

**MINUTES
of the
LEGAL COMMITTEE
KwaTaqNuk Resort-Casino
Polson, Montana
August 4, 2022**

Table of Contents

Welcome and Introductions	3
Approval of Minutes	4
Montana Legal Issues	4
Western Water Cooperative Committee for Corps of Engineers Projects.....	4
State Supreme Court Cases	5
Utah Legislative Session 2022.....	8
Staff Updates.....	11
Draft FY2022-2023 Legal Committee Work Plan.....	12
Sunsetting Positions for Fall 2022 Meetings	13
Other Matters	13

**MINUTES
of the
LEGAL COMMITTEE
KwaTaqNuk Resort-Casino
Polson, Montana
August 4, 2022**

MEMBERS AND ALTERNATES PRESENT (**via zoom*)

ALASKA	Emma Pokon Julie Pack
ARIZONA	Amanda Long-Rodriguez <i>Ayesha Vohra</i>
CALIFORNIA	<i>E. Joaquin Esquivel</i> <i>Jeanine Jones</i>
COLORADO	
IDAHO	John Simpson Jerry Rigby
KANSAS	<i>Connie Owen</i> <i>Kenneth Titus</i> <i>Matt Unruh</i>
MONTANA	Anna Pakenham Stevenson <i>Jay Weiner</i>
NEBRASKA	Jim Macy
NEVADA	Jennifer Carr Micheline Fairbank
NEW MEXICO	<i>Nathaniel Chakeres</i> <i>Mike Hamman</i>
NORTH DAKOTA	Andrea Travnicek Jennifer Verleger
OKLAHOMA	Sara Gibson
OREGON	

SOUTH DAKOTA

Nakaila Steen

TEXAS

Jon Niermann

UTAH

WASHINGTON

Mary Verner
Buck Smith

WYOMING

Jeff Cowley
Chris Brown

GUESTS

Clare Ols, University of Montana
Justin Lavene, Nebraska Attorney General's Office
Renee Spooner, Utah Attorney General's Office, Division of Water Rights
Kathy Alexander, Texas Commission on Environmental Quality

WESTFAST

Heather Hofman, Federal Liaison
Lauren Dempsey, US Air Force
Mindi Dalton, U.S. Geological Survey
Roger Gorke, Environmental Protection Agency

STAFF

Tony Willardson
Michelle Bushman
Erica Gaddis
Adel Abdallah
Ariel O'Callaghan
James Ryan

WELCOME AND INTRODUCTIONS

Committee Chair Chris Brown called the meeting to order.

APPROVAL OF MINUTES

The minutes of the meeting held on September 14, 2021, in Deadwood, South Dakota had some minor changes made by Chris Brown. A motion to approve the minutes with the changes was made by Jennifer Verleger. There was a second, and the minutes passed unanimously.

MONTANA LEGAL ISSUES

Anna Pakenham Stevenson, Administrator, Water Resources Division, and Jay Weiner, Administrative Law Judge, Montana Department of Natural Resources and Conservation provided an update on Montana's current legal issues. The water rights litigation under the statewide Compact system is winding down, and that presents issues going forward for how the state will handle new applications or claims for water rights. The state has had two methods for obtaining water rights, through the court or administratively, and for some claimants, one method has been easier than the other. Moving forward into the implementation phase, this may be changing, and Montana is grappling with what that looks like.

WESTERN WATER COOPERATIVE COMMITTEE FOR CORPS PROJECTS

Jennifer Verleger reported on the Water Resources Development Act (WRDA) that passed the Senate last week and now needs to be reconciled with the House version of WRDA. Included in WRDA is a provision to create what's called the Western Water Cooperative Committee. Senator Kramer and Senator Merkley are also going to introduce this portion as a standalone bill. The legislation creates a specific committee that requires the Army Corps of Engineers (Corps) to meet with western states to work on water issues. The Committee consists of the Corps, and then a member from each western state who has been appointed by their governor, and one who was appointed by the attorney general. If the governor doesn't designate someone, then it would be whoever is on the WSWC Executive Committee by default. There will also be a representative from the Bureau of Indian Affairs (BIA). The Corps committee members will be the Assistant Secretary of the Army, or a designee and a Chief of Engineers. The point was to try to get representation from all the states, but keep the committee small enough to actually have some good dialogue and discussion back and forth on issues with the Corps. Essentially, this committee is being established to reinforce cooperative federalism, which they're not particularly happy about. We'll see if the legislation passes.

Senator Kramer and Senator Merkley's offices are asking for you to ask your representatives to support as much as possible so we can hopefully get this legislation passed.

Chris Brown: Does that committee apply to only Army Corps facilities?

Jen: The purpose is to ensure that the Corps flood control projects in western states are operated consistent with congressional directives by identifying opportunities to avoid or minimize conflicts between operational Corps projects and state water rights on water loss.

Chris Brown: There are couple projects in Wyoming that the Corps has control over the flood control space, but they're actually Reclamation facilities.

STATE SUPREME COURT CASES

Jon Niermann provided an overview of the Texas Supreme Court case, *Pape Partners, Ltd. et al. v. DRR Family Properties, LP, et al.* The court held that the Texas Commission on Environmental Quality (TCEQ) lacks authority to adjudicate competing claims for surface water rights and that's a matter for the courts. TCEQ's role is ministerial, simply as the recorder of those records.

If there are conflicting claims, TCEQ typically takes the first pass at it. For example, if we have two applications for change ownership, and they compete - key staff can make a decision. What happened in the *Pape* case is it came to the Commission on a motion to overturn the executive director's action, and the Commission didn't act on it. We didn't want to have anything to do with it. We don't want to adjudicate water rights. Our position was ultimately upheld by the Supreme Court.

Jon noted that the controversy arose in a permit application context.

Michelle: What would have happened if the Supreme Court hadn't agreed with you? Because there was a district court or appellate court which came to the opposite conclusion. What would have happened?

Jon: Actually, the lower court, the trial court and the appellate court actually went the other way so the Supreme Court overturned that. What would happen is that the Commission would have to take that up and adjudicate those water rights. And you know, we would have a first cut at and then it could be reviewed in district court. But I think it would create more work for the commission under those circumstances. And I think, ultimately, the decision would go to judiciary anyway. I think in terms of efficiency, that's probably a better solution, certainly from TCEQ's perspective.

Sara Gibson: Is the basis for that because the legislature has not delegated the authority to the agency, or something to do with constitutionally it's inherently judicial authority?

Jon: I honestly don't know how to answer that question. We never asserted it. We never found it in our statutory authority. I don't know whether the constitutional question ever came up.

Sara Gibson: The Oklahoma Water Resources is the same. It doesn't have the authority to hear these kinds of cases.

Jon: I'm surprised that it took until 2022 for this to actually be sorted out by the courts.

Micheline Fairbank provided an overview of a recent Nevada Supreme Court decision, *Diamond Valley Natural Resources Protection & Conservation Ass'n, et al. vs. Diamond Valley Ranches, LLC, et al.*, 138 Nev. Adv. Op. 43 (2022). She provided some historical context, with pumping that had exceeded the sustainable perennial yield, groundwater declines, and dried up springs. The state engineer designated a Critical Management Area (CMA) in Diamond Valley in 2015, which started a ten-year clock to develop an approved Groundwater Management Plan (GMP).

In order for a GMP to be approved, the state engineer is required to consider: hydrology of the basin; physical characteristics of the basin; geographic spacing and location of withdrawals of groundwater in the basin; water quality in basin; wells located in basin, including domestic (non-permitted) wells; whether a GMP already exists for the basin; and any other factor deemed relevant by the State Engineer. I should note that this particular location, Diamond Valley is the first and only CMA designated in the State of Nevada.

The Diamond Valley GMP objectives included removing the basin's CMA designation within 35 years by stabilizing groundwater levels in Diamond Valley; reducing consumptive use to not exceed perennial yield; increasing groundwater supply; maximizing the number of groundwater users committed to achieving GMP goals; preserving economic outputs from Diamond Valley; maximizing viable land-uses of private land; avoiding impairment of vested groundwater rights; and preserving the socio-economic structure of Diamond Valley and southern Eureka County.

Under the Diamond Valley GMP, the shortages were shared on a pro rata basis. The water right (and attendant shares) stay tied to a specific piece of land (i.e., not unbundled). Priority (i.e., seniority) is considered in number of shares issued. Accomplished using formula: $WR * PF = SA$; $WR =$ Total groundwater right volume as recognized by DWR accounting for total combined duty; $PF =$ Priority factor based on seniority - $SA =$ Total Groundwater share allotment *20% "spread" between most senior PF and most junior PF; and annual reductions in the number of issued shares annually to meet benchmark reductions.

The state engineer held a public hearing because due process is an important thing and we got sued. The trial court found that the state engineer's approval was arbitrary and capricious, as the GMP violated the doctrine of prior appropriation and the beneficial use statute. The court also found that the effect of the GMP was that it impaired vested rights (senior surface water rights), and that the state engineer did not violate due process through the public hearing held to consider the GMP and followed the required considerations. Of course it was appealed to the supreme court.

It was a 4-2-2 opinion. The majority held that the state engineer is authorized to approve a GMP that will result in removal of CMA status so long as the articulated factors are considered. Because NRS 534.110(7) requires curtailment by priority if a GMP is not approved, the plain reading of the statute allows for deviation from the prior appropriation doctrine. Interpretation supported by existing precedent that statutes may impair non-vested water rights. The GMP did not impair vested rights.

A pointed quote from the court: “We recognize that our opinion will significantly affect water management in Nevada. We are of the belief, however, that – given the arid nature of the state - it is particularly important that we effectuate the plain meaning of a statute that encourages the sustainable use of water. The GMP here is a community-based solution to the long-term water shortages that befall Diamond Valley. Because the GMP complies with NRS 534.037 and NRS 534.110(7), it is valid. Thus, we reverse the district court order granting respondents' petitions for judicial review and reinstate Order No. 1302.” We considered that a win, but with an asterisk because it was not that unanimous opinion. It was actually a pretty tight decision.

The two dissenting opinions generally hit a lot of the same points, but emphasize different things: NRS 534.037 and 534.110(7) do not unambiguously permit a GMP to depart from the doctrine of prior appropriation - subject to more than one reasonable interpretation, and no express declaration to allow deviation from prior appropriation; the statute places the onus on junior users to reduce water use; GMP does not account for vested rights (depleted spring flow); reallocates senior rights to junior users; prior, unpassed, legislation demonstrates that GMPs are not permitted to deviate from prior appropriation; and impairs property rights without just compensation.

We don't have a settled decision. There's been a motion for rehearing filed. Where do we go from here? We have an upcoming legislative session, with the potential for legislative clarification. We think that community-based solutions need to be the focus.

Micheline also talked about the aquifer pumping in the Lower White River Flow System. It is very interconnected and also serves as headwaters to the discharge of the Muddy River Springs, which is the habitat for the Moapa Dace, which is an endangered species. The state engineer denied new surface water applications, then dealt with a large residential development that wanted to use groundwater. Following the administrative hearings, the issue went to the district court. The court found that the state engineer had exceeded its authority to regulate the aquifer or to rely on the best available science. The statute tells us that the state shall consider the best available science, but the court said that was distinguished from relying on that science. Regulating groundwater for the protection of senior decreed surface water rights seemed to be appropriate, but apparently it's not. Our ability to rely on science is called into question. Our authority to do really anything other than just grant every water right that comes in the door has been called into question. This case is being appealed to the state Supreme Court.

Questions:

?: I think on your first slide or two, you mentioned people settled the area in 1867 and started irrigating out of those springs. Sounds like you haven't figured out the groundwater flow....

Micheline: For the surface water codes, we issued mitigation rights. They were actually allowed to pump groundwater and consider it part of that vested right. That's part of adjudicating that particular basin right now. The adjudication is in front of courts, which has been related to the mitigation. That's essentially how we resolve that particular issue - we issue that mitigation right

so they can have access to that same duty of water that they would have otherwise gotten from discharge.

?: Do they keep their priority date?

Micheline: Yes. The permits are basically tied to the original vested claim date, which will ultimately be decreed the question is, is the duty.

UTAH LEGISLATIVE SESSION 2022

Nathan Bracken, Partner, Smith Hartvigsen, PLLC, presented on Utah 2022 Legislative Session. We had a pretty interesting session this year. Some have called it the Year of Water in Utah. We've also had some interesting press. Some of you may have seen a piece by John Oliver in which he said Utah isn't doing anything to face its water challenges other than praying, which just isn't objectively true. This session, we saw at least 28 water bills that were passed by the legislature.

HB 33 – Instream Flow Amendments introduced by Rep. Joel Ferry who is now new Executive Director of the Utah Department of Natural Resources. This bill basically allows for private right instream flows, it allows pretty much anyone to file a right to put water in stream for environmental purposes, as long as they get a couple of Divisions to say that the change application will support their mission. Their fixed time change application is up to 10 years. In addition, that bill added the Division of Forestry, Fire and State Lands, who administer the Great Salt Lake (GSL) to the list of state agencies that can own permanent water rights to hold in stream. We added some language to specify the sovereign lands, i.e., the GSL can be a place for well, it's not in a stream if it's in a lake, but a water right to benefit the lake. The other thing that this bill did is it removed what we call the priority penalty in the old version of the statute. That required all environmental flows or in stream flow water right change applications be administered according to the most junior priority date. That was a real obstacle that the bill removed.

HB 410 – Great Salt Lake Watershed Enhancement, by Rep. Brad Wilson, also got a lot of press. It authorized \$40 million to the National Audubon Society (NAS) and The Nature Conservancy (TNC), which I represent, to put together a water trust to hopefully take that state money and do some projects to benefit the lake, including leasing water rights to put them in the lake under HB 33 and hopefully get some private capital. Some people have said, well, that's just a drop in the bucket. Everyone knows that we need more money, but a lot of these tools are brand new. The idea is to test them out, see how it works, and then get some additional money.

HB 429 – Great Salt Lake Amendments - the picture on the side (see slide 2) is of the signing ceremony. Rep. Kelly Miles came to Representative Hawks (gentleman on the left) wanting to do something to benefit the GSL this year. Rep. Hawks put him in touch with NAC, TNC, as well as Candice Hasenyager, Director, Division of Water Resources, Utah Department of Natural Resources, and Erica Gaddis. We worked together on this bill. The intention was to do a Great Salt Lake Watershed assessment to accomplish a number of things. It gave \$5 million to

Candice to do that assessment. Some of the other things that you saw just really kind of run the gamut.

One of the big bills in the Senate was SB 110 - Water as Part of General Plan that's going to require all land use authorities in Utah to amend their general plans to address water, how they're going to deal with water. There's a bunch of other things in here requiring secondary water metering for existing systems that need to be installed by 2030. Water wise landscaping amendments. We were able to get the state engineer some more funding to hire new deputy. I won't go through all these, but it's a massive amount of legislation, and there was a huge focus on water.

In addition to the bills that were passed, they appropriated roughly \$500 million. This isn't a full list (see slide 3) as I ran out of space and time to track them all down. The biggest ticket appropriation was about \$200 million for secondary metering, in addition to \$50 million appropriated in November. I think there's some estimates that's going to result in about 55,000 - 60,000 acre feet of savings, most of which will hopefully benefit the GSL. \$50 million appropriated this session, plus another \$20 million from November of 2021 for agricultural optimization. There's money for the SRFs, rural drinking water, waterwise landscaping - basically to pay people to rip out their lawns. Money for the state engineer to help them increase their staffing levels and also money to help land use authorities to update their general plans to address water. It's a big list. Obviously, \$500 million isn't going to be enough. I think there's definitely recognition from the legislature that more is needed. I think this one was large, because a lot of this is coming from ARPA, another stimulus bills from the federal government related to COVID.

Nathan noted that 20 water bills is a lot for Utah in one session, but many of these bills were in process for a long time. As many of you know, population is growing quite rapidly. It's projected to nearly double by 2065 from what it is now. The GSL, which is very visible, reached its lowest level this year, with a noticeably receding water line. Speaker Brad Wilson was a huge champion and I think a big reason for a lot of the bills that we saw this session. He held a summit on January 5, right before the session, with policymakers. The point of that summit was basically hey, we're taking this seriously this session, and we're going to do everything we can to fix it. They also lined up Blackhawk helicopters to take people out to the lake. A lot of the bills had a GSL focus and were prompted by concerns about the GSL, but have statewide application like HB 33, which is the in stream flow bill.

This didn't happen all at once. It's probably the result of well over 15 years of effort prior to this. When Governor Herbert was our Governor, he had commissioned a group of water experts to put together a recommended water strategy. They did that in 2017 and basically came up with a list of menu options for the state to use, and not just for the GSL, but for everything to deal with our growing population demand and declining hydrology. That strategy had a number of suggestions for figuring out ways to do instream flows better. Figuring out ways to support agriculture, ideally, to avoid buying-dry transfers, use market based approaches like water banking and split season leases, seeing just basically how do we do this voluntarily. I think the water community always worked collaboratively. I think there was recognition that if we tried to mandate things, we just get bare minimum results and we don't have the bare minimum problem. We also

don't have time to fight or litigate about it either. This 2017 recommended strategy served as a blueprint for a number of really big bills and the first year of water was actually 2020, when you see a lot of the bills that resulted from that water report. One of these was SB 26 - Water Banking Act. I co-chaired the drafting committee that put this together and it's a really wonky bill. Basically, it allows water rights deposited into a bank to be used for virtually any use, including uses that facilitate: robust and sustainable agricultural production; and a healthy and resilient natural environment, such as the GSL. That was a big bill, and passed unanimously in 2020.

Another big bill from the 2020 session that kind of teed things up for 2022 is H.B. 130 – This authorized fixed time and split time season leases in Utah for the first time. Before H.B. 130, water right change applications could only be permanent or one-year, which often didn't work for right holders. Now, water right leases can be for any time up to 10 years, which works better for many right holders. TNC and Audubon used fixed-time change applications to secure the 21,000 acre-feet for GSL, although nothing in that approach would prohibit the Division of Wildlife from acquiring water permanently. Split season leases before H.B. 130, agricultural water right holders could only lease their water rights for the entire irrigation season. Now, they can lease their water rights for part of the irrigation season, which provides more flexibility. Many of the water banking and leasing discussions in the works may use split season leases.

Nathan noted that implementation of these laws will test them to see what works and what doesn't. I think going forward, we're going to need to do a better job of marrying land use and water use in terms of making big changes to the state legal system in order to at least support the GSL. Four things will be important going forward: money, education, data, and understanding. We need money to do ag optimization, water leases instead of buy-and-dry, and to implement these new tools. Our state agencies need sufficient money and resources too. We can pilot ways to help GSL but state policy leaders and the public must understand that preserving the GSL is a state responsibility requiring public funds, even though private contributions will be needed to. The new legal tools are the first step. We still must show that water rights can be placed into GSL without hurting others – that requires new data, information, and new methodologies. We will pay more for water regardless of what we do, but how much we will pay will depend on our ability to act now. Will we pay a little more now to save GSL or a lot more later if we don't?

I think one of the biggest lessons to me of how we got here is, this was one of those things that was kind of a trickle, and then it happened all at once. But there were 1,000s of hours from people in the water community that spent a ton of time working collaboratively with each other. We do have, I think, a very collaborative culture in Utah that I'm personally very proud of. I think it's probably the biggest reason why we were able to do what we were able to do in this last session, but there's still a ton of work to do. I know that there are differing opinions if you read the press about whether what's been done so far will be effective. I don't think it's a drop in the bucket. I think it's a pretty big step. Time will tell.

Questions:

Micheline: What was the source of the funding on HB 410, the Great Salt Lake Enhancement Program?

Nathan: It comes from the general fund.

Jerry Rigby: What protection is in the individual instream flow water right? Idaho doesn't allow for that. One of the reasons is because obviously the non-consumptive use that has historically been made. I mean, the argument is in the general river or stream, if you take the full water right, it's over-appropriated, but because of the return flows, it is not all consumptive use. How do you protect that in that statute?

Nathan: If you're going to file a change application to move water instream, you have to go through the normal change application process. That process requires a consideration of impairment to other water rights. Even though the statute doesn't specifically say that you're going to be limited to consumptive use, that's just the practical reality of how you change any water right in Utah. That is honestly, I think one of the big questions about how that's going to work, it's new. I'm not entirely sure we're going to have enough data for every instream flow change application to be able to show that it's not going to impair other water rights, or are we going to have enough data to be able to shepherd that water from one point to another. We've bumped into that a little bit with the first water bank that's being created in Price with the Carbon Canal water bank. It's an area where they haven't had to do distribution before and so there's a big question about how that's going to work.

Mary Verner: I was intrigued by your presentation. It was a lot of work. In regard to the water banking bill, as I understood it, a water user can transfer water into the bank and it then can be used within a certain hydrologic area. Is that right? What is the place of use for the bank water?

Nathan: The way the bank is set up to keep it as simple as possible, there really are two types of banks that you can create. One is the contract bank, which is intended to provide a legal mechanism for a lot of the gentleman's agreements that were already kind of in place. People were doing it voluntarily, but they didn't necessarily have the legal protection or recognition under the law. Basically they authorized the creation of the bank as an entity and in that bank, you'd have to define where the water is going to be used. Obviously, the bigger you make that service area, the harder it's going to be. The next step after the bank has been created, you have to file a change application to move the water right, or water rights, as they're associated with that bank into the service area. The state engineer will go through the normal change application process and determined how this right can be used in a way that won't impair others. Once the water right has been approved for use in the bank, the bank service areas, the place of use, the water right can then be changed within that service area without further standards. Some years, somebody may lease it one year, then they may take it back. The idea is to make it easier to move water back and forth. Kind of intended to be more of a marketplace or a bulletin board. If you create a bank, other people could deposit their water rights in it. Once it's approved, that water can be moved.

STAFF UPDATES

Michelle provided a brief update on the legislation/litigation issues. She mentioned the WRDA bill with different versions overwhelmingly passed in both the House and the Senate. The

Wildfire Response and Drought Resiliency Act (H.R. 5118) passed the House and contains several provisions on wildfire, but of particular note are the drought resilience provisions, and a provision to make the Reclamation Water Settlement Fund permanent. She noted that she has talked to the Department of Justice and Navy about the possibility of coming to talk to the WSWC about the Indian Wells water adjudication; this would be the first time that a non-tribal federal entity would be claiming reserved water rights to groundwater. They may not be able to visit us until after the litigation comes to a close. She noted that the Sackett case is scheduled for oral arguments on October 3. The California v. BLM case is still pending in the 9th Circuit, and Chris Brown noted that there is a new hydraulic fracturing rule currently at OMB. In the Gold King Mine litigation, all off the states and the Navajo Nation have settled with EPA, but the case is proceeding forward with the contractors. In Texas v. New Mexico, there were settlement negotiations agreed to in principle. Jon Niermann noted that there are some ongoing discussions, and they are looking at trying the liability phase in December.

Michelle also provided a staff update on the Legal Committee survey reports, which are still ongoing.

DRAFT FY2022-2023 LEGAL COMMITTEE WORK PLAN

Chris Brown spent some time going over the topics in the workplan.

A brief update on Wyoming's MOUs. We have both the Forest Service (USFS) and the Bureau of Land Management (BLM), our legislators, and some of our legislators weren't very pleased with those MOUs because they felt they could be changed by the agency and so proposed legislation two years ago and then brought it back in last session. We're having some pretty good success with the USFS, BLM, and those memorandums. We were able to get the language adopted from our MOU. There was one slightly difference, but wasn't significant. Now we've got a statute(?) for what we were already doing with our MOUs at least with regard to grazing rights. The other rights weren't affected, it dealt specifically with the grazing rights.

Ad Hoc Group on Reserved Indian Water Rights - You heard Jay and Michelle talking a little bit about some of the efforts we've supported in the past with regard to funding of tribal federal reserved water rights, The Council has partnered with NARF to have a symposium every other year to discuss that particular topic. I think that's something that will continue to occur. I will note that currently Jay is the only member on that subcommittee. I would encourage anybody who has an interest in tribal reserved water rights to jump on board.

The last thing simply relates to the surveys that Michelle mentioned that went out to the States with regard to some different topics: proof of beneficial use, state water rights, well construction rules, and regulations. I would encourage anyone who's state has not yet responded to those surveys, please take a look. Consider responding to them.... Any questions, or comments?

Hearing none, Chris entertained a motion to approve the work plan with the edits. Jen Verleger made a motion to approve, the motion was seconded and the work plan was adopted as amended.

SUNSETTING POSTIONS FOR FALL 2022 MEETING

Position No. 440, supporting legislation requiring the federal government to pay state filing fees in state general stream adjudications is up to sunset at Fall meetings. Chris encouraged members to review it.

OTHER MATTERS

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