

**MINUTES
of the
LEGAL COMMITTEE
Doubletree Hotel – Washington, DC – Crystal City
Arlington, Virginia
April 6, 2022**

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MEMBERS AND ALTERNATES PRESENT (*via zoom)

ALASKA

ARIZONA

Amanda Long-Rodriguez
Ayesha Vohra

CALIFORNIA

Jeanine Jones
Joaquin Esquivel

COLORADO

Jeremy Neustifter

IDAHO

John Simpson
Jerry Rigby

KANSAS

Connie Olson
Earl Lewis
Kenneth Titus

MONTANA

NEBRASKA

Tom Riley

NEVADA

Jennifer Carr
Micheline Fairbank

NEW MEXICO

Rebecca Roose

NORTH DAKOTA

Jennifer Verleger

OKLAHOMA

Sara Gibson

OREGON

Brooke Paup

SOUTH DAKOTA

Nakaila Steen

TEXAS

Jon Niermann

UTAH

Erica Gaddis
Todd Stonely
Norm Johnson
Candice Hasenyager

WASHINGTON

Mary Verner

WYOMING

Chris Brown
Jeff Cowley
Jennifer Zygmunt

GUESTS

Travis Yonts, Bureau of Reclamation
John Rhoderick, New Mexico
Nat Chakeres, New Mexico Office of the State Engineer
Stephen Czapka, U.S. Fish and Wildlife Service

WESTFAST

Heather Hofman, Federal Liaison
Mike Eberle, U.S. Forest Service
Chris Carlson, U.S. Forest Service
Lauren Dempsey, US Air Force
Roger Gorke, Environmental Protection Agency

STAFF

Tony Willardson
Michelle Bushman
Cheryl Redding
Adel Abdallah
James Ryan

WELCOME AND INTRODUCTIONS

WSWC Chair Jen Verleger called the meeting to order.

APPROVAL OF MINUTES

The minutes of the meeting held on September 15, 2021, were moved for approval and seconded, and were unanimously approved.

PROPOSED POSITION

Position #470 – Endangered Species and State Water Rights.

Kenneth Titus: We originally suggested expanding our Endangered Species Act (ESA) statement to include the Migratory Bird Treaty Act (MBTA), but in speaking with Chris Brown, we decided it would be better to break it out in its own position, because the protection criteria are slightly different.

Several months ago, the U.S. Fish and Wildlife Service (USFWS) had a request for information on a proposed MBTA rulemaking. They were considering a permit for incidental takes, and in particular for operation of a government facility, or government activity. Not knowing what that was exactly, until we see the rule, we don't have an exact position on the books to deal with this. The intent is to have a WSWC policy when this is finalized.

The bones of this is from the ESA statement, so it will look familiar. Chris suggested in the fifth Whereas clause - the ESA statement actually used the word "reserved for the public good" he wanted to avoid the idea of a federal reserved water right and recommend "with some uses reserved for the public good, while others are recognized as protected private property rights." It seemed like an appropriate change. Any objection?

The next paragraph was just a clarification since the MBTA doesn't deal so much with other species and their habitats as much as ESA does; it only applies to migratory birds. Same in the next paragraph.

Chris just emailed me a change to include another Whereas clause that says, "various state and local governmental agencies own or operate water use or distribution facilities which benefit water users and the public as well as migratory birds and their respective environments."

Chris Brown apologized for being so late and indicated that new Whereas would be in lieu of that one that's highlighted on the screen, just different words for the same concept. I'm not sure that fully reaches what you were trying to get at.

Kenneth: It does.

Jen: Any further discussion? Anybody want to make a motion on that? A motion was made and seconded, and the position was approved.

MIGRATORY BIRD TREATY ACT REGULATIONS

Stephen Czapka, Division of Bird Conservation, Permits, and Regulations, USFWS provided a PowerPoint presentation on MBTA and the background of the proposed rulemaking still in progress.

We engage federal agencies and others through a variety of authorities codified in multiple natural resources statutes. Those include: the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), Bald and Golden Eagle Protection Act, and then National Environmental Policy Act (NEPA).

The ESA protects endangered and threatened species and their habitats (designated critical habitat). The ESA makes it unlawful for a person to take a listed animal, whether on private or public property without a permit. For plants, it's only illegal to take a threatened or endangered plant on public lands. To take - to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The ESA does include incidental take.

The MBTA implements four international conservation treaties with Canada, Mexico, Japan and Russia. Developed in the 1900's. Currently there are 1,093 species native to the United States that are protected under the MBTA. Birds do not have to physically migrate to be protected. If there's a species group, an order family, whatever the group is in one of those four treaties, then any birds that belong to those groups are on the list. The MBTA makes it unlawful to: pursue, hunt, take, capture, kill, possess, etc. MBTA does not protect habitat, it only protects the actual birds, their nests, their eggs, or their young birds.

Does the MBTA restrictions include incidental take? The answer is yes. The final rule was effective December 3, 2021 and is currently implemented by applying enforcement discretion. USFWS is working on developing proposed regulations to authorize incidental take under the MBTA. Everything we have done, can be found on this website: www.fws.gov/regulations/mbta. Anything additional that we work through, will also be put up on that website.

The definition of a MBTA incidental take results from human activities that harm or kill migratory birds during otherwise lawful activities, when take is not the purpose of the lawful activity. For example, if you're a homeowner and mowing your lawn, and you run over a fledgling bird, or there's a ground nesting bird, that's considered incidental take, because mowing your lawn is not illegal.

For the MBTA, there's a big distinction. This is one of the points that came up on our call a couple of weeks ago. The MBTA regulates direct, incidental take. It does not apply to indirect incidental take. Direct incidental take are actions that directly cause migratory bird injury, death or other harm. Examples of that are just what I said about mowing your lawn. Indirect incidental take, which the MBTA does not regulate, are as the name suggests - legal activities that indirectly harm migratory birds. Example of that is habitat alteration, pesticide use.

The rulemaking that we're working on now is looking at several different sectors. We've identified several industries that we know take migratory birds directly, and that there's also established best practices to minimize that incidental take. The slide shows a list of industries they are hoping to allow legal incidental takes. They are looking at several ways to authorize incidental take. There are universal regulatory authorizations (permit exceptions). Specific to the industries there will be different categories: activity regulatory authorization, general permits, and specific permits. These categories are based on risk. We're looking at applying a conservation fee to general and specific permits. We are still working out the mechanisms for that and what that fee might be. That would be used directly for conservation efforts to offset the take that occurs, even after all beneficial practices are implemented.

Currently, we're not going to regulate state agencies. We are planning to review this program every five years, similar to what the Corps of Engineers does for the nationwide permit program. If the things aren't working, or if things are working, or if new beneficial practices come up, we may add those to the regulation. But for now, as things stand, we're not looking to really regulate state agencies.

Schedule for the draft proposed rules: Eagles - early summer 2022; and Migratory Birds - late summer 2022. Hoping to have a final rule in late summer 2023. There will be presentations to cover more detail in coming months.

WILD AND SCENIC RIVERS

Mike Eberle, National Water Uses and Rights Program Lead, U.S. Forest Service, provided an update. At the Western States Water Council's fall meeting we presented about the Wild and Scenic Rivers Act and provide some background. It was also to solicit some information and/or input from the Council on a paper that was in draft form at that time. From that presentation, we met with a number of Council representatives in November, and they provided some just excellent feedback into the paper, which really made it a much, much improved paper over the previous draft. I'm here today to say a few things. First, the Instream Flow Paper has been released and is available on www.rivers.gov; second, I just wanted to extend appreciation to the Council for their cooperation and collaboration in the development of the paper and all the comments; and finally, I wanted to see if there was an opportunity to continue this cooperation as we move forward. The Wild and Scenic River Coordinating Council would like to extend an invitation to keep the continued collaboration with the Council when developing water focus papers.

Tony Willardson: I can't speak for our members, but I would definitely think it would be to our benefit to continue to collaborate as you move forward.

Michelle Bushman suggested continuing discussions on the topic with the WestFAST - WSWC Non-Tribal Federal Water Rights Workgroup.

STAFF UPDATES

Jen Verleger noted a new Supreme Court decision reinstating the CWA 401 Rule. Jerry Rigby said he wondered why EPA was moving forward with the WOTUS rulemaking in light of the pending *Sackett v. EPA* case for this very same reason.

Michelle Bushman - Under Tab N is the Legislation and Litigation update. I'm not going to go through everything, as we just had Congress here talking about some of the things that they've got going on.

I will add one thing, that I think is more for the Water Quality Committee Members, but S. 3571- Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2022. We've been trying to get good Sam legislation passed for some 20 years. We have a position that supports Good Sam legislation, among other things such as interagency coordination. I have not had time to finish reading through this, but my thought is that we'll probably provide a letter supporting this bill, at least in some respect. If this is an issue of concern for your state, please take a look at it. It was just introduced in February by Senator Martin Heinrich (D-NM). Senators from Colorado, Idaho, Mexico, and Montana are all involved in supporting the bill.

As always, if you have any legislation or cases you would like us to follow, please let us know.

In 2021 WSWC sent out four massive surveys that many of our states responded to. I'm in the process of compiling those into reports. Since we lost Jessica, it will take a longer than expected. I'm hoping to be able to provide a draft to you for our August meeting.

On WaDE terminology, you all have different legal terms for your water, so we're trying to find ways to group common terms together for online search purposes that honor the differences and similarities in terms between states.

DRAFT FY2022-2023 LEGAL COMMITTEE WORK PLAN

Chris Brown: I'm hopeful that folks on the Legal Committee had a chance to take a look at the work plan. If you did, you probably noticed that there's not a whole lot of changes from the previous versions. Michelle went through and made some updates, specifically with regard to the various survey results. There is another update on the Clean Water Act jurisdiction piece, which is really just keep an eye on it. With regard to the Ad Hoc Group on Reserved Indian Water Rights, Jay Weiner from Montana is the only member on it. He could probably use some company if anyone is interested. Jen Verleger mentioned she's currently the sole member of the WRDA and Corps Policy subcommittee. If anybody has any other comments on the draft work plan, be sure to get those to staff before the next meeting.

SUNSETTING POSTIONS FOR SUMMER 2022 MEETING

There are no positions for the Summer 2022 meeting.

OTHER MATTERS

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