the 10th Circuit Court of Appeals back in November of last year. The 10th Circuit ultimately found that the fisherman was asserting his own right and did have prudential standing. They said he was asserting his right to fish, rather than some generalized right. The court also found that the federal court had erred in

considering generalized grievance as part of prudential standing, and that under *Lexmark International v. Static Control Components*, 134 S. Ct. 1377 (2014), that had become part of constitutional standing. The case was remanded back to the federal court to reconsider generalized grievance and a number of other issues.

The federal district court, once again, found that the fisherman was asserting a generalized grievance because he was asserting the right of the public to enter on these allegedly state-owned lands. Having found that this was a generalized grievance—which now the court was analyzing under constitutional standing—and found that they did not have jurisdiction and remanded the case back to state court.

Once again, both the state and the landowner moved to dismiss from state court for lack of standing, arguing that the fisherman had not demonstrated an injury, or a personally protected right. The state court just recently granted our motion to dismiss. The court disagreed with us as to injury and said that these threats of harm and threats of being prosecuted for trespass constituted injury. But the right the fisherman was asserting as a member of the public to go upon these lands, that he alleged were owned by the state, was a generalized grievance and that he had no personally protected right that he had identified. The court dismissed for lack of standing under state law.

The deadline for Hill, the fisherman, to appeal expires in just over two weeks on November 2, 2020. We fully expect he will appeal and that we will continue briefing and arguing this case in front of the Colorado Court of Appeals. I suspect that one of us will appeal from that decision, and we will ultimately end up in the Colorado Supreme Court. We imagine this will be litigated to the end.

Chris Brown: At any point during the course of litigation, has the state of Colorado had to take a position as to who owns the riverbed?

Scott Steinbrecher: We have tried hard not to take a position.

Chris: I suppose there are probably forces on both sides of the question, urging you to take the position one way or the other though.

Scott: We have not gotten a terrible amount of pressure. We do have had a lot of support from the Colorado Water Congress, which is a water user member group in our state. They filed an amicus brief sort of jumping ahead a couple steps to what the ultimate rights to use would be and leaned pretty heavily on the fact that Colorado does not have a recognized public trust to argue. Even if Hill could prove that the river was navigable, because we do not have a public trust, there would be no ultimate right to use the land and it would be up to the legislature to make some change in the law to allow public access. The Water Congress has made their argument and have not pushed us to go that far.

Jennifer Verleger: Please keep us updated on this case.

Norm Johnson: We have a similar matter that went to our State Supreme Court on standing, relating to the movement of rails. It pertains specifically to a one mile stretch of the Weber River that flows through Ogden and into the Great Salt Lake. The State Lands Agency is puzzling over the aftermath of that ruling and trying to provide the access that the fisherman have.

Chris noted that in Wyoming they do not have anything specific that talks about the navigability for title tests, per se.

Greg Ridgley commented on related case in New Mexico currently in the State Supreme Court.

WALKER LAKE: PRIOR APPROPRATIONS AND PUBLIC TRUST DOCTRINE

Micheline Fairbank, Deputy Administrator, Nevada Division of Water Resources described the background and outcome of the recent Nevada Supreme Court opinion in *Mineral County v. Lyon County* (#75917). The case deals with the scope and effect of Nevada's Public Trust Doctrine, particularly on the existing water rights in the Walker River Basin. The Walker River Basin encompasses over 4,050 square miles and two rivers, the West Fork and the East Fork Walker River, with the water rights subject to federal decree. The California headwaters converge in Nevada and then they discharge into a terminal lake, Walker Lake. In 1924, the United States initiated an adjudication of the surface flows, and ultimately, it was the decreed in 1936, and amended in 1939.

Walker Lake has historically supported Lahontan cutthroat trout, which is an endangered fish species, as well as other native fish populations. As a terminal lake with upstream diversions, Walker Lake has lost approximately 80% of its volume, and has had a five-fold increase in salinity, so those native fish species can no longer survive within the lake. The fishery and recreational uses partly sustained the closest residential community of Hawthorne, Nevada, but over time that has gone away due to the receding lake and increased salinity and turbidity.

Some background on the legal foundation of Nevada's Public Trust: the Public Trust principals historically embraced various matters relating to state ownership in navigable waters and beds beneath. The first case to expressly adopt the Public Trust Doctrine was *Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011). Public trust derived from Nevada's constitution, statues, and common law. Nevada's constitution provides that the State shall not donate or loan money, or its credit, subscribe to or be, interested in the stock of any company, association, or corporation, except corporations, formed for educational charitable purposes; this is how the court tied public trust back into our constitutional provision.

With respect to the *Mineral County* case, in 1994, Mineral County and Walker Lake Working Group sought intervention in the federal court. In June 2000, Mineral County sought a writ to the Nevada Supreme Court to require the State Engineer to manage the Walker River

System to fulfill public trust obligations related to Walker Lake. It was dismissed on the basis that the U.S. District Court—which issued the 1936 decree—is the proper venue. In May 2015, the federal district court dismissed Mineral County's action stating that the "public trust doctrine does not contemplate retroactive re-prioritization."

The Mineral County and Walker Lake Working Group Appealed to the 9th Circuit. The 9th Circuit certified two questions to the Nevada Supreme Court: (1) does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?; and (2) if the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudication or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?

The State Engineer and Division of Water Resources were not parties to the *Mineral County* litigation and so we have not been active participants. However, we did file an amicus brief with the Nevada Supreme Court that was neutral because it did not take a position with respect to the underlying facts and the underlying questions of the case. We just articulated our own legal interpretations and perspective as to potential implications of the outcome.

The Nevada Supreme Court's September 17 decision was split. The majority rephrased the 9th Circuit's questions to be: (1) does the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation, and if so, to what extent?; and (2) if the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?

Chris asked what in the context of those questions does the word reallocation mean?

Micheline: That was one of the fundamental parts of the question and the issues that were argued before the court. Mineral County and the Walker Lake Working Group do not necessarily agree with the use of the word reallocation. The Walker Lake Group said they did not consider it a reallocation, but rather a fundamental natural flow in the system that has to be delivered to the lake to support those public trust values.

In answering question one, the majority found that the public trust doctrine in Nevada does not permit the reallocation of water rights already adjudicated and settled under the prior appropriation doctrine. They declined to consider the second question based upon their response to question one. To highlight some of their findings: (1) they recognize that the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, such that the doctrine has always adhered in the water law of Nevada, a qualification of constraints on every appropriated right; (2) the public trust doctrine applies to all waters of the state, whether navigable or non-navigable into the lands underneath navigable waters; (3) Nevada's water laws are already consistent with the public trust doctrine, because they constrain water allocations based upon the public interest, and satisfy all of the elements in

the dispensation of public trust property; (4) Nevada's water laws are consistent with these public interest principles.

The court specifically went on to find that pursuant to NRS 533.025, the water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public. Under NRS 533 050, the court also referred back to the beneficial use, which is statutorily declared to be a public use. The court also looked to the evolution of Nevada statutes. For example, in 1969, recreation was added as a beneficial use and so prior to 1969, you could not get a water right for wildlife, or different types of recreational purposes. Also under Nevada law, our appropriation statute requires the state engineer to consider the public interest in acting on water rights. The state engineer has established 13 guidelines to assist in determining what constitutes the public interest. These considerations are consistent with the public trust doctrine. They went on to articulate whether or not Nevada's water laws are consistent with the public trust principles that were articulated in the 2011 *Lawrence* case. They found that Nevada's water laws satisfy those principles, as water allocations are appropriated only for a public purpose. They also said that there is fair consideration for the allocation of water, which supports Nevada's economy. They looked at the third criteria and found that the state's limitation on water allocations, including requirements for beneficial use, loss, or abandonment, forfeiture, etc., assures that the trust is maintained for the use and enjoyment of present and future generations.

The majority opinion said that the public trust doctrine does not permit the reallocation of water rights already adjudicated and settled under the doctrine of appropriation, making the finding that adjudicated rights are final and conclusive. The plain reading of the law prohibits reallocation of adjudicated rights and reallocation would create uncertainties for future development and undermine the public interest in finality and thus also the management of these resources consistent with the public trust doctrine. They ultimately also concluded that adjudicated rights are final and the court cannot substitute its policy judgement for that of the legislature's.

Chris: This is interesting to me, because Wyoming has such little law with regard to public trust and public interest. But it seems to me that the thrust of the case is that all of those water rights have always been subject to these public trust considerations?

Micheline: Yes, they have always been subject to those constraints.

The minority opinion disagreed with the recharacterization of the certified questions. The minority said this is not about a reallocation, it simply operates as a natural constraints on the availability of water. Public trust doctrine in the context of Nevada's water laws is accomplished through the balance of the competing values, rather than set them on a collision course. The redirected question misdirects the analysis, because it excludes the balancing that lies at the heart of the public trust doctrine. The clarification by the majority results in the expansion of the public trust doctrine in Nevada. The expansion of consideration to all waters far exceeds the scope of the questions and was unnecessary. The recasting of the question undermines the public trust, as it places the whole responsibility in an administrative agent, which is improper. Public

trust interpretation may inform the interpretation and application of Nevada's water laws. Public trust considerations are to be determined by the judiciary. Public trust exists independent of laws of the legislature. Water rights in Nevada are never permanent - even vested rights are granted only to the extent their holders do not over-appropriate or waste water. Public trust doctrine requires that the state affirmatively reassess the availability of water resources, as necessary to protect the public interest in light of current knowledge or current needs and demand feasible accommodations, as necessary. They cited back to the *National Audubon Society* case from California.

The minority also made some findings that I felt were somewhat notable: while enforcement of the doctrine could potentially alter the amount of Basin water available for private use – as Mineral County points out, just as any other natural constraint on the already variable availability of water to supply private appropriations – it does not effect a reallocation of vested water rights. They have made the finding that protection of Walker Lake would not divest anyone of any legal title they previously held, supporting their argument that it is not a reallocation. So the protection of the lake would not result in the taking of any particular right. Ultimately, the minority opinion answered question one as enforcement of the public trust doctrine does not result from the reallocation of water rights, and question two, because there is no reallocation, there would be no taking.

What does that mean for Nevada? The State Engineer was not a party. They did not take a hard, fast position one way or the other. Recognizing determinations about the Public Trust could put the State Engineer's Office in a challenging situation and could bring additional litigation. There is a private solution trying to achieve the goal of restoring Walker Lake. A decision expected out of the 9th Circuit in the next year.

STATE SURVEY: CURTAILMENTS AND BENEFICAL USE

Michelle Bushman referred to a survey that was initiated about two years ago in the committee workplan. A draft survey is included as part of the briefing materials under Tab Q. Recognizing that nomenclature for states is different, she requested Committee members review the draft survey so we can make any changes and then send it out to the states.

Tony commented this is a rough draft. We are looking for your input to see if we have addressed the right questions and if you may be able to answer these questions.

Chris asked if the Legal Committee should respond or all WSWC members?

Michelle: The Legal Committee is responsible for the survey, but we can send it out to the entire group.

Chris: Should we send this out to all WSWC members to make sure they see the survey and provide their feedback? I suggest about 3 weeks.

Jen: What is the overall goal?

Michelle: There are multiple goals. States have asked us several questions about how other states are doing things. We find that we are a resource that states come to, and we do not necessarily have the answers. It is easier to reach out to the WSWC than to go to each state individually.

Tony: We are a "clearinghouse" for many of these questions.

This document will be sent out to Council members with a deadline of three weeks for feedback. It will then be revised and sent out to be completed.

UPDATE ON GRAZING WATER RIGHTS

Michelle Bushman asked the Committee to take a look at the draft report of the various grazing workshops that have been held over the past several years, located under Tab R in the briefing materials. She invited anyone to send her edits in the next few weeks, as she intends to clean up a final version and publish the report on the Council's website. Part of the Legal Committee's workplan is for the Non-Tribal Federal Water Rights Workgroup to host further engagements with state and federal representatives and the grazing organizations to try to see if we can solve some of the ongoing problems that are out there. The report will provide a useful and informative springboard for subsequent webinars and discussions.

Idaho already made some recommended changes to the report, and Chris Brown said he will probably have a few minor edits for Wyoming's portion.

Chris: An individual that I work with on occasion with regard to water rights, has a grazing allotment over in Idaho. He forwarded to me the agreement between him as the allotment holder and the Forest Service, also located under Tab R. Its entitled for the purpose of establishing and maintaining stock water rights on National Forest grazing allotments in accordance with the laws of the State of Idaho. He had questions for me: What is this thing? And why would I sign it? I was just trying to explore what the purpose was behind this. I thought I would bring this up here considering the Idaho issues were a topic in our grazing workshops.

Chris Carlson: This is an Idaho specific situation that revolves around the United States, primarily Bureau of Land Management (BLM) and the Forest Service (FS), investing considerable resources in participating in the Snake River adjudication in Idaho. Through that process, the federal government was decreed thousands of stock water rights. As most of you probably know, the federal agencies do not directly use the water. Rather, they manage the water right for the benefit of the permittees and their livestock. We are not aware of any past or present issues associated with the United States holding and managing those specific water rights. Idaho recently passed legislation that could result in the loss, through forfeiture, of most of these decreed water rights, creating a potential risk that the water would not continue to be

available to support public land livestock grazing. Many of the existing permittees, including some of the largest in the state, believe it is in their interest for the United States to continue to hold the stock water rights for federal land grazing allotments. Those permittees do not want to get involved in the administrative requirements to obtain and manage those water rights in their own name, including all the paperwork for filing, proving up their claims, and defending future challenges around authorized uses. They would rather have the BLM and FS take on that responsibility.

Idaho just this year passed some amendments to the legislation that appears to recognize the common law in the state, that a landowner that does not own livestock may hold stock water rights, if it has an agency relationship with a lessee or a permittee that does. Where this agency relationship is documented, it would allow the United States to protect the stock water rights on federal land grazing allotments. The FS and BLM have asked permittees whether they were interested in entering into these voluntary agency agreements. To date, hundreds of permittees have agreed to do so. The voluntary agency agreements may be terminated by the permittee upon written notice. The last thing, the agencies disagree with some of the recent statements in the press, suggesting that the BLM and the FS are offering these voluntary agreements for any reason other than to protect the water rights on federal land grazing allotments, which are now and have always been for the benefit of the ranchers and their livestock who use those allotments.

Chris Brown: I appreciate that explanation. In some of the press I think that if folks had not come across it, that there was some pushback from some user groups. I think it suggested that an allotee should at least hesitate, or be cautious about signing these agreements. My observation of it anyway is precisely how Chris described it. Unfortunately, we do not have anyone on from Idaho still, but appreciate Chris's explanation and will pass it along.

LEGISLATION AND LITIGATION UPDATE

Michelle referred to the update located in Tab S. In the interest of time, she noted that there have been no significant updates since the Summer meetings, aside from those already mentioned during the Fall meetings.

SUNSETTING POSTIONS FOR SPRING 2021 MEETING

Chris Brown noted that at the next meeting, this Committee will be considering Position No. 422 – State Primacy over Groundwater, which is due to sunset. Chris believes the position will need revision.

OTHER MATTERS

There being no further matters, the Legal Committee was adjourned.