

MINUTES
of the
LEGAL COMMITTEE
Holiday Inn Express and Suites
Deadwood, South Dakota
September 14, 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>Kenneth Titus Earl Lewis Tom Stiles</i>
MONTANA	<i>Anna Pakenham Stevenson Jay Weiner</i>
NEBRASKA	<i>Jesse Bradley</i>
NEVADA	<i>Micheline Fairbank Jennifer Carr</i>
NEW MEXICO	<i>John D'Antonio Rebecca Roose</i>
NORTH DAKOTA	<i>Andrea Travnicek Jennifer Verleger</i>
OKLAHOMA	<i>Sara Gibson</i>
OREGON	--

SOUTH DAKOTA

Nakaila Steen
Jeanne Goodman
Eric Gronlund

TEXAS

Jon Niermann

UTAH

Erica Gaddis

WASHINGTON

Mary Verner
Buck Smith

WYOMING

Chris Brown
Jeff Cowley

GUESTS

Sharon Kim, National Park Service
Sam Massman, U.S. Forest Service
John Burns, Sitka Technology Group
Tracy Streeter, Burns and McDonnell
Andrea Rogers, USDA Forest Service
Karen Vyerberg, USDA Forest Service
Steve Chesterton, USDA Forest Service
Alan Peck, Bureau of Land Management
Michael Elliott, City of Huntington Beach
Susan Rosebrough, National Park Service
Jaron Ming, U.S. Fish and Wildlife Service
Nicole Hayes, Bureau of Land Management
Meg Perdue, U.S. Fish and Wildlife Service
Ella Wagener, U.S. Fish and Wildlife Service
Sue Lowry, Interstate Council on Water Policy
Christopher Estes, Chalk Board Enterprises, LLC
Kathleen Ligon, Texas Water Development Board
Andy Brummond, Montana Fish, Wildlife and Parks
Racquel Rancier, Oregon Water Resources Department
Doug Woodcock, Oregon Water Resources Department
Clive Strong, Conference of Western Attorneys General
Jim Rizk, Texas Commission on Environmental Quality
John Paczkowski, North Dakota State Water Commission
Kimberly Sager, Alaska Department of Natural Resources
Kathy Alexander, Texas Commission on Environmental Quality
John-Cody Stalsby, Texas Commission on Environmental Quality
Charley Palmer, Alaska Department of Environmental Conservation

WESTFAST

Lauren Dempsey, U.S. Air Force
Mike Eberle, USDA Forest Service
Travis Yonts, Bureau of Reclamation
Mindi Dalton, U.S. Geological Survey
Stephen Bartell, U.S. Department of Justice
Christopher Carlson, USDA Forest Service
Paula Cutillo, Bureau of Land Management
Rachel Esralew, U.S. Fish and Wildlife Service
Roger Gorke, Environmental Protection Agency
Mike Strobel, Natural Resources Conservation Service
Heather Hofman, Natural Resources Conservation Service

STAFF

Tony Willardson
Michelle Bushman
Cheryl Redding
Adel Abdallah
James Ryan

WELCOME AND INTRODUCTIONS

Committee Chair Chris Brown called the meeting to order and asked anyone not already introduced in the previous committee meetings to introduce themselves.

APPROVAL OF MINUTES

The minutes of the meeting held on June 24, 2021, were moved for approval by Jen Verleger, seconded by Jerry Rigby, and were unanimously approved.

SUNSETTING POSTION

Chris Brown noted the few changes in sunseting Position #431, regarding States water rights and natural flows primarily aimed at the Army Corps of Engineers Water Supply Rule. Those make it more consistent with the 1902 Reclamation Act. With no further discussion, Jen

made a motion to recommend approval to the Full Council, Micheline Fairbank seconded and was unanimously approved.

FULL APPROPRIATION IN SOUTH DAKOTA

Eric Gronlund, Chief Engineer, Water Rights Program, South Dakota Department of Agriculture and Natural Resources provided an update on full appropriation in the State. He offered an overview of the rivers that shape South Dakota's water supply, geography, economics, and politics. The state has 14 major river basins and 9,937 miles of streams: 1,932 miles are perennial; 8,005 miles are intermittent. Water use permitted uses include: irrigation; municipal and rural water; commercial; industrial; fishing; wildlife; and recreation. Irrigation dominates water use at 81% based on diversion rates, with municipal at 7%, followed closely by industrial and commercial, then rural water, domestic, fish and wildlife.

South Dakota water rights law recognizes appropriations for both surface water and groundwater, and today's focus is groundwater. A permit to appropriate water may only be issued if (1) there is reasonable probability that unappropriated water is available for the applicant's proposed use; (2) the proposed diversion can be developed without unlawful impairment of existing domestic water uses and water rights, (3) the proposed use is a beneficial use, and (4) the permit is in the public interest as it pertains to matters of public interest within the regulatory authority of the Water Management Board as defined by SDCL §§ 46-2-9 and 46-2-11. We're governed by a board of seven member citizens appointed by our governor who hear contested water cases, among other duties.

South Dakota has an anti-groundwater mining statute that basically says the annual withdrawal of groundwater is not to exceed recharge. There's an exception for water distribution systems. We have to balance the quantity of water withdrawn from our groundwater source so that it does not exceed the estimated annual recharge. The exception to that would be if it's stratigraphically below the Greenhorn formation, which is a deeper aquifer, and it's for a water distribution system. Like a lot of these statutes, that exception became law in 1978. The state legislator that championed that became a short-term governor with us. He's an irrigator in one of the fully appropriate groundwater sources, and he's applied for a water permit, but has been denied. If you talk to him today, he would still be the champion of that statute.

Chris Brown: What is a water distribution system?

Eric: A water distribution system is defined as a rural water system. It could be called a suburban housing development with 15 or 20 houses and exceeds 18 gallons.

For a full appropriation determination, the administrative rule requires that the Water Management Board shall rely upon the record of observation well measurements in addition to other data to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge of the aquifer. Recharge estimates come from historic observation well water levels or county studies. Withdrawal estimates come from annual

irrigation questionnaires and water use reporting. The Water Management Board has the ability to suspend a permit. Anytime we get a water permit application, an engineer does a report that looks at the hydrological budget and existing impairment rights.

Jennifer Verleger: How good is your compliance on that?

Eric: We send out about 3300 to 3400 of those and by the December deadline, our compliance is probably about 300. Then we send out the second warning notice in January that schedules them for a hearing before our Water Management Board. We generally bring 10 to 15 up for action by the Board.

We have an observation well network of just shy of 1,600 wells completed in the various aquifers. Each summer, we attempt to hire up to four seasonal college students, and we put them on the road. We have somebody visit to do a water level measurement throughout the irrigation season. That isn't the case during the winter. We have records starting on the left side from 1977 up to 2019 (see slide 12). These observation wells often show us climactic conditions. They show fluctuations during the irrigation season with the low points on the hydrograph, and the recovery of that aquifer after the irrigation season is over. For the long-term, seeing that the aquifer water levels are stable, they don't believe that aquifer is stressed, which is an important piece of information they use in making their determinations.

We do have fully appropriated aquifers and some that are nearing full appropriations (see slide 13). Two that I'll focus on today are the largest ones in yellow and green on the map (slide 14). The one on the right, we deem as the Tulare East James Aquifer and the one on the left is the Tulare Western Spink/Hitchcock Aquifer. The James River is the dividing line for managing units between these two aquifers.

The Tulare East James Aquifer was deemed fully appropriated in early 1980's based on decline of water levels. In 2005, we had a gentleman that applied for that aquifer and we denied it. He appealed to the courts questioning our methodology in determining withdrawal from the aquifer. The court directed us to use average withdrawal since the statute required us to use estimate average recharge. That reopened appropriations in the aquifer, and there was a race to be first in time for any available water. Water permits were approved until we reached full appropriation based on court's directive.

Tulare Western Spink Hitchcock Aquifer was deemed fully appropriated in 2013. About this same time, a recalculation of the hydrologic budget resulted in water being available for appropriation. Again, race ensued for individuals in both aquifers to be first in line to file for water permits to irrigate. One of the problems we encountered was no mechanism in place to establish a waiting list, which created animosity among landowners and raised questions of fairness over who got permits. One landowner began filing a recurring application, so we were in this never ending circle of dealing with applications for that aquifer. In 2014, the legislature passed a law to bring fairness when a full appropriation determination is made. Upon a Board full-appropriation determination, we advertise a 30-day period to submit applications; all received applications receive common priority date; and the Board conducts a random draw to establish a priority list.

The priority list determines eligibility if unappropriated water later becomes available. The current priority list consists of 14 held applications from the Tulare East James Aquifer; and 28 held applications from the Tulare Western Spink Hitchcock Aquifer.

The statute also requires that a Board review the appropriative status of the aquifer at least every five years. That process includes: DANR review of the appropriative status of aquifer; notice to holders of held applications of hearing; public notice of review and scheduling of hearing; applicants pay 10% of original application fee if they want to remain on priority list; failure to pay results in withdrawal. That's just a little overview of where we have been with full appropriation with groundwater.

Questions:

?: What do you classify stock water or feedlots in your uses?

Eric: There are two different classifications, domestic or commercial. Domestic does not require a permit if it doesn't exceed reasonable domestic use. Reasonable domestic uses are defined in South Dakota as a maximum pump rate of 25 gallons per minute, with a daily use not exceeding 25,920 gallons. Today that equates to 18 gallons a minute continuous, which is the standard in South Dakota law. Anything above would be considered commercial, and that requires a permit. If it is stock water for pasture cattle, there is no limit on it.

Jennifer Verleger: Do the people on your Board have to have qualifications?

Eric: Yes. Seven members are appointed on the Board and they are from different areas. One has to be a representative of irrigation; one has to be a well driller; one has to represent industrial, municipal fish and wildlife, and at-large and a domestic.

Jennifer: Do they have to have any technical background? technical qualification?

Eric: Not in the statute, but I will tell you that we currently have two attorneys; a city engineer, professional engineer on there; and a gentleman who was an irrigator; and in the case of the well driller, they have to be a South Dakota licensed well driller.

Jennifer: If a person does not like the decision your Board makes, what is the appeal process of that decision?

Eric: The party has a 30-day appeal period to the district court.

John Paczkowski: What is the cost of your permit application? What is your application fee?

Eric: Depends on your water model. If you're less than 45 gallons a minute, it's \$100. If it's 75 gallons a minute, it's \$500. And then most of our permits are for irrigation. The first 60 acres is \$500. The next 60 acres is \$250. The next 60, or portion thereof is \$100. If you're talking about one center pivot out there, you're looking at \$850. A \$200 licensing fee is required to pay up-

front. That's basically once the system is developed, we come out and look at it in the state verification that the system is constructed and the extent that it's constructed.

John P: The permit applications that were denied, were any lawsuits filed?

Eric: No, they had no recourse.

Micheline: Are those all state-owned wells, or are you also monitoring privately owned wells for groundwater depth?

Eric: They are all state-owned wells.

Micheline: Who funds the costs of drilling all those wells?

Eric: The Southwest Geological Survey, which is also programmed within our department. They do all the work, we reap the benefits.

Jeanne Goodman: Just add to that, those are primarily done with general funds through the state. The county studies that were conducted in the State of South Dakota were a 50/50 share between state and federal, but the state has always done the drilling and always constructed the wells.

Micheline: Are you contracting with well drillers or do you drill the wells yourselves?

Jeanne: We have state drilling rigs.

Micheline: Were you looking at wet water or paper water?

Eric: Wet water. They follow the general rule - what we call a 60% pump rule and that would be for non-irrigation. For irrigation, we use entirely the reported quantities.

Micheline: In making a determination with respect to your water budget, there wasn't an accounting that somebody could potentially fully exercise their right, you were just monitoring the actual use? That's something that we've experienced. The reason I ask, is in the data, we have many basins that are over appropriated, yet pumping doesn't exceed our perennial yield, our annual recharge and so our paper water exceeds the water budget, but the actual use does not.

Eric: We use paper water. Not every aquifer, but most aquifers in South Dakota would be fully appropriated. But when you ask about what extent do we use the irrigation? There are judgment calls. The large rural water system in southeast South Dakota, or Lewis and Clark, that's bringing Missouri River water up to Minnesota, Iowa and South Dakota, we have recordings now that's been in place for a number of years. We know they're going to continue developing up to their volume limit so we make a judgment call.

Jennifer Verleger: Do either of you take away your old paper water rights that aren't being used so they're available?

Eric: If somebody has a water right, like a municipality for one cfs and it's limited to 400 acre-feet a year, but their reporting is only 300 acre feet of water, we know that they're going to keep inching their way to the permit limit so we do not in that instance. In South Dakota, if somebody is not using their water right, or exercising their water right, that is subject to forfeiture for non-use - and you have to use your water at least all, or part of it at least once every three years, or it can be subject to forfeiture for non-use, which means total cancellation in three years.

Micheline: Are you successful in enforcing that and aren't challenged on that? Or do the courts back them up, or uphold that decision?

Eric: I can only think of one time it went to court and we actually lost that one. I would tell you that the line I use with everyone on the Board before we bring a water right up for cancellation is we're going to be rock solid.

Micheline: Our courts fall on equity. They require the state engineer to follow the law and adhere to the statutes, but they feel bad for the person and exercise equitable jurisdiction to award them back their water.

NEW MEXICO COURTS AND WATER RIGHTS SETTLEMENTS

Arianne Singer, General Counsel, New Mexico Interstate Stream Commission, Office of the State Engineer, discussed a state case regarding the Congressionally-authorized Navajo Nation Water Rights Settlement. New Mexico reached a settlement on the Navajo Nation's water rights back in 2005, and it was enacted into law in 2009. Part of that settlement was the construction of the Navajo Gallup water supply pipeline. It was conditioned on the decrees adjudicated in the New Mexico State Adjudication Court for the Navajo Nation's water rights to the San Juan River. We had a great deal of objections to those rights. One of the objections raised was that the tribal water rights settlement was like a gaming compact under New Mexico law and had to be approved by the legislature.

The District Court went through all the objections, and in 2013, overruled the objections and said that the decrees were in accordance with law and applied a rigorous standard - we had to show that the water rights granted in the settlement were less than the ones they could have achieved at trial. There were protections for junior water rights. That decision was entered in November of 2013, and was appealed to the state Court of Appeals.

In April 2018, we got a decision from the Court of Appeals approving the settlement agreement, but on different grounds than anyone had argued. The court held that because the San Juan River passes through several states, it's ultimately subject to federal control, not state control. Therefore, it preempts state law, and states have no ownership interest in its waters. That was a great concern to the State. It also held that because the settlement agreement became a federal law when it was approved by Congress, all the state law objections that have been raised, including the *inter se* objections, and in the courts adjudication proceedings, were basically moot as they should have been raised before the court before the settlement agreement became a federal law

and was approved by Congress. It also ruled that because the settlement agreement was later enacted as a federal statute, it trumped all previous federal laws, including compacts. Basically, it becomes a new compact on its own.

We appreciated that the court had upheld the settlement, but we filed a petition for writ of cert to the Supreme Court saying this decision is raising all kinds of problems for us. It's overruling state court precedent, it's preempting state law and state procedure, and we need review. The Supreme Court actually granted our petition and we fully briefed it by January of 2019, but it sat in front of the Supreme Court for two years. I should mention, the Supreme Court has completely new justices on the bench. On March 29, 2021, we got an order. The court all of a sudden decided that the petition for writ of cert was improvidently granted and quashed it. We filed a motion to please rehear and reconsider their order quashing the writ and to correct the statements of law that are in the court of appeals opinion and go back to the district court's opinion. We have not yet received a response from the New Mexico Supreme Court, and the matter is still pending. How do you tell the Supreme Court they made a serious mistake that has serious consequences, and they really need to pay attention and fix it?

Stanley Pollack represented the Navajo Nation on this settlement agreement and on the appeal, Stanley talked about how the settlement agreements in the future could easily include language, as this one actually did, that it doesn't preempt state law. It doesn't preempt prior federal compacts. It's in compliance with existing compacts, but having this decision on the books in New Mexico is causing a real dilemma for us. How do we negotiate these settlements so that we are not agreeing that settlement agreements preempts state law? It calls into question our adjudication procedure. Under McCarran, the adjudication court can adjudicate the water rights of the Navajo Nation. This Court of Appeals opinion instead held that we weren't really adjudicating the Navajo Nation's water rights. I don't think the court really understood what it was doing. By saying that it was basically a compact was treating the Navajo Nation as if they were a state and that the settlement agreement was allocating water to the state, not recognizing a water right. Rather than adjudicating the water right to the Navajo Nation, we were basically allocating the supply of the state's waters to the Navajo Nation and entering into another compact that trumps all previous compacts. We are trying to narrow this so that this case does not affect our other ongoing settlement cases. Arianne also mentioned that the State Court of Appeals judge did not understand western water law. She clarified that this is in the state court system, and that the Navajo Nation and the stater are in agreement.

SYMPOSIUM ON THE SETTLEMENT OF RESERVED INDIAN WATER RIGHTS

Michelle Bushman provided an updated on the Symposium held on August 24-25. A summary report can be found under Tab N. This was a first online virtual symposium. The materials and videos are on our website.

STAFF UPDATES

Michelle Bushman referenced Tab R, which contains Administration/Legislation and Litigation updates. She noted that a lot is going on in Congress right now, but a significant focus is the infrastructure omnibus that is taking shape.

Survey questions have been sent out throughout the year. Please send in your responses. Raw data from the surveys is available to the states in a Google doc on a Google drive. Ask Michelle for the link if you need it. This will provide a snapshot of what some of the states are doing.

SUNSETTING POSITIONS FOR SPRING 2022 MEETING

Chris Brown noted this Committee has no positions for the Spring 2022 meeting.

OTHER MATTERS

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