

**MINUTES
of the
197th COUNCIL MEETING
Holiday Inn Express and Suites
Deadwood, South Dakota
September 16, 2021**

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MEMBERS AND ALTERNATES PRESENT (*via zoom)

ALASKA	<i>Tom Barrett</i>
ARIZONA	<i>Trevor Baggione Ayesha Vohra Amanda Long-Rodriguez</i>
CALIFORNIA	--
COLORADO	<i>Jeremy Neustifter</i>
IDAHO	<i>Jerry Rigby</i>
KANSAS	<i>Earl Lewis Kenneth Titus</i>
MONTANA	<i>Anna Pakenham Stevenson</i>
NEBRASKA	<i>Jesse Bradley</i>
NEVADA	<i>Micheline Fairbank Jennifer Carr</i>
NEW MEXICO	<i>John D'Antonio</i>
NORTH DAKOTA	<i>Jennifer Verleger Andrea Travnicek</i>
OKLAHOMA	<i>Sara Gibson</i>
OREGON	--
SOUTH DAKOTA	<i>Nakaila Steen Jeanne Goodman Eric Gronlund</i>
TEXAS	<i>Jon Niermann</i>

UTAH

Erica Gaddis

WASHINGTON

Mary Verner
Buck Smith

WYOMING

Chris Brown
Jeff Cowley

GUESTS

Robyn Colosimo, Army for Civil Works
Michael Elliott, City of Huntington Beach
Alan Peck, Bureau of Land Management
Meg Perdue, U.S. Fish and Wildlife Service
Christopher Estes, Chalk Board Enterprises, LLC
Kathleen Ligon, Texas Water Development Board
Racquel Rancier, Oregon Water Resources Department
Doug Woodcock, Oregon Water Resources Department
Jim Rizk, Texas Commission on Environmental Quality
Kathy Alexander, Texas Commission on Environmental Quality
John-Cody Stalsby, Texas Commission on Environmental Quality

WESTFAST

Lauren Dempsey, U.S. Air Force
Mike Eberle, USDA Forest Service
Travis Yonts, Bureau of Reclamation
Mindi Dalton, U.S. Geological Survey
Christopher Carlson, USDA Forest Service
Paula Cutillo, Bureau of Land Management
Roger Gorke, Environmental Protection Agency
Heather Hofman, Natural Resources Conservation Service

STAFF

Tony Willardson
Michelle Bushman
Cheryl Redding
Adel Abdallah
James Ryan

WELCOME AND INTRODUCTIONS

WSWC Chair Jennifer Verleger welcomed everyone.

APPROVAL OF MINUTES

The minutes of the meeting held on June 25, 2021, in Cody, Wyoming were moved for approval by Jon Niermann, seconded by Chris Brown, and were unanimously approved.

UPDATE FROM THE OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS

Robyn Colosimo, Director, Policy and Legislation and the Assistant Secretary of the Army for Civil Works, provided an update on the Biden Administration's priorities. Jaime Pinkham is acting as our Assistant Secretary of the Army for Civil Works until the Secretary is confirmed. Mike Connor has been nominated and was cleared earlier this week by the Senate Environment and Public Works Committee and was placed on the executive calendar for Senate Armed Services Committee.

On policy and legislation. We don't have an official position on the infrastructure bill. We are looking to advance what's already on our books, the backlog and projects that are nearing authorization. We have unprecedented funds under disaster bills, and there's a great opportunity - and great challenges - in that space. We have a lot of supplemental work to carry out, and work from our normal budget. Add in the infrastructure bill, and we don't currently have a strategy for all of that.

On our Clean Water Act permitting responsibilities, we continue to have productive relationships with EPA on how to execute the program and provide certainty to communities and governments as processes change between administrations. EPA has taken a two-phase approach in rescinding the Navigable Waters Protection Rule (NWPR), with listening sessions and public dialogue to inform the new rule. In terms of overall timeline, this is a pretty big lift. It takes a lot of our capacity as a staff to move these kinds of things forward and we will do that progressively. We always want to hear folks interests and concerns so please take advantage of the processes.

The Principles, Requirements and Guidelines, which was authored under the Obama Administration, essentially shifts our formulation of Civil Works projects to a broader and more complete consideration of total project benefits. It shifts us from economics as a driver to a three-prong approach of economics, environmental and social benefits, and costs with the public benefits kind of methodology. We are going to look to advance that consistent with WRDA direction and administration priorities here in the fall agenda. We expect that rulemaking will take a couple of years. We will specifically look for some of your input there. We will be looking to collaborate with other agencies to see what their lessons learned have been. For those who saw Mr. James

memo about total benefits, it's completely consistent with that concept. It's really just going another step further when it comes to other considerations.

Other areas of interest are climate resiliency, environmental justice, and fossil fuels. We will continue to put good science forward and consider a broad range of scenarios when formulating projects, which aligns well with the Administration's interest in both flood resilience and coastal resilience. There are interagency work groups that have been established by the federal government, the Council on Environmental Quality (CEQ) in particular, and we are participating in those as a matter of policy. Environmental justice is an interesting one for us. Many of you have probably felt that some of our projects have been perhaps incomplete because there were opportunities to do broader segments. For example, levees to protect disadvantaged communities that have never been justified or were challenging to justify without congressional direction. We don't have a lot of visibility on how this will work going forward. We do know the Administration wants to think broadly about alignment of projects - how we think about disadvantaged communities and formulation. The fossil fuels issue is emerging, with an interagency group grappling with whether navigation in Corps programs is a direct subsidy.

Questions:

Jennifer Carr: One thing that I'd like to make a pitch for as we continue to move forward in that arena, is the need for mapping. Because we really have a hard time explaining what's in and what's out of any WOTUS definition without good maps.

Robyn: There was an effort to take this on, and aquatic mapping has been started. Everyone in the Administration is interested in this.

Jen Verleger: Water Supply Rule - do you have any overall comments on whether that will be coming back in some form.

Robyn: I had a heavy hand in working on this. We tried to hit all of the bases, but came up short on many, so it was withdrawn. I am responsible for rulemaking, but there is no active plan to resurrect it.

Micheline: With the advancement of a 30 by 30 concept, does the Army Corps have any plans on how they're going to go ahead and balance the federal interest in the 30 by 30 with state interests with respect to the management of the water resources within the jurisdictions of the states?

Robyn: Not officially. We're looking to figure out how we can fit in. There'll be more looking forward and backwards.

COMMITTEE REPORTS

A. Water Resources Committee

Mary Verner referred to Tony to assist with the report as she had to step out during the Committee meeting. The Water Resources Committee heard extensive presentations from our federal partners on some of the programs related to Position No. 428, regarding federal water and climate data collection and analysis. In the fifth whereas clause, there is one addition to the program in which we have a particular interest in and that is Reclamation Agrimet System and similar weather stations. There is a Whereas clause to add that wildfires, floods and other natural disasters have led to the significant loss of monitoring capabilities require timely action to restore, maintain, and upgrade sensors and observation systems and networks. Then an addition to the result clause, BE IT FURTHER RESOLVED, that the Western States Water Council supports efforts to enhance and expand the availability of and access to consistent and comprehensive water supply, demand and water use data and information, such as, but not limited to, the Open Access Evapotranspiration (OpenET) data program and related federal authorizing legislation and appropriations. Tony reviewed the two other sunseting positions, which were forwarded to the Full Council without further changes.

Mary thanked Tony for his update and made a motion for the approval of all three positions by the entire Council. John D'Antonio seconded. The motion was unanimously approved.

B. Water Quality Committee

Erica Gaddis noted that the Water Quality Committee discussed two sunseting positions, particularly the one on Waters of the United States (WOTUS) and 401. We also discussed a new position on abandoned mine cleanups around the West. We also had a great discussion on a number of other topics related to water quality. Erica presented the positions for discussion.

The first that we would like to consider is the position on WOTUS. One new whereas clause that acknowledges the regulatory whiplash or uncertainty that's created by the constant change in policy and regulation between administrations and requests a more enduring and broadly supported definition. Yesterday we had a proposal to add the word ephemeral to the list of waters that would be excluded from any definition of WOTUS. Then at the end, we have added to number 11 some language suggesting that there'll be sufficient time and implementation of any rule to allow states to develop tools, as well as federal agencies to develop tools to ensure a seamless implementation of the new rule. There's another new resolved clause that speaks to the need to consider regional differences in waters across the nation and allow for some flexibility and implementation that reflects those differences. Then finally, there is a resolved clause that we added asking that EPA and the Corps consider incorporating states in the drafting process in a very engaged and active manner so that they can receive feedback during the drafting process and ahead of a formal public comment process.

Erica moved that this amended position be adopted. Chris Brown seconded, and the Council held a lengthy discussion on the motion.

Tom Stiles: As we were going through this yesterday, the Council has always prided itself as being an organization for the most part that lives through consensus. With the Water Quality Committee, that's a hard bargain to do on many of our issues and WOTUS is primary among that. As we carried on the kind of the wordsmithing yesterday in trying to figure out what would work and what not. I think many of these changes that are on the floor right now are really good and reflects where the federal government is poised to take it. But there's definitely dissent among the states as to the reach of federal jurisdiction. I think we can get closer to a sense of the Council and close to consensus if we kind of take a step back. Rather than kind of go hard charge and say to the federal government, hey, you need to recognize that Kennedy's significant Nexus needs definition of what significance and so forth, or you have to abide by the limits that Congress and the court to place as expressed through Scalia. Everything that's in this result is basically telling the federal government as you're starting to embark on rulemaking, we want you to consider these things. I think on both five and six, rather than go with the hardline language, we just asked them on five instead of recognizes, just say appropriately considers justice Kennedy's significant Nexus test and then go forth. That's really what we want them to do, or at least some states to consider how Kennedy's test can be applied here. At the same time, with number six, rather than complies with, just say appropriately considers the limits. I would strike Congress out of this because I don't think Congress knows what limits they've placed. If they did we wouldn't be having these WOTUS debates every year. I'd say probably consider the limits the U.S. Supreme Court had placed on Clean Water Act jurisdiction and strike the next prepositional phrase because it doesn't really add anything. Then instead of consistent with the plurality, I would say something like expressed through the plurality opinion authored by Scalia then strike the consistent with. Making those changes I think it more appropriately places our ask of the federal agencies across the board, no matter which of the 17 states and how they feel about WOTUS. Right now, we want them to appropriately consider Kennedy's test, we want them appropriately consider the limit and the narrower perspective that Scalia expressed there.

And then the big take home goes into the number seven. It dawned on me overnight that we were trying to write the rule through this resolution. There'll be a time for us to consider what should be in and out. The only thing that I think is fairly clear-cut and has been consistently expressed to the Counsel is groundwater is not considered in this. I would essentially gut number seven to just basically to say specifically excludes groundwater. Then everything from B through F, just cut it out right now as there'll be a time for us all to express what we think is appropriately in and out. We don't need to start writing the rule right now in terms of that. If we strike out B through F right now, all we've done is basically drawn our hardline that we don't believe groundwater should be included and I think all the states believe in that. Everything else beyond that is something to be open to discussion and we can't get it done without additional follow up, we need to hear from the dissenting states what their respective positions are on things like ephemerals. One thing we've learned now is that I'm getting more and more to believe that ephemeral isn't a black and white consideration. An Arizona ephemeral is different from a Colorado ephemeral, which is different than a Kansas ephemeral. There are very many shades of gray in terms of how we look at that these things. I think we need to come forth at the Spring meeting with each of the states saying, here's our perspective on these things, whether it's isolated wetlands, or ephemeral streams, and so forth. If we strike everything else out, we haven't literally

lost anything. We've just basically put a marker on the table and then let the feds come forth and say, here's where we are based on the pre-2015 interpretation right now. Then we're starting with the add on's that they want to do. The new provisions of 12 and 13, capture the ask to make sure they recognize all the regional differences. Part of our problem with number seven is we were starting to reflect regional differences and we were trying to bang it out. We couldn't get there so let's just strike it out and we'll defer that for now as EPA and the Corps come up with some proposed new language. We can all come together and share our perspectives on certain aspects of waters, and how it plays into that. With these amendments I'm proposing here, I suggest that, in good faith, I think all the states can get behind that because we've taken away much of the debatable issues there, and reflecting on that. It's basically a statement to the federal government that as western states, we have very diverse and unique situations, we want you to consider all these things and we want you to recognize that there are these regional differences there. We don't have to go forth and start making the list of who's in and who's out. That's what I would like to propose coming out of this meeting and from the Council.

Tony noted that without action on this position it would sunset under our rules of organization and discussed the requirement for a 2/3 vote from the Executive Committee members or their designated alternates. The Executive Committee meets by call prior to the Council meeting to review the resolutions and then to clarify who will be voting for the state. There is a complication in that we may not have an appointment from some of the states to be a representative and so there is the possibility that some states could be precluded because we do not have a letter from the governor officially appointing an Executive Committee member. As an additional technical matter, under our existing rules of organization, a state can choose to ask that we delay the vote until the next meeting; in this case, doing so would cause this position to sunset. If we do make changes, that will require a two thirds majority and we will have to have a roll call state by state and I will have to verify that whoever is voting for the state is an appointed member, or his designee is an alternate of an appointed member for the Executive Committee.

Mary Verner expressed appreciation for Tom Stile's comments. I think that we would have real difficulty achieving a consensus on the edits as they've been introduced. In fact, on behalf of the State of Washington, I can engage us for a half an hour in discussion this morning about whether we should not include the word ephemeral. I appreciate the suggestion of just striking the controversial language where we do not have interstate agreement. I think it's a creative way to suggest "appropriately consider." It's a new concept for me that you've introduced this morning as far as this position, but I do find it interesting. I would support including that as maybe a friendly amendment. I do want to refer though to the suggestion that the new 12 and 13 would be able to replace the controversial language. I would have some concern about just using the substitute language as it is today. The reason is, if you look at 12, it says defined regional nature of the rule and I think that phrase might infer something that Washington doesn't understand and so I'd like to know more about that to see if we support it. I wouldn't be arguing over ephemeral, but I would be asking for further clarification, because I'm not sure what that means and whether or not that takes care of our regional differences. I'm not sure what the procedure is here for me to just say, I support the suggestion from Kansas. If someone needs to offer an amendment procedurally then let me know.

Jerry Rigby said he hoped that no state suggests this position be sunset. I think we need to resolve this amongst ourselves today. I'll just go on the record and say that I support this as it is now, without the modifications that have come this morning. In other words, yesterday's position. With the way it was before the proposed deletions of this specific language, what states were concerned about ephemeral? We added that yesterday and that can be taken out. If that's it, I would like to proceed to see what states do support it as it came out late last night, or as we received it, yesterday. If we have the majority, or 2/3, let's proceed.

Jennifer Carr explained for Mary the phrasing in number 12, because she wrote it. The idea is that the nature of ephemeral waters varies in different regions, even within our states, let alone the nation. A potential path forward is for EPA to stop trying to write one rule for the Nation. In rereading that language today and hearing your comments, a minor tweak that might clarify it might be flexibility in implementation, or define a regional nature of the rule. If that helps, I'm certainly happy to edit this a little bit further. But that was the thinking behind it. I don't know that EPA could ever write a rule that would recognize all of the flow regimes across the country. Thank you, Tom, for teeing that up. I had a similar sort of reaction to the drafting when we were trying to come to some phraseology over that word ephemeral. It did feel to me also like we were a little bit maybe premature in this process because of that level of wordsmithing and debate.

Jeremy Neustifter thanked Tom for his comments, which he feels hit the nail on the head for Colorado. As originally drafted and amended in the Committee yesterday, I don't believe that the State of Colorado could jump on board with this position recognizing that we're probably in the minority. However, if Tom's amendments are accepted, Colorado could be on board.

Mary Verner said she appreciated Jennifer Carr's explanation. Ephemeral is a regional difference and that is the point of our concern. I agree with the State of Colorado.

Chris Brown said he appreciated all of the comments as the Committee worked through this. Wyoming proposed to add the word ephemeral to what is now number Seven F and we are happy to withdraw that suggestion if it helps folks get more comfortable. Also, potentially consider a vote that would allow us to move forward with those edits that are acceptable to everybody and perhaps conditioning upon reconsideration at the Spring meeting, so that we don't lose what we have with regard to the Clean Water Act, but acknowledges, that we need to do more work with regard to making sure we have consensus with regard to some of the other provisions. I do have a couple of thoughts with regard to Tom's suggested edits to some of the earlier provisions with regard to complying with Congress. I think we probably need to leave that in, but I think we've wordsmithed that a little bit. Wyoming, similar to Idaho, is comfortable with the way this was previously worded and does support the way it was with talking about a couple of these edits here. I don't want to do that now where we're talking about removing ephemeral and perhaps moving this forward.

Erica asked Colorado and Washington if consensus could be reached if the word ephemeral is stricken?

Jeremy: Even if ephemeral is removed, I don't think that Colorado could get on board. We still have some other concerns. We also take issue with the whole clause concerning complying with the plurality opinion. I think that the amendment proposed by Tom Stiles would be something that we could get on board with given that it's not so hard and to the point. It certainly should be taken in consideration. That's something that Colorado probably couldn't sign on to as currently written.

Jennifer Verleger: I would propose another possible solution that maybe is the middle ground. What if we just kept the first sentence and we didn't have including we just say specifically excludes waters and features outside of the scope of the CWA jurisdiction?

Doug Woodcock said he appreciate Jeremy's points here, and would be in agreement that we clearly articulate the groundwater is not included and that B through F would be eliminated and we could support that.

Erica withdrew her first motion, made another motion that we adopt this resolution, subject to further consideration at our Spring meeting with the amendments that Tom Stiles purposed. Motion was seconded by Earl Lewis.

Jennifer Carr asked for clarification on how the decision today would impact upcoming comments to EPA on federalism. Michelle and Tony noted that most of the edits being discussed today wouldn't change the general federalism concerns expressed in the position. There was some discussion of the evolution of the position to meet the concerns of each new WOTUS rulemaking and rule. Members expressed interest in compromising and reaching a consensus position, with a request that the position be revisited at the Spring meeting in an effort to find some more acceptable common ground on critical issues of concern for various states. Of particular concern were the explicit list of exclusions, including ephemeral features, and language regarding limits on jurisdiction made by Congress and the Supreme Court. Erica committed to work with states prior to the Spring meeting to work up a list of exclusions that could be added as an amendment.

Erica: I will withdraw my original motion and make a substitute motion to adopt the position with the edits that are shown on the screen here, acknowledging those in number five that we changed "recognizes that" to "appropriately considers." On number six, we say "complies with the limits set by Congress and appropriately considers the limits the U.S. Supreme Court has placed on CWA jurisdiction, expressed through the plurality opinion authored by Justice Scalia in Rapanos." In number seven, everything is stricken and reads, "specifically excludes waters and features outside the scope of the CWA jurisdiction including but not limited to groundwater." At the very end, we take the suggestion of Jennifer Carr, so twelve would read, "recognizes the unique landscapes and flow regimes in various regions of the Nation and the need for flexibility in implementation or define a regional nature of the rule." That is my motion.

Jennifer Verleger: We have a motion and a second and with a voice vote of all in favor, the motion passes.

Tom Stiles took over as Vice Chair on behalf of Erica Gaddis and provided a summary of changes to Position No. 426, regarding Clean Water Act Section 401 Certification. The changes reflect the new circumstances. There are two “Whereas” clauses added on the second page. Again, it’s somewhat of a balancing act in terms of where the various states are in regard to their overall 401 authority, and waiting to see what the Administration is going to do. But notwithstanding that, I think most of the states comprising the Council still support that. We want to maintain a strong 401 program. It’s the only provision within the Clean Water Act that directly authorized states with authority and not have it delegated to us by EPA.

Tony: Just for clarity, the changes in blue are recommended by the Executive Committee and the additional changes in red are the changes that were made here at the meetings.

Tom called for a motion to approve the changes. The motion was made and seconded, and the position was opened for further discussion.

Doug Woodcock: Under the Therefore, Be It Resolved clause, it doesn’t read quite right to me where the Council supports any changes that strengthen the deference to state water laws and diminish the primary state authority responsibility. I have an alternate language here that fits with the intent where it goes Western States Water Council supports any changes that strengthen the state’s ability to assure state laws are met and preserve the state’s primary authority responsibility for the appropriation allocation, etc.

Chris Brown: I’ve noticed the exact same thing at perhaps a simpler edit to that sentence to flip it back around in the right direction where I would say the Council supports any changes that strengthen the deference to state water laws and do not diminish the primary state authority.

Doug: That works for Oregon.

Chris moved a resolution to his amendment to include “do not.” Jerry Rigby seconded and it was unanimously approved as amended.

Tom Stiles: The last position is a new position on abandoned hardrock mines, which is a big issue that continues to vex many of our western members. The sense of the Council is to express to EPA to clear a better path for good Samaritans to work on these types of cleanups and allow for that. Tom made motion to have the Council consider, approve and adopt this new position, and the motion was seconded and the position opened for discussion.

Mary Verner: I did receive input from Washington ecologies abandoned mine expert that I want to convey to you, as I have no expertise on this. Gary Gaff recommended that we look at incorporating prohibitions on future mining at the mine sites. He conveyed to me that Washington has a problem with prospectors going in abandoned sites and continuing or engaging in future mining activity. I’m conveying that without a real suggestion of where to address that and the language, I apologize. But if you could consider that input, I would appreciate it. He was wanting specifically to look at future mining activity.

Tony: I'm assuming that comment is related to unauthorized entry and mining? That has been raised, but would actually be a separate issue. When I talk about re-mining, it's coming in with a viable entity that is able to not only remediate, but re-mine that site, which helps pay for the cleanup, which otherwise there may not be an avenue to do that.

Mary: Thank you, Tony. I apologize that we haven't had a chance for further internal coordination. My sense is that the point of the whereas clause here, as emphasized by Tom is the Good Samaritan aspect of it. I will send a note quickly to my colleague, but will defer to the ongoing discussion here on the pending motion.

There being no further discussion, with a motion and a second, with no opposition, the new position was unanimously approved.

C. Legal Committee

Chris Brown provided an update on the Legal committee, which met on Tuesday. On the position regarding state water rights and natural flows, we approved some proposed edits with regard to the Corps of Engineers appropriately considering and recognizing states' rights to develop, use, control the appropriation, storage, and distribution of natural flows. The Committee recommended approval of that by the Full Council with changes. Chris made a motion for approval. John D'Antonio seconded. Motion passed.

We had a Wild and Scenic Rivers Workshop, which I found very valuable. We heard case studies from Idaho, Alaska, and Wyoming. We had multiple speakers from the federal family who talked about Wild and Scenic Rivers and the water rights associated with those and who work toward moving forward with that group to better understand and discuss Wild and Scenic Rivers.

With regards to the Legal Committee meeting itself, we had a presentation from Eric Gronlund of South Dakota with regard to full appropriation of aquifers that I found rather interesting. I think some of our states in that dealt with the groundwater questions as much as others find those sorts of examples very helpful as we wrestle with those questions. We also had a presentation from Arianne Singer with New Mexico with regard to how the New Mexico Court of Appeals dealt with trying water rights settlements, which was very concerning. Michelle gave an update on the Symposium on the Settlement of Reserved Indian Water Rights Claims, and the Council's numerous surveys that are out there, and on the current litigation/legislation.

D. Executive Committee

Jon Niermann reported the Executive Committee met on Tuesday and approved the minutes and heard several reports, including one on budget and finances, which are outlined under Tab D. Dues are mostly all in except for the State of Alaska. With the grants, including a grant from the Walton Foundation, WaDE is fully supported for at least the next three years, probably longer. Jessica Reimer, WSWC Policy Analysis resigned. Jennifer reported on pending Council resolutions and Tony presented on the Western Governors' Association's 2021 policy resolutions and then gave a report on activities and events that are under Tab F. And I'm always amazed at

how much the Council staff does. Tony also gave a plug to encourage non-appointed members to make sure that they have an appointment letter from their governor. And I think what I heard earlier today is that if you're participating without that official appointment, that may call into question your authority to vote for your state. Tony, I also made some comments recognizing the long tenure of Council staff. And maybe the most important thing that I heard at the meeting was that he promised that he planned to remain in his post for at least another year.

WESTFAST REPORT

Roger Gorke, Western States Federal Agency Support Team (WestFAST) Chair began by giving an overview of WestFAST membership and priorities (see slide).

WestFAST reached out to states on water planning listening sessions regarding the use of federal assets in state water planning. The initial survey was sent to five states. To date, two states have responded. Next steps include scheduling listening sessions with states; identifying key staff to attend listening sessions; and identifying follow up needs and actions.

The upcoming 2021 Southwest Drought Virtual Forum will be held on September 21-22, and 28-29, 2021. The Forum will assemble states, tribes, stakeholders, decision-makers, and drought experts for a cross cutting dialogue on long-term implications of drought in the Southwestern United States, response and relief efforts across levels of government and sectors, with the goal of supporting communities and building long-term drought resilience in the region. To register go to: www.southwestdroughtforum.com.

The update that Chris gave yesterday during the Water Quality Committee is connecting the dots between water resources and wildfire in the West, and we are planning a series of webinars (see slide 10). Our webinar series are very exciting, or as exciting as webinars can be, and are very well attended. Roger reviewed briefly the last four webinars.

Roger gave an update on the new WestFAST leadership, which went into effect July 2021. Chair - Roger Gorke, Senior Policy Advisor, Office of Water, EPA; Vice Chair - Christopher Carlson, Program Lead, Watershed and Aquatic Ecology Research, USFS; and Heather Hoffman, Natural Resource Specialist, Natural Water Climate Center, NRCS will remain WestFAST's federal liaison.

He also provided some follow-up comments regarding the baseline water quality standards for tribes and the rulemaking efforts early next year.

Questions:

Jennifer Zygmunt: My understanding is that EPA is not intending to do further outreach on this subject, which is a very important subject for Wyoming. I would strongly encourage that EPA further actively engage the states on this issue between now and the proposed rulemaking next spring. Thank you.

Roger: I'll make sure that Radhika is aware of this.

STATE REPORTS

Kansas: Earl Lewis thanked South Dakota for hosting. In regard to drought, compared to the rest of the States, Kansas is in much better shape. Our legislation this past year was pretty light. We had one minor bill related to our water rights program, but mostly technical issues. As you may know from Tony's comments earlier, we've started to inquire about organization of State agencies. We have a dedicated water committee on the House side this year and will have the same committee next year - it's a two-year term. They spent most of this past term hearing what the different agencies do, and how they fit together, etc. We expect there will be changes. We are really pushing forward on the Ogallala in Wichita County. Kenny Titus talked about the Rattlesnake Creek litigation during the Legal Committee. With water quality, nutrients are a big issue. We started paying a bit more attention over the last couple of years on uranium, which is coming from the Arkansas River in Colorado. Shale is back into our systems and is causing issues there.

Nevada: Jennifer Carr - WOTUS, it has been interesting working with the Corps on 401 issues and lack of definition of waters in Nevada. Only Lake Mead and Lake Tahoe are Section 10 waters. When WOTUS was finalized a year ago, we were asking questions about other interstate waters in the State. They were shocked to discover that they had very little research on Nevada waters. The Corps actually took it upon themselves to initiate a Section 10 designation for the Carson River; they felt that designating new waters in Nevada would help them be more durable regardless of what WOTUS definition comes out next. We just discovered that Section 10 brings some other rules with it that we hadn't known about, and so we're getting up to speed on that. We've decided to continue to work on strengthening our state permitting program, regardless of the definition. We seem to be hemorrhaging staff right now. Local and county government seems to be paying more with less responsibility and better benefits than the State of Nevada does. We are well over 10% vacancy. If other states are struggling with that, it might be nice to get some heads together and see what strategies we might be able to come up with - not just recruitment, but maybe retention so maybe we won't lose staff. I'd be interested if anybody just wanted to have a sidebar on that someday.

Micheline Fairbank: We're going to start to engage in a tribal water settlement negotiation in the near future, which we haven't done in Nevada for probably 20 years. On a litigation front, we have a particular issue in Southern Nevada. Nevada is broken up into 256 separate and distinct hydrographic basins. We made a decision to include five and a portion of a sixth hydrographic basin based upon the underground geology and hydrology of a permanent aquifer. We made a finding with regards to the water resource budget, the perennial yield of that particular resource that could be developed without impairing senior existing surface water rights and aquifer discharges and springs that are the headwaters for a decreed river system. Ironically, the twist with this is the headwater serves as a habitat for an endangered species. We're currently undergoing litigation with respect to our decision making. We're also facing two inverse

condemnation claims from water right holders who are claiming that we've now impaired their water rights. That will be a tough one for us to continue to try to navigate. We're dealing with drought, drought, and more drought, which is not an unfamiliar conversation in the West. Nevada is trying to find mechanisms in which to better manage our resources. We're exploring different ways how we build resiliency, particularly in river systems where we see significant impact on senior surface water deliveries due to groundwater use. Our Humboldt River system has a groundwater model that we've been working on with the USGS. It should be published early next year, which will hopefully serve to help guide our management strategy. We're going to be able to pinpoint based upon a well, the exact rate of capture of river flow within that entire region. We will need to make those determinations of how we manage those and balance the interests.

Wyoming: Jeff Cowley thank everybody for being so welcoming and helpful. He is replacing Steve Wolff and gave a little bit of his background with the State Engineer's office. Wyoming has been hot and dry. The snow we got did not runoff like we thought it would so a lot of our reservoir levels in Wyoming are considerably lower than we're used to. In the North Platte basin, we missed an allocation. We did go through the summer with our pumping restrictions. At the governor's direction we convened the Colorado River Working Group Committee. We have a state senator and representative on this committee. They're wanting to provide more input than we're probably going to be able to allow, but we'll definitely listen. There are very strict rules on the Colorado River. All of Wyoming rivers are short on water.

Chris Brown: The Bear River was probably hit harder than most our basins this last summer. They were seeing regulation in June, which they typically see in mid-August. Many of the downstream irrigators, primarily in Idaho and Utah, were seeking some accommodation and actual amendment of agreements that have been on that river that are extraneous to the compact that the three states have, but kind of go to implement the way the water is divvied up in that system. We worked pretty hard to try to figure out a way, at least on a temporary basis given the extraordinary circumstance of the year, to get some additional storage water to help those downstream irrigators. Unfortunately, we couldn't find a path to sufficiently address mitigation so there's an additional extra storage water delivered this year, which will have a negative impact on Wyoming in future years. Fortunately, we got some monsoon rains in that basin in late August and September that hopefully mitigate some of that need with additional water. I'm sure it's not the last we've heard of attempts to accommodate shortages.

We've got a kerfuffle going on right now between the City of Laramie and the University of Wyoming (Chris noted that he spoke about this during the meetings in Cody). It's in Wyoming District Court. The City of Laramie is attempting to prevent the University from pumping water from its own wells. The City claims that it interferes with the city wells, claiming the unconstitutionality of the statute. We filed a brief on the constitutional theory, that it's actually the purview of the state engineer to determine whether or not somebody can pump groundwater, not the City of Laramie. Interesting scenario where a municipality attempts to extend its jurisdictional reach into the ground to protect the source of supply. Would be interesting to see if other states wrestled with that. Last thing, Jennifer Zygmunt is no longer the interim, she is now the permanent Water Quality Administrator for the WY DEQ. I am very excited to have her in that role.

Jennifer Zygmunt: Just a couple updates from the water quality perspective in Wyoming. We continue to work heavily on carbon sequestration, due to primacy for injection wells. We finished revisions to our rules this summer, which has some good improvements. We are working with some draft legislation regarding long-term stewardship, or liability modeled after North Dakota statute. Another issue, that's more of a question for other states or potentially a topic for a future meeting is subdivisions. We're seeing an explosion of subdivisions in Wyoming that prompts questions about drinking water supplies, wastewater treatment and protecting water quality, particularly groundwater from nitrates. We're having a lot of discussions with counties about that issue. It's an ongoing challenge that's picking up speed here in Wyoming. If other western states are seeing the same challenge, I think a discussion on that topic would be very helpful for us in the future. I do want to thank South Dakota for hosting the meeting and Council staff for all their efforts.

Texas: Jon Niermann - Texas knows extreme droughts and so our hearts certainly go out to our sister states. Currently, we're enjoying a remarkable absence of drought. Under 3% of the state is in a moderate drought right now. It's a strange moment for Texas. A lot of our water work right now has been dominated by disaster. In the last two or three weeks, we've been visited, just barely, thankfully, by two hurricanes Ida and Nicolas. They had some minor effects on some of our drinking water systems. We're still working through the postmortem on the major disaster we had earlier this year from winter storm Uri that knocked out water entirely to many, many Texans, hundreds of thousands of Texans. Half the state was on a boil water notice. We're looking to put whatever measures need to be put in place to improve resiliency for those systems. The Texas Commission on Environmental Quality is currently undergoing sunset. So for the next 20 months or so the agency will be justifying its existence to the legislature. I think there's going to be some good opportunities to improve our services to our fellow Texans. Earlier this week, I was reappointed to serve another six-year term. So I expect to be around the Council meetings for a few years to come.

North Dakota: Jennifer Verleger thanked South Dakota for hosting, for the beautiful field trip and facility and no snow!!

Andrea Travnicek: The legislature passed a bill to restructure the State Water Commission, so now we are the Department of Water Resources, which is led by a director that oversees the state engineer, and still works with the water Commissioner. It is week seven on the job for me and so I'm trying to get up to speed as quickly as possible. A couple other legislative notes that came up this session. An interim committee was put together study drainage around the state. The committee will be looking into some of the assessment districts, working with the water resource districts. There have been some discussions related to authorities that water resource districts have and some of the impacts associated with landowners, and now we should continue to improve how those assessments work. So we're going to be at the table with the legislators this next legislative session. Budget wise, we got over \$450 million towards water projects within the State of North Dakota. We continue to make that a high priority whether it's flood protection, water supply, or the drought conditions that are impacting us as well. We continue to emphasize the importance of the work that we continue to work towards on the Red River water supply project from Missouri water supply, Southwest and Western water supply. We also have a governance study going on

right now on how some of those projects should be managed. That's in front of the water commissioners right now in draft form. The planning board direction is coming out over the next year related to that as well, but still very exciting that we were able to get some more dollars towards those projects. The legislative body also passed a bonding bill related to water projects. We continue to look for ways to assist landowners, ranchers, and farmers. With the executive order this April from the governor, we were able to bring our draft disaster livestock water supply project. Our program for that really tried to get dollars in the hands of farmers, ranchers, and some infrastructure in the ground for them to assist with their water supply needs for livestock. We are always trying to remain innovative. We continue to work on our mapping progress and remote sensors.

Arizona: Amanda Long Rodriguez - As you may know, the Bureau of Reclamation's twenty-four month study was released in August, which triggered another adaptive management strategy that was put in place in the Drought Contingency Plan (DCP). This furthered consultation with the Secretary and the lower basin states to determine additional measures to protect Lake Mead water levels. In a separate process, Arizona is also leading the Arizona Water Reconsolidation Committee to prepare for our Colorado River management with the current rules expiring in 2026. So within our Department, we've been very, very busy with the Colorado River discussions. Work continues on the governor's Water Augmentation, Innovation and Conservation Council. The Council discussed future groundwater management options for the state. The fifth and current active management plans are in the drafting phase and the drafts are expected to be complete by the end of this year. This will mark a very significant milestone for the Department. Finally, Arizona has had a very active monsoon season this year, especially compared to last year. Some areas of the state have received up to 200% of normal rainfall. However, unfortunately, most of the state still remains in severe to the exceptional drought.

Idaho: Jerry Rigby thanked South Dakota for hosting and joked that he was reluctant to come back to Deadwood given previous experience. In regard to drought, the State of Idaho has it all - from moderate to severe drought. It depends upon the particular basin. Thanks to western Wyoming, the Snake River almost had an adequate water supply, which we were very fortunate as that saved a lot of farms. John Simpson has been very involved in the Columbia River collaborative, which involves Idaho, Montana, Oregon, and Washington. It's been a very arduous process. Right now, the intent is to provide sustainability for salmon, power, ports, farming etc. The only concern we have with it is that the numbers of those who are of another opinion than Idaho far outnumber us on the collaborative committee. So we're really concerned on how that is going to turn out. The Columbia River Treaty is still ongoing. We're obviously very concerned about that. We know the demands from Canada would put a huge burden back on the United States for lowering our reservoir levels to the point where it's almost like being in constant drought, and that will not work for us. Representative Simpson has a desire to remove four lower Snake River dams, which isn't going too well with most of the constituents. Those who will be making the decision are not on board with it and so we'll see where that goes.

One particular issue that I think is going to have to be a decision made by our state supreme court is on the Wind River Valley disaster. I will say it's a disaster. Senior users were not getting their water due to the junior pumpers in the Sun Valley area. This basin is one of those that just

screams for some kind of a ruling. Interestingly enough, Idaho has what they call the consumptive management rules which generally say that one must make a call. If you think you're being injured by a junior, right, you make a call. In this particular case, pursuant to the consumptive management rules, it basically says that nothing in these rules limits the Director's authority to take alternate or additional actions relating to the management of water resource. So pursuant to that, he's gone out of that twice and dealt with one groundwater management area. Therefore, a plan under the groundwater management area can trump these rules. In our particular case, in the Wind River Valley, he looked to a statute which says that he may initiate administrative proceedings to work to prohibit or limit the withdrawal of water from any well during any period he determines that the water to fill any water right is not available. In other words, he said he didn't need conjunctive management rules, didn't need the groundwater management area, pursuant to that statute. I'm saying it's clear that the pumpers are impacting the seniors. So we are representing the seniors. We jumped into this with seventeen attorneys on the other side, and three of us on our side. We had the fastest depositions going on one day before the actual administrative hearing. In the end, he curtailed all of the pumps. You can imagine the uproar that came from that. In fact, everyone told me not to go to Sun Valley, that I wasn't welcome. We did work out a resolution for this year, but we're back into the groundwater management area in an attempt to come up with a plan for future and final resolution of this, but it's going to be appealed and I'm sure that will be another decision the Idaho Supreme Court will have to weigh in on.

South Dakota: Nakaila Steen thanked everyone for attending, in person and online and also thanked the WSWC staff. South Dakota has implemented some changes to water permit application hearings relating to the Trans Canada Keystone Pipeline. In the Fall of 2019 until early 2020, the South Dakota Water Management Board spent over 12 days hearing testimony on three contested water permit applications filed by Trans Canada Keystone Pipeline to pump water from the Cheyenne, White and Bad rivers for use during construction of the pipeline. Ultimately, the Board approved the water permits. However, in June 2021, the federal permit for the project was revoked, resulting in the termination of the Keystone XL Pipeline project entirely. Soon after the announcement, the Council for Trans Canada filed a request with the State of South Dakota that the water permits be cancelled. These three water permits are scheduled for cancellation at the October board meeting this year. Additionally, in 2012, Powertech USA filed two water permit applications and a groundwater discharge plan with the State for proposed *in situ* uranium mining operation in Fall River County, which is located in the southern Black Hills. There were approximately 300 individuals who petitioned in opposition to the applications. In Fall 2013, hearings for the water permit applications and the ground groundwater discharge plan were held before the Board. Powertech then filed a motion, which was granted to continue the state hearings until the resolution of the pending federal applications that are still before the Nuclear Regulatory Commission and EPA. This year in June, Powertech filed the motion seeking to reconvene the hearings before the Water Management Board. Powertech sought to establish timeframes to bring the matter back before the board. In October of this year, DNR filed a response opposing Powertech's motion because all the federal permitting for the project was not resolved and the timeframe proposed by Powertech was simply too ambitious due to the long hiatus since the hearing eight years ago. The prehearing officer issued an order that the entire Board consider the motion at the October meeting also this year. Lastly, most of South Dakota is classified in drought conditions or worse.

Utah: Erica Gaddis - Utah is in a severe drought - 99% of state is in extreme or exceptional drought. Three fourths of Utah's reservoirs are below 55% available capacity. Several are actually empty for the first time so we've had to close and turn off secondary water and shut down boat ramps. Governor Cox has prioritized water conservation initiatives across the state in response to these unprecedented drought conditions. There's a number of different programs that are in the works. One that's of most interest is a new water planning efforts that will for the first time engage all the state's water divisions, to really come together with a strategic plan to deal with water issues across the state. We've had a lot of discussion in our state about how to make good use of the ARPA funds. I'm sure that's true of many states because there's been a priority on water conservation. We've been asked from DEQ to help demonstrate eligibility for some of those initiatives. Secondary metering is the priority for the legislature. Our Division of Drinking Water was able to demonstrate that by reducing the demand on culinary water, through secondary metering, which would be eligible use of ARPA funds under the drinking water SRF eligibilities. The other priority is agricultural water optimization, which again looks at both water conservation and maximizing value for the agricultural sector. Most of the work that the Department of Agriculture wants to do under that program, we think is eligible through our non-point source management plan that's adopted in Utah and therefore eligible under the Clean Water SRF eligibility criteria. We've been creative in helping our partner agencies figure out how to use some of those funds. We also would really love to see some of the funds go to clean water drinking water infrastructure. We have a \$1.3 billion [million?] list of sewer needs that are either shovel ready or in active construction. I'm sure that many of you have seen the same construction costs that are just through the roof. All of our facilities that are in the middle of an upgrade are finding costs just exceeding their ability to accommodate them. We'd like to see some ARPA funds to help them as well to tackle some new sewer issues in some of our most threatened and pristine waters.

Washington: Mary Verner - Washington has experienced drought conditions this year. A drought emergency was declared in early July. The hardships have been mostly in the fish and wildlife arena in the local communities having to truck in public drinking water supply, and the dry land agriculture. I want to thank our friends in Idaho for assisting with sufficient water in the Columbia Snake River system. The Columbia River irrigators had sufficient water for them to function without major curtailment, but the dryland folks and ranchers were nearly in hardship this year. Our legislature is very interested in seeing if there's a way to establish a durable account so we can help folks in time. A couple of days ago, we asked if some supplemental funding for drought could be included in the governor's budget, but we're forecasted to have heavy rain this weekend. We are looking at adjudicating a couple of major watersheds in our state, for which the legislature approved funding. We are doing the pre-adjudication work at this point, will get ready to file court actions beginning as early as 2023. We appreciate the engagement with our Department of Justice representatives on behalf of the Federal Reserve's interest and then of course, tribes and tribal interests, which go beyond strictly reserved rights. The tribes are letting us know that they want to talk about exercising their full scope of sovereign rights. That is going to be interesting. For Washington, PFAS contamination is a big issue. Finding alternate water supplies for those who are experiencing PFAS contamination is increasingly an issue for us. Our legislature passed a significant historic line piece of legislation this year with regard to Climate

and the Climate Commitment Act, which really is focused on reducing emissions and it's not directly related to water resources. However, the legislature with that clearly expressed that we would look more at a higher priority for climate resiliency. Our water programs are reorienting toward a climate resilience.

Oklahoma: Sara Gibson - We're working on funding and planning our first ever statewide floodplain program in conjunction with the update of our comprehensive water plan to hopefully help us balance our drought and flood cycles. We had a great summer. Much like Texas, not a lot of drought, but it's an endless loop and so our drought is coming. We had a light legislative year. Over the summer, medical marijuana and industrial hemp have really boomed in Oklahoma, which is raising a lot of issues across the state, including how grant groundwater is regulated, and the enforcement capabilities, or lack thereof, of the Oklahoma Water Resources Board. We are looking at some more legislative action this coming year. Most importantly, on an agency basis, our Executive Assistant Mary Schooley is retiring at the end of the month after 35 years of service. We are scrambling to figure out what we're going to do without her.

New Mexico: Greg Ridgley - Drought persists in New Mexico despite some nice monsoon rains this July and August, which did ameliorate drought and reduce it so that only approximately half the state is in severe drought or worse, which is certainly better than it was at the beginning of the calendar year. We had a priority call on the lower Pecos River by the Carlsbad Irrigation District that we were gearing up to address, but the monsoon rains provided sufficient supplies and the district under our Pecos River Settlement Agreement could no longer continue with the call. We are continuing with the implementation of the Lower Rio Grande Pilot Program. A couple of years ago our legislature appropriated several million dollars to fund a program administered by the New Mexico Interstate Stream Commission to pay for temporary fallowing of irrigated farmland within the Lower Rio Grande area of New Mexico. We're in the second phase of that and in the middle of taking applications for grants to not irrigate for a year or in this instance 18 months. That is to enable New Mexico to study the impacts on the long-term resilience and health of our aquifer from fallowing.

The New Mexico legislature legalized recreational marijuana in our legislative session back in January and put a sister agency of ours on a tight timeline to develop regulations governing producer licenses, as well as commercial provider licenses. The producer license has a requirement that the licensee demonstrate they have valid water rights. That has necessitated a lot of work for the Office of the State engineer and our sister agency on how they will be able to determine whether an applicant has valid water right.

We continue to move forward with what we're calling our 50-year water plan - an update to the New Mexico State Water plan. This is a high priority for our governor. We are just moving into the phase where we will be engaging with the public on the water plan over the next several months. We had a very significant decision out of our Pecos River Adjudication Court in August involving the water right claims of a potash company on the lower Pecos claims to surface water rights. It's a significant decision that will probably have impacts on New Mexico law of forfeiture and abandonment of water rights. Lastly, the New Mexico Office of the State Engineer and our Interstate Stream Commission continue to work on negotiations to address the water rights claims

of nine separate tribal governments, Pueblos, or Nations. As you can imagine, we don't have the bandwidth to apply to each of those as many resources as we would like. Many tribal governments sensing a window of opportunity with the current alignment of the Congress and are applying as much political pressure as they can to accelerate those negotiations. So that's taken a lot of time and energy of the State Engineer and his staff to work on.

Nebraska: Tom Riley shared concerns about staffing. We remain 10-15% understaffed and about the time we make some progress, we take a couple of steps back with folks either leaving or retire. We've completed our water administration. As Earl noted, while Nebraska has had some drought conditions sneak in, my heart goes out to other states. To look at the drought map every week is just crushing to see how the conditions are. Hopefully they improve here in the Fall for everybody. We've been working on drought planning in a number of basins, which I think is something that will go to all of our basins soon. It's been good to work with folks on that. We continue to work on finishing up our statewide flood mitigation planning operations, again, that were spurred by the 2019 severe flooding in Nebraska. Minimum legislation that we dealt with over the year and I'm crossing my fingers for that to be the case this coming spring for our short legislative session here in Nebraska.

Alaska: Tom Barrett - We are dealing with manpower and workforce issues as well. We have a backlog of over 600 water right applications that date back to 1968 and so that's been a priority for us moving forward. Our state budget is constantly under work. I think we're on our fourth special session this year. It does look like we will add a couple temporary positions to help us turn to this backlog and get us up to date. Some activities we've been up to this past year: we have issued proposed regulation changes to the water use regulations. They haven't been significantly changed since 2004. We did get quite a bit of feedback from the public on that. Someone mentioned PFAS. That was a big activity for us last year. We have an area in the center of Alaska that has a very large PFAS plume that went under a subdivision. We implemented what we call a critical water management area, which is basically a moratorium on the PFAS-affected groundwater and it used a lot of staff time. It's a great tool for controlling the exposure to the contaminated water and in use, and spread of the contaminated water. Alaska isn't in a drought, but with the warmer weather forecast we've seen, it means smaller snowpacks that go away quicker, which means our fire season starts earlier.

FUTURE COUNCIL MEETINGS

The WSWC Spring Meetings (198th) are scheduled to be held in Washington, DC on April 5-7, 2022, at the Doubletree Hotel - Washington DC Crystal City.

SUNSETTING POSITIONS FOR FALL 2021 MEETINGS

Tab XYZ of the briefing materials contains sunseting positions for the 2022 Spring meetings. Please review them and get any changes to staff.

OTHER MATTERS

Tony talked about the issue with sunseting positions. Change in rules of organization would require a unanimous vote of the Council. May need to bring that up with the Executive Committee before the next meeting.

Michelle mentioned given staffing issues raised by several states, this could be a topic to be consider for the WSWC to put together an agenda item or a Zoom meeting. Many members agreed. Jennifer directed Council staff to start with a conference call to facilitate this.

There being no other matters, the meeting was adjourned.