MINUTES
of the
LEGAL COMMITTEE
Virtual Spring Meeting
(due to COVID-19)
March 25, 2021

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MEMBERS AND ALTERNATES PRESENT

ALASKA	
ARIZONA	Trevor Baggiore Kyle Miller AyeshaVohra
CALIFORNIA	Jeanine Jones
COLORADO	Rebecca Mitchell Jeremy Neustifter Scott Steinbrecher
IDAHO	
KANSAS	Connie Owens Kenneth Titus Tom Stiles
MONTANA	Jay Weiner
NEBRASKA	Tom Riley
NEVADA	Jennifer Carr Micheline Fairbank
NEW MEXICO	John D'Antonio Greg Ridgley
NORTH DAKOTA	Jennifer Verleger John Paczkowski
OKLAHOMA	Julie Cunningham Sara Gibson
OREGON	Tom Byler

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

GUESTS

Matt Unruh, Kansas Water Office
Lucas Stephens, Internet of Water
Tracy Streeter, Burns and McDonnell
Stephen Bartell, U.S. Department of Justice
Bidtah Becker, Navajo Tribal Utility Authority
Tanya Trujillo, U.S. Department of the Interior
Christopher Estes, Chalk Board Enterprises, LLC
Peter Colohan, Internet of Water, Duke University
Kathleen Ligon, Texas Water Development Board
Mary Schooley, Oklahoma Water Resources Board
Jacqueline Tinetti, Council of State Governments-West
Jim Rizk, Texas Commission on Environmental Quality
Earl Lott. Texas Commission on Environmental Quality
Lauren Vernon, House Committee on Natural Resources
Amanda Long, Arizona Department of Water Resources
Nat Chakeres, New Mexico Office of the State Engineer
Weir Labatt, Central Texas Regional Supply Corporation
Jill Csekitz, Texas Commission on Environmental Quality
Kelly Mills, Texas Commission on Environmental Quality
Erin Chancellor, Texas Commission on Environmental Quality
Kevin McCalla, Texas Commission on Environmental Quality
Loreal Stepney, Texas Commission on Environmental Quality
Kathy Alexander, Texas Commission on Environmental Quality
Kimberly Nygren, Texas Commission on Environmental Quality
John-Cody Stalsby, Texas Commission on Environmental Quality
Kara Valentine, Nebraska Department of Environment and Energy
Jennifer Zygmunt, Wyoming Department of Environmental Quality
Teresa Wilhelmsen, Division of Water Rights /State Engineer's Office

Anne Castle, Getches-Wilkinson Center, University of Colorado Law School
Nakaila Steen, South Dakota Department of Environment and Natural Resources

WESTFAST

Indrani Graczyk, NASA JPL
Heather Hofman, USDA/NRCS
Lauren Dempsey, US Air Force
Kevin Werner, NOAA Fisheries
Patrick Lambert, U.S. Geological Survey
Christopher Carlson, USDA Forest Service
Roger Gorke, Environmental Protection Agency

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 gave some minor changes to staff, which were made. Norm Johnson made a motion to approve the minutes of the virtual meeting held October 15, 2020. A second was made by Jennifer Verleger. The minutes were approved with Chris's changes with no objections.

SUNSETTING and PROPOSED POSTIONS

Sunsetting Position No. 422 relates to state primacy over groundwater. There are some fairly minor edits and a slight modification to the fourth whereas clause to recognize that some of our state laws recognize private ownership and control of groundwater. There was a new whereas clause added with regard to surplus statutes and some provisions related to what has been asserted as exemptions for the need to obtain some state permitting. Then under the resolve clauses, we just rearranged them and moved the second resolved clause down to the bottom because it made

more sense there. Given no further discussion, Chris invited a motion to recommend that this position be moved to the Full Council for consideration for readoption with the amendments. Norm Johnson made a motion to approve. Jen Verleger seconded. Unanimously approved.

Position No. 457 relates to the Dividing the Waters (DTW) Program. The Council readopted this position at the last Council meeting, with some discussion about adding an additional resolution encouraging state support for the DTW program. We heard a presentation at the Fall meeting describing some of the financial problems DTW has encountered with regard to funding. There was a small subcommittee that got together and worked on some language, modified by the Executive Committee. The clause now says that the WSWC supports consideration by member states of support for the Dividing Waters Program through funding or other means that supports judicial education on water resource management disputes. With no further discussion, Chris invited a motion. Motion made seconded and approved.

The committee discussed in some detail the proposed position on supporting Universal Access to Clean Water on Indian Reservations and in Alaska Native Communities, which was edited on a shared screen during the discussion. It was noted that Indian water rights claims frequently take a long time to complete, and that there is some urgency to complete drinking water infrastructure apart from the resolution of water rights, to address public health concerns. The question was raised whether the Bureau of Reclamation should be explicitly included, since Congress has charged Reclamation specifically with addressing water systems for western tribes, and whether it should reference the Department of the Interior as a whole, covering the Bureau of Indian Affairs as well. There was some discussion as to whether to include climate change as another factor of concern, but the conclusion was that it may complicate matters further at this point. The reference to federally recognized tribes and Alaska Native communities was standardized throughout the position. There was also some discussion on federal expertise for training and technical support, developing internal capacity (technical, managerial, and financial) for tribes to operate and maintain infrastructure. A comment was added about clarifying the need for infrastructure necessary to provide reliable, affordable and clean drinking water.

The committee discussed the concern that in some states, where tribal reserved water rights claims have not yet been resolved through adjudication or settlement, tribes would still need to go through the process of obtaining the necessary water rights, through the state water right process or other applicable laws if needed. The infrastructure itself may be provided through other federal programs, but the water rights issues should also be appropriately resolved in an expedited manner. The WSWC does have other resolutions that address the importance of resolving tribal water rights claims through negotiated settlements and adjudications more explicitly, as well. New Mexico noted that they have many tribal claims for the pueblos that are not based on federal reservations, but are based on other legal doctrines.

Jon Niermann moved to recommend adoption of this resolution with the suggested edits. Micheline Fairbank seconded. The motion carried.

COLORADO RIVER WATER AND TRIBES INITIATIVE

Rebecca Mitchell, Director, Colorado Water Conservation Board, gave a brief explanation of circumstances that led to the proposed position in support of universal access to drinking water for tribes. The COVID19 pandemic really highlighted some disparities in case counts across Colorado, western states, and the nation, largely due to the lack of access to clean water, indoor plumbing, and the infrastructure components. This proposed position really focused on addressing support for federal funding, collaboration, coordination, and an expedited approach to meeting existing needs. These problems are not new, but they have become urgent and apparent during the pandemic. Some of the Colorado Congressional leaders have taken some initiative on this, introducing resolutions and working on language for bills. While acknowledging the importance of the quantification of water rights in settlements, the resolution focus is not on the rights, but rather on drinking water quality and infrastructure.

Bidtah Becker, Associate Attorney, Navajo Tribal Utility Authority and a former WSWC member, provided some background on the Colorado River Water and Tribes Initiative. Together with Ann Castle, Becky Mitchell, Jay Weiner and others, they are working on an effort called Universal Access to Clean and Safe Water focused in Indian country. While the initiative began due to the pandemic, the issues with lack of access are not new. In August 2020, the Centers for Disease Control reported that Native Americans and Alaska Natives are 3.5 times more likely to catch COVID-19 than the white population. In the very early stages of the pandemic researchers at various universities found a statistical connection to the lack of indoor plumbing.

Pre-COVID, the U.S. Water Alliance found that the strongest predictor of lack of access to water and sanitation in this country is race. Native American households are 19 times more likely than white households to lack indoor plumbing. Nearly 40% of tribal homes do not have access to clean drinking water, or basic sanitation. In the United States as a whole, it's estimated that less than 1% of all homes lack these facilities. We define the lack of access as falling into four buckets: (1) the lack of piped water; (2) inadequate water quality; (3) aging infrastructure; and (4) the ability to support operation and maintenance. Our researchers have found that every tribe in the Colorado River Basin has one or more of these issues, which limits their ability to access clean drinking water.

Anne Castle, Sr. Fellow, Getches Wilkinson Center, University of Colorado Law School, added that the Colorado River Water and Tribes Initiative has been working to elevate tribal voices in connection with decisions around river management and operations. The initial efforts involving a Universal Clean Water Access Project were aimed at understanding the scope of the lack of access to clean water within the Colorado River Basin on tribal lands. Their research team surveyed all 30 tribes in the Colorado River Basin, and also researched more broadly nationwide about some of the barriers to access. They are also making recommendations on solutions to legal barriers. The full report is in its final editing stages and should be available in another week or so. That report has findings of fact within the Colorado River Basin, but also looks more broadly at the federal trust responsibility to Indian tribes. The report looks at various federal programs that are already designed to address the problem and discusses some of the reasons that the lack of access issue has not yet been solved. They want to educate people about this problem, because

there are so many people in the United States that have no idea that our neighbors on tribal lands don't have indoor plumbing or access to drinking water in their houses. They want to engage partners to support this effort, and the WSWC is a prominent example. They want to be practical and promote on-the-ground solutions. They are talking with White House Domestic Policy Council staff about what can be done. There has never been a better time with national attention on the consequences of the pandemic to really make sure that we provide some equity here.

Obviously, funding is needed. The infrastructure bill that is being put together right now may provide an opportunity. The American Rescue Plan has provided funding that can be used for this purpose. It's up to tribes to determine what their priorities are for that. We'll see how far that goes, but funding by itself is not enough. There needs to be a whole-of-government approach because there are so many federal agencies that own a piece of a problem, but not the whole problem. They've been siloed and have vastly varying requirements. If that federal expertise is brought to bear and coordinated with a directive to solve the problem, we think it can be done. Of course, the resolution that you're considering talks about that whole-of-government approach and the commitment that's needed to solve the problem.

A resolution very similar in language to what the Council is considering today, is being introduced in the Senate by Senators Bennet, Wyden, Warren, Murray, Merkley, Cantwell, Heinrich, Kelly, and Booker.

Questions:

Chris Brown asked what sort of surveys or research have been done with the Alaska Native communities? I'm not sure we've had anybody from the state of Alaska take a look and see if there's any unique aspects that this proposed position should address for them.

Anne: We have had discussions with the Alaska Native Tribal Health Consortium, which is the organization that takes money from the Indian Health Service and uses it to build water facilities, and sanitation facilities. In Alaska Native communities, the problem is huge. If you're looking at the total need in terms of dollars, probably half of that need is in Alaska. The problems are unique there because of the short construction season and permafrost melting and just the remoteness of some of the Alaska Native villages. There was a hearing yesterday in the Senate Indian Affairs Committee on water infrastructure needs in Indian country, and the director of the Consortium spoke quite movingly about the needs there. The situations are unique, but the need is universal. I'm not aware of anything in the statements that are made in this resolution that would be inconsistent with the needs in Alaska.

Bidtah: We were advised to be prepared to go national when we started pulling this together. While we can't prove it, we're pretty confident that a vast majority of tribes and Alaska Native communities face one or more of those bucket issues that we listed before. By way of example, we had a White House listening session on Monday, and the Warm Springs tribe reported that their water system is made of wood and clay pipes. The Cherokee Nation talked about their aging infrastructure. Every community has a unique situation that they need to resolve, which is why we are calling for a whole-of-government approach.

Chris: Thank you very much for that additional information, especially about Alaska. I would like to note to the committee that Jeanine put a comment in the chat box about a 2012 statute in California with regard to drinking water being a basic human right (AB-685; California Water Code §106.3).

Becky: We also looked at Hawaii as part of this effort, but we didn't find the same high level of case incidents, the disproportionate occurrences that we see with the native communities and the Alaskan communities so that wasn't addressed here.

TEXAS LEGAL ISSUES

Erin Chancellor, Director, Office of Legal Services, TCEQ offered a presentation on water right permits and impoundment issues. Generally, in Texas, the state regulates the use of surface water and not groundwater, but I will say a little bit on groundwater. Texas is a rule of capture state for groundwater, meaning, the landowner has a right to use the groundwater they can pull from the ground, as long as they aren't wasting the water, or causing subsidence to adjoining property. The use is also subject to reasonable restrictions, if they're located in a groundwater conservation district. TCEQ isn't overly involved in groundwater issues, but we do have a role in assessing groundwater quality and we do have a limited oversight role when it comes to those groundwater conservation districts.

For surface water, the State of Texas owns surface water and the TCEQ issues water right permits to use that surface water. TCEQ regulates these water rights on a priority basis - first in time, first in right - meaning the senior water right holder will get the full amount of their water before the junior water right holder.

Texas Water Code Section 11.021a defines state water as the water of the ordinary flow, under flow, and tides of every flowing river, natural stream, lake, bay or arm of the Gulf of Mexico, stormwater, floodwater, rainwater of every river, natural stream, canyon, ravine, depression and watershed in the state. Not surprisingly, the code also specifies that state water is the property of the state. The next subsection of the Texas Water Code goes on to specify that water imported from any source outside the boundaries of the state, for use in the state, which is transported through the bed and banks of any navigable stream within the state, or by utilizing any facilities owned or operated by the state is also the property of the state. The state also has a regulation that defines state water. It largely mirrors the statutory language, but it further specifies that state water does not include percolating groundwater, nor does it include diffuse surface rainfall runoff, groundwater seepage or spring water, before it reaches the watercourse.

Our Texas water rights permitting authority is found under Texas Water Code Section 11.121, and it specifies that there are some exceptions. For the most part, a permit is required to store, take, or divert state water. Examples of when a permit may be needed include: (1) to store, take, or divert flow water, stormwater and rainwater that enters the stream; or (2) to impound, or divert a flooding waterway. If rain, or water runoff, is flowing across your land, you as the property owner could catch that before it hits a watercourse without needing a permit.

There are many very specific scenarios for whether or not a permit is required. There are exceptions for industrial desalination operations, for mariculture, for historic cemeteries, for diversions of marine seawater, and for surface coal mining operations. The exemptions that are included in Texas Water Code Section 11.142, subsections (a) and (b) (and another subsection b) cover property owners and impoundments. Just when you think water law can't be confusing enough, we have a whole statute with two subsection bs, go figure.

The first subsection (b) exempts the construction of a dam or reservoir, if it's on a person's property, the normal storage is 200 acre-feet or less, it's for fish and wildlife use on qualified open space land, and it's a non-commercial operation. The second subsection (b) exempts the construction of a dam or a reservoir if it's on a person's property, the normal storage is 200 acre-feet or less, it's for commercial or non-commercial wildlife management, which does include fishing, but does not include fish farming, and it's in an unincorporated area.

The exemption under subsection (a) warrant a little more discussion. This exemption is for the construction of a dam or reservoir, if it's on a person's "own property," an important term. The normal storage is 200 acre-feet or less on average, over a 12-month period, if it's for domestic and livestock (D&L) use and it's a non-commercial operation. So this means that a property owner who uses water for the for D&L purposes, can take as much water as reasonably needed and can impound up to and including 200 acre-feet for D&L purposes without obtaining a permit. Some D&L purposes, for example are: watering your cows, drinking, washing, watering plants, and things like that. This exemption is more unique than the others, and it has the term "own property" in it. That's been interpreted to mean that it is on a non-navigable stream, because the State of Texas generally owns the riverbed of a navigable stream, and private persons usually would own the riverbed of a non-navigable stream. So all that is to say the D&L exemption does not apply to impoundments on navigable streams.

Chris Brown: Erin, how do you enforce that?

Erin: Good question. So D&L users are not tracked or recorded. If there's any sort of issue, we usually find out from a complaint. We have both a watermaster program and regional offices that work to do the investigations on this kind of thing. It's hard - the enforcement. It's kind of on a case-by-case basis, if we receive a complaint. You know, whenever there's a water shortage, there are complaints.

Chris Brown: You would otherwise have to have a whole lot of water police.

Jon Niermann: Try explaining to a landowner that the bed of the creek on his or her property is navigable under state law, and not only for purposes of water, but for purposes of the public actually using it. The legal right should be distinguished from what's a safe thing to do in Texas practically, and so you probably don't want to test that out. But that's another interesting wrinkle to it. But to pile on to Erin's answer, Chris, I think that there's a lot of non-compliance, until, like Erin said, push comes to shove and the complaints come in, and then that's really where we enforce.

Erin: D&L use is superior to all other water rights. If there's any sort of shortage, the junior water rights will be the first to be curtailed. D&L use is a big deal in Texas. If you have an exempt impoundment because of Section 11.142, but the owner wants to change the land use, or something, then Texas Water Code Section 11.143 kicks in and it can play out in a few different ways. They may no longer have an exempt impoundment. Land use is a big one. Let's say a developer buys a ranch with an existing unpermitted 180 acre-foot pond. The developer wants to turn that ranch into a subdivision, golf course, etc. All those are commercial operations and they're not covered by the exemption and they're going to need a permit if they want to keep that impoundment. If a ranch owner's property is not covered under a wildlife management plan, but wants to open it up to allow ATV's, mountain bikes, etc., that make it a commercial operation, and they would need a permit for any impoundment on their ranch. Or if they have a swimming hole that they have just been using for their own personal enjoyment and now want to charge people to come to it, it becomes a commercial operation. In all those situations a previously-exempt non-permitted impoundment would need a permit.

Maintenance can also affect the exemption. If a ranch owner wants to make their pond deeper or wider, that's fine unless the total volume is more than 200 acre-feet on a 12-year average. If it's over that 200 acre-feet threshold, they would need to get a permit. The issue here is water availability and so a new water right application would obviously be junior to any senior water, right applications. There's no guarantee that there's going to be water available to fulfill a new permit in that particular stream. If that happens, if the use were to change in a way to make that impairment no longer exempt, they would no longer be allowed to impound that water, even if it's been there for a really long time. They can work with us to try to figure out if they had an alternate source to maintain the reservoir fill, like groundwater, or they could purchase an existing water right, and that kind of thing can help in that situation.

We monitor compliance in Texas either through a watermaster program, or through regional staff that are in our Office of Compliance and Enforcement and spread out all over the state in our different regional offices. The watermaster staff monitor compliance as their main responsibility, while regional staff have many other responsibilities. Watermaster staff conduct daily monitoring, accounting, management and compliance activities. And in a time when we have reduced flows in the basins, the water master will begin to reduce diversions throughout the basin to help ensure all water right holders get the water they need. A watermaster area is just a more proactive approach with daily management.

Typically, we would wait for a water right holder to make a priority call and then the agency will conduct an analysis of conditions and action may be taken to reduce diversions for less senior water right holders. Obviously, there's a lot of interplay between groundwater and surface water. We have open enforcement cases and ongoing litigation about this kind of thing. I'm not going to get in too deep, but I will mention a couple of federal cases and then some things that are going on in our current legislative session.

In the interim before the 86th legislative session, the Texas House Committee on Natural Resources recommended the creation of a statewide advisory group to develop policy recommendations related to improving the understanding of and management of groundwater and

surface interactions in Texas. We are now in our 87th Texas legislative session and there are two bills: Senate Bill 1039 and House Bill 2652. These bills would basically create an advisory committee to study surface water and groundwater interaction. Additionally, House Bill 2095 would require the University of Texas and Bureau of Economic Geology to study surface water and groundwater interaction and provide models and report.

Two federal cases have impacted this issue, both *Texas v. New Mexico* cases. One is on the Pecos River and the other the Rio Grande. The Pecos River case has already played out at the U.S. Supreme Court and involved an interstate water dispute between Texas and New Mexico. In 1949, the Rio Grande Compact Commission was formed with Texas and New Mexico. The U.S. Supreme Court appointed a river master to oversee and calculate New Mexico's compliance with its compact obligations. Later a dispute arose over the rivermasters calculation of New Mexico's water delivery obligations after a tropical storm flooded the Pecos River Basin. New Mexico then challenged that calculation and asked that their delivery obligations be retroactively credited, which the rivermaster did, but then Texas challenged that modification. When all was said and done, it went to the Supreme Court. This past December and the Court affirmed the rivermasters calculation and retroactive modification. The Rio Grande case is in litigation. The Supreme Court has appointed a special master.

Chris Brown made a comment about being involved in a similar situation in Wyoming recently that involved a company out of Texas whose experience is with treating oil or gas produced groundwater.

ROUNDTABLE: WATER ADMINISTRATION IN DROUGHT

This item was moved to the Summer meeting.

SYMPOSIUM ON THE SETTLEMENT OF RESERVED INDIAN WATER RIGHTS

The virtual symposium is scheduled for August 24-25. See flyer in Tab R.

ROUNDTABLE: WATER CONSERVATION & THE USE OF SALVAGED WATER

Washington: Mary Verner - We are being asked by major irrigators in Washington State to consider further beneficial use of the water that they have conserved through efficiencies of their systems. I'm interested in hearing from other states, but I suspect all member states treat this kind of water differently. In our state, water that is not put to beneficial use for more than five years can be considered relinquished. The irrigators want us to take a different position, allowing them to keep the water they've saved. It's less of a problem of spreading that water to more land, than it is for a novel approach that they're presenting, that they should be able to use that conserved water to bank, lease, or mitigate for other out of stream uses. That's the piece that is really challenging us in Washington right now.

Alan Reichman - One statute in the Washington Water Code, related to applications for changes of water rights, does allow for what Mary described as water spreading, or adding irrigated acres. Up until roughly the late 1990s, Washington was like other western states and would not allow for water spreading in terms of increasing the number of irrigated acres based on the notion that it would increase consumptive use, which could be adverse to [injure] other water right holders who want to exercise their water rights, or it would be adverse to in-stream flows in terms of reducing flows. But the Washington State Legislature passed a statute, which allows people to apply for changes to their water rights to either add irrigated acreage, or add purposes of use. It involves a formula where the Department of Ecology would assess the prior five years of use, and also assess estimated return flows to ensure that there would be no increase in consumptive use. The bottom line goal is to prevent increases in consumptive use, but as Mary explained, water users want to get more creative. They don't want to necessarily be limited to just being able to spread water by adding irrigated acreage, they'd like to bank the water and be able to market it and so forth. We are trying to find a balance and so are curious as to what other states do.

Chris Brown noted that this question has been around western water law for quite some time, as has the idea of incentivizing conservation, versus the old "use it or lose it" doctrine.

Oregon: Tom Byler had prepared a PowerPoint that can be viewed later, but was not shared during the meeting due to time constraints. He briefly described the program they have in Oregon. Basically, as long as you are "ready, willing, and able" to make use of water and you have a delivery system that's capable of delivering that water under your water right, that is the extent of your use. This acted as a disincentive for folks to make improvements to their delivery systems for conservation purposes. If their systems were no longer able to convey the full amount of their water right, they would be subject to losing part of their water right, because they were no longer ready, willing and able. There was no incentive for improvements to delivery systems that would result in conservation.

In 1987, our legislature passed the Allocation of Conserved Water Program (ACWP) as a way to extend current water supplies by encouraging users to conserve water. In the PowerPoint, you'll see there was an original iteration of the Act that didn't work very well. It didn't get much use. In the 1990s and early 2000s, Oregon made changes on how conserved water was calculated – the smaller of the face value of the certificate or the maximum amount diverted using existing facilities, less the amount needed after implementation of conservation measures. The key policy decision here by the legislature was that in order to allow someone to make these changes, a portion of that saved water would have to be converted to public instream uses protected under a mainstream water right. The calculus we have for that is that a minimum of 25% of the saved water has to be converted to instream uses. If the project uses public funding to help them to realize the improvements, that percentage can grow based on the amount of public funding. The applicant, or the water user, has the ability to choose (or elect) to put more water in stream if they want to. One example of that is in Central Oregon, where there are great needs to address Endangered Species Act (ESA) listed fish. There was an incentive for the water user and the irrigation district to convert all of the saved water to instream purposes, and have it protected instream. In the interest of time, I'm going to wrap it up, but just wanted to give you a sense of what Oregon does.

Nevada: Micheline - On Monday, Nevada introduced legislation that basically mirrors Oregon's conservation credit program. We've looked at Oregon's program, but we're proposing to make it applicable to both surface water and groundwater, largely because Nevada doesn't have the surface water resources that our northern northwesterly neighbors do, or candidly, anybody else does. We are doing the same type of thing, looking at a mandatory 25% relinquishment to the resource whether it's the groundwater or surface water. The groundwater relinquishment would go towards building a reserve.

Last session, we had a piece of legislation that stated we're required to reserve 10% of the available perennial yield in basins that are not fully appropriated. Ultimately, the goal is to try to build up to 10% of the perennial yield in each of our basins that don't have that reserve. We're grappling with conservation that doesn't increase the consumptive use. It's going to involve calculus, allowing for expanded acreage, or allowing for an expansion of a period like the season of use, because a lot of our underground rights are limited to the season of use. We have some irrigators who want to expand to a March 15 to October 31 season. They're doing more cold weather crops, or they want to go ahead and do secondary crops, so they want year-round use. Those are some of the challenges that we're grappling with, and that we've tried to incorporate. The other thing for Nevada is we're limiting it to irrigation, not to any other manner of use. This is kind of a partner bill with a water banking and leasing program. We've kind of mirrored Utah's water banking bill. The idea is that water conservation credit can get deposited into the water bank.

I think that a lot of states are trying to evaluate the use it or lose it constraints, the tension that you have between wanting to encourage conservation, but at the same time, you have the requirement that you beneficially use the totality of your right. One of the selling points of the conservation credit program is that irrigators can go ahead and put that saved water into conservation status so it would be permitted in a conservation permit. While it's being held in a conservation permit, it's not subject to the "use it or lose it" provision, whether it's the underground or the surface water system. If they want to go ahead and lease it, or convert it into a different right, or expand their irrigation or their acreage, then as soon as they flip out of that conservation status, then it's permitted back and is subject to our time periods for beneficial use and all those other requirements. These are different ways that we're trying to approach the issues here in Nevada. Tom, I'm curious how Oregon dealt with the consumptive use aspect.

Tom Byler: Great question. I failed to mention that this is an important aspect of this program. If we find there's injury to other water right holders, you can't utilize this program and so that simple calculus that I described, won't come into play. If that's the case, then we'd take a much more refined view of the historic use of the water, and really look at a more consumptive use approach.

That's not in the law. It's just more of an administrative approach we have. That has been our mechanism to try to mitigate injury by just taking a much more refined look than we would under normal circumstances. The net effect would be there, either they wouldn't be able to do it, or there would be less conserved water available for both the applicant and for instream purposes in order to mitigate for those injuries. In our program we also allow for groundwater conservation. One of the issues that we've yet to resolve is water spreading. The policy we have allows for the spreading of water through these conservation improvement practices that the applicant benefits

from under this program, and the policy trade-off is we benefit more broadly by getting some pretty meaningful instream water rights, because they have the same priority date. But with groundwater, we've not figured out a way to protect the groundwater that's conserved. We worry about future allocations of groundwater, undermining the benefit of conservation from a groundwater resource. Micheline, if you have any insights on how Nevada is thinking about that, I'd love to hear it.

Micheline: In Nevada, that's where our SB140 plays in. I mentioned in the 2019 session, the legislature enacted a statute that requires us to set aside the available water for appropriation equal to 10% of the perennial yield, or 10% of the available water within that basin. We went through all of our basins and did an assessment and set aside that 10%. The way that we've built this particular statute is any conserved water goes towards that 10%, which is held and not available for appropriation, until we get to 10% of the perennial yield. At some point, if we ever get a basin to that 10% of the perennial yield being held in reserve, and there's excess water available, then that water, even if it was conserved, could potentially be available again for reappropriation. The idea is to get people to really focus on efficiencies and improvements in optimal beneficial use of their water within limitations.

Nevada's recent bills:
https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7910/Text
https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7907/Text

Chris Brown: Interesting discussion. Wyoming doesn't recognize salvaged water. We don't have anything on the horizon.

Utah: Teresa Wilhelmsen - In Utah, we are working through some of these issues as well. We do have a water banking statute that has passed. It is in a three-year pilot project right now to see how it may work, but it definitely has had mixed reviews. A lot of irrigators and farmers are very concerned that any instream flow that bypasses their point of diversion, or isn't applied on the ground above them, that it will affect their diversions. We do have an instream flow statute in place, but there are talks about maybe some additional changes. In our groundwater management basins, we will be regulating by priority. We have one very large irrigator that filed a temporary change application to look at using saved water and putting it on more land. We approved it through measuring each of the diversions, with installation of weather stations to determine what the consumptive use of the crop is in a particular area. They've invested a lot of money to see if this would work. We're hopeful that they'll be successful, but we definitely focus on just the consumptive use portion. Hopefully that's of help from Utah. I'm sure we've got more to come.

New Mexico: Greg Ridgley - New Mexico takes an approach similar to what Chris Brown described Wyoming does. We manage water rights based on beneficial use and for irrigation, that's the consumptive irrigation requirement amount. That's the only amount of the water diverted that we consider owned by the water right owner. There's been 20 years of push on this issue. Our legislature enacted various tax provisions to incentivize the utilization of water conservation infrastructure for irrigation. There's been a push to enact laws that allow water right owners to transfer, or do something with the amount of water that they conserve.

The problem from the New Mexico State Engineer's perspective is that classic example of going from surface flood irrigation to drip irrigation does not result in the conservation of water, it actually results in the increase of consumption use of water because it's a more efficient method for getting water to the root system of the plants. We do have a statute that allows a water right owner to apply to the State Engineer for a permit to transfer the amount of water that is conserved from changes in irrigation practices, or infrastructure. The burden is on the applicant to demonstrate conservation of water. In the 14 years that law has been on the books, we've had one application that went nowhere. Not much has really happened on this front in New Mexico except for incentivizing conservation through tax credits. New Mexico's conserved water statute is NMSA 1978, Section 72-5-18.

Jennifer Verleger: In the interest of time and because I don't know much on the details, I will add that in North Dakota an irrigator could potentially use the saved efficiency water. If the alternative use is a superior use type, they would have to do a change of use application and go through that process. We would try to make sure the average existing consumptive use would remain unchanged.

Chris Brown: There is a comment from Jennifer Verleger in chat, and I think that would be similar to Wyoming, that only the consumptive use portion of a water right under existing change statutes can ultimately be changed. Our change statutes offer a laundry list of considerations -- the rate of diversion, the total volume of diversion, that total consumption, minus return flows. It's the least amount of all those things that can be changed. I assumed that if we ever had some sort of water salvage statute, it would be something similar, not to make the calculus more complicated. This is probably not something that is an issue for Washington.

I think if Wyoming were to have some sort of water salvage statute, we would have to seriously take into consideration how that might affect Wyoming's interstate obligations. This concept was explored to some degree in the *Montana v. Wyoming* litigation. Ultimately, that decree in 2018 prohibits essentially Wyoming water users from using their original right on any additional land without following appropriate change procedures, which would then reduce or limit the amount that can be changed to the consumptive use. In our North Platte Basin, we have both consumptive use caps and irrigated acreage caps associated with our 2001 modified decree with Nebraska and Colorado. We would certainly have to think about any sort of saved water statute in that context as well. That's an interesting concept that I think will keep people busy for quite some time.

Mary Verner: I was curious about the concept of banking. Our irrigators are not interested in that option. How were they incentivized to take those steps?

Teresa Wilhelmsen: Utah has a Water Banking Act that passed last year through the legislature, but it definitely is still in the testing stages. Some irrigators are supportive, some are not. That's the reason for the three year pilot project – to see how water banking can work. In the meantime, we still have an instream flow statute that is in place, because the Water Banking Act has a 10-year sunset provision. I don't know if I could answer much more than that at this point, but I'd be happy to talk about it in later years once we know a little bit more.

Alan: This discussion has been very helpful. We are facing similar challenges. Thanks for sharing your experiences.

Chris Brown: I think Montana, in the past couple of years, passed a water salvage type statutory scheme.

Jay Weiner: That's not something that I've got direct exposure to. I was under the impression our salvage statutes are something of a mess. I will track it down and put it in chat.

Montana's salvage statute is here:
https://leg.mt.gov/bills/mca/title_0850/chapter_0020/part_0040/section_0190/0850-0020-0040-0190.html

It does not look like it's been amended since 2007. But I'm not deeply familiar with how our Department of Natural Resources and Conservation implements the statute or the administrative rules that may be implicated.

Tony had a question for Micheline. I recently saw a report that the City of Fernley is suing the Bureau of Reclamation over lining the federal canal due to the loss of the seepage, which is ironic, given they sued the Bureau over a break in the canal and subsequent flooding as well, not long ago in that same area.

Micheline: Yes, the City of Fernley filed suit against the Bureau of Reclamation in Nevada Federal District Court with respect to the lining of the canal. The challenge that they have is the perennial yield of that particular basin where the City is located, which is about 600 acre-feet a year. That's the natural recharge to the groundwater supply. The issue involves the Truckee Carson Irrigation District (TCID) canal that transports federal project water from the Truckee River into the Lahontan Reservoir and the Carson River, contributes about another 18,000 acre-feet of seepage water to that groundwater basin. If they line the canal, there's certainly going to be some deficit with respect to the groundwater supply serving those that have irrigation wells, the municipal wells, as well as all the domestic wells within that basin. We're not parties to the litigation yet, and I don't know whether we're going to have to become involved or not, but it's certainly going to be a something to watch over the course of the coming months or years.

Chris Brown: Interesting. We've got some case law that addresses that question in Wyoming. The ultimate conclusion from the Wyoming Supreme Court, at least for folks who rely on other people wasting water, is that they do not have a vested right in the continued waste of that water. The town in that instance would be out of luck. The country of Mexico became fairly upset when the United States lined a big portion of the All American Canal and stopped contributing to the groundwater resource across the country's border in Mexico.

STAFF UPDATES

Michelle provided brief updates on the progress of the grazing water rights report and the state responses to the surveys sent out by the Legal Committee. Due to time constraints, Michelle referred to Tab T for the most recent Congressional and litigation updates.

Chris asked Scott Steinbrecher if he would mind talking about the *Mississippi v. Tennessee* case

Scott Steinbrecher: Colorado has taken an interest in and has been watching *Mississippi v. Tennessee*. We're preparing to file an amicus brief. I think many of you have seen the memo that we distributed and we're getting ready to send out a draft. If after hearing this is something of interest, or you think your state would be interested in joining, please reach out to me. The basic underlying facts are that Memphis relies on a series of groundwater wells to pump water that supply the city near the border. Mississippi sued claiming that the water in the aquifer is property of the state, and so they sued for damages and at this point are refusing to seek equitable apportionment.

Colorado's brief addresses the issue of whether damages should be an available remedy before there is an any obligation placed on a neighboring state, and we take the position that is inappropriate. We argue that without some pre-existing obligation through either equitable apportionment, or an interstate compact, a state like Mississippi can't seek damages from another state and must rely on the little bit of equitable apportionment law that is out there. To make the case, the policy reasons behind it are focused on the significant weighing of equities that courts do in these equitable apportionment cases, to consider the impacts of any injunctive relief or damages and the benefits to one state of allowing it to continue to use a water resource and the detriments that would accrue to another state. It's a very traditional interpretation of interstate equitable apportionment law, and includes some of the considerations in compact cases. If anyone hasn't received our memo requesting support and thinks they'd be interested, please reach out.

Tony Willardson: It's my understanding that there are no interstate equitable apportionments of groundwater at this point in time, or interstate compacts on groundwater.

Chris Brown: Unless there's something I'm not aware of, you're right. There's no case that is specifically on point with what Mississippi has sued Tennessee for.

Greg Ridgley: I just wanted to add to Michelle's litigation update on *Texas v. New Mexico* on the Rio Grande. We had a couple of events in the last two weeks. The Special Master announced that the trial will commence in September 2021. The Special Master also heard oral arguments on dispositive motions on the apportionment between the states under the Rio Grande Compact. He's told parties that he expects to issue his ruling in May. The big question is whether there will be exceptions to that ruling, which would affect the September trial date.

Chris: Greg, are you finding things moving more quickly with a federal judge as a special master as opposed to a private attorney?

Greg: Yes, I think New Mexico has been very impressed with the special master. His work has been well prepared and is moving the case along.

Chris: I'll just mentioned with regard to the grazing water rights issue. Our legislature introduced some legislation this session to follow suit with regard to prohibiting federal ownership of water for grazing rights on federal land. I am pleased to report that as of this week that bill died. Although they were hankering for a fight and following suit with our neighboring states, we won't yet. Thank you very much staff for helping me put together some materials to try to educate people on that particular issue.

DRAFT FY2021-2022 LEGAL COMMITTEE WORK PLAN

Please take a look at the work plan. It will be taken up by the Committee at the Summer meeting for adoption, so be prepared to make any changes or proposals at the Summer Meeting.

SUNSETTING POSTIONS FOR SUMMER 2021 MEETING

The Legal Committee has one position scheduled to sunset, Position No. 425 regarding endangered species and state water rights. Please review it and get any proposed changes or edits to your Executive Committee member prior to the Summer meeting.

OTHER MATTERS

Tony mentioned that staff have been working offline on a letter related to Section 401 of the Clean Water Act and there is going to be a brief discussion after the Legal Committee Meeting for anyone who wants to participate.

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