MINUTES
of the
LEGAL COMMITTEE
Artesian Hotel, Casino & Spa
Sulphur, Oklahoma
October 20, 2022

Table of Contents

Welcome and Introductions 3

Approval of Minutes 4

Sunsetting Position 4

Oklahoma Legal Issues 4

Water Rights Speculation in Colorado 6

Water and the Kansas Legislature 11

Watershed Restoration Project Funding and Water Rights 12

Water Rights and the Chickasaw National Recreation Area 15

Staff Updates 18

Sunsetting Positions for Spring 2023 Meetings 18

Other Matters 18

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MEMBERS AND ALTERNATES PRESENT *(*via zoom)*

ALASKA	Julie Pack Emma Pokon
ARIZONA	Amanda Long-Rodriguez *Trevor Baggiore* *Ayesha Vohra*
CALIFORNIA	*Joaquin Esquivel*
COLORADO	*Jeremy Neustifter* *Kevin Rein* *Scott Steinbrecher*
IDAHO	Jerry Rigby John Simpson
KANSAS	*Connie Owen* Matt Unruh Tom Stiles Earl Lewis
MONTANA	
NEBRASKA	Tom Riley
NEVADA	Jennifer Carr *Andrea Travnicek*
NEW MEXICO	
NORTH DAKOTA	Jen Verleger
OKLAHOMA	Julie Cunningham Sara Gibson Shellie Chard

OREGON	
SOUTH DAKOTA	Nakaila Steen
TEXAS	Jim Rizk
UTAH	*John Mackey* Todd Stonely Renee Spoonor
WASHINGTON	Mary Verner
WYOMING	*Jeff Cowley* Jennifer Zygmunt

GUESTS

Caroline Nash, CK Blueshift, LLC
Laura Ziemer, Culp & Kelley, LLP
Terry Fisk, National Park Service
Peter Fahmy, National Park Service
Stephen Greetham, Chickasaw Nation

WESTFAST

Paula Cutillo, Bureau of Land Management
Roger Gorke, Environmental Protection Agency

STAFF

Tony Willardson
Michelle Bushman
Erica Gaddis
Adel Abdallah
James Ryan

WELCOME AND INTRODUCTIONS

John Simpson, filling in for Committee Chair Chris Brown called the meeting to order.

APPROVAL OF MINUTES

The minutes of the meeting held on August 4, in Polson, Montana were moved for approval by Jennifer Verleger. Jerry Rigby seconded, and the minutes passed unanimously.

SUNSETTING POSITION

John reviewed Position #440, supporting legislation requiring the federal government to pay state filing fees in state general stream adjudications. This position originally came from Idaho. John invited comments or anyone wishing to make a motion.

Jerry Rigby agreed that Idaho did originally bring this position to the Council, and they still support it. They had an adjudication they thought was complete, but the Department of Justice (DOJ) is objecting on the grounds that *de minimis* uses were not included in the adjudication. Jerry moved to renew the motion, and Jen seconded. With no further discussion, Position Number 440 was renewed.

OKLAHOMA LEGAL ISSUES

Sara Gibson, General Counsel, Oklahoma Water Resources Board (OWRB), provided an update on Oklahoma's legal issues. We have had a lot of developments in water law, rulemakings, water quality-quantity nexus issues, and work related to new financial assistance.

About this time last year, we had a case go up to the State Supreme Court on our stream water notice statutes (*Purcell v. Parker*, 475 P.3d 834, (Okla. 2020)). The statute currently requires only notice by publication for new or amended stream water right. The petitioners argued that, as neighbors owning land abutting the lake, due process required individual notice of the respondents' application for a permit from OWRB. The case is notably silent on whether the petitioners held water rights that could be impacted, or on what grounds the petitioners had standing to require more direct notice of the application. The Oklahoma Supreme Court decided the newspaper publications were constitutionally insufficient notice for due process, but didn't tell us what would be constitutionally sufficient. This case came to the Supreme Court without kind of fact finding from the district court and so the legislature is hesitant to create new notice statutes without any direction from the State Supreme Court. We have another case pending before the court that could give us more guidance, but they don't seem inclined to take that up anytime soon. For now, we just tell all stream water rights applicants that they have to provide notice in the form of personal service to people who have an interest or may be interested that are known or easily discoverable. When they ask us what that means we tell them we have no idea. The case that went before the Supreme Court was on a 300-acre NRCS pond with five surrounding landowners who recently received notice of a permit application. So that is to be continued.

As far as legislation goes, as a result of the influx of medical marijuana, the OWRB was able to obtain some legislative authorization to have administrative enforcement capabilities for

the use of water without a permit and some other violations of water law in Oklahoma. We can now assess up to $5,000 per day for any violation of the groundwater law, or use of water without a permit. We don't expect to see a big influx of money coming from this, but we have enforcement authority now. Our only option before was to get the DEA to file a misdemeanor charge. So we are creating new processes for that.

Chris Neel (OWRB) briefly mentioned in this morning's presentation our intent-to-drill rules for water wells and related water rights (Okla. Admin. Code §785:35-13-1?). We're already seeing some impact of those programs. The legislature authorized those programs in 1972 and we have just never implemented that in administrative rulemaking. We hope this will help a lot with compliance issues.

The State of Oklahoma regulates pollution and water quantity by ensuring that no pollution is occurring either because of the way the well was drilled, or from the way that it's being drawn up through the well. Oklahoma's statutes prohibit groundwater users from wasting fresh water by allowing polluted water to intrude (Okla. Stat. tit. 82, §1020.15). The same section says that: "The Board shall be precluded from determining whether waste by pollution will occur pursuant to the provisions of this paragraph if the activity for which the applicant or water user intends to or has used the water as specified under Section 1020.9 of this title is required to comply with rules and requirements of or is within the jurisdictional areas of environmental responsibility of the Department of Environmental Quality or the Oklahoma Department of Agriculture, Food, and Forestry." That statutory language was added after a Supreme Court case that dealt with some permitting issues. Now we've had a district court judge who had this issue come before him and he ignored the statute and said the OWRB has to have testimony that all the rules and statutory authority of the other programs are being complied with. There are a lot of agriculture industry partners who are concerned about the impact that could have on new production facilities. We will be appealing that case. There's also talk about changing statute. If anybody has better words than "shall be precluded," I'm happy to hear them. At this point, I don't know what they are.

Shellie mentioned water quality standards that are going to the Department of Environmental Quality (DEQ) on November 1. OWRB's role in that effort is limited, and Shellie's team is putting a lot of work into this program.

We participated in an instream flow study for our legislative committee. Oklahoma has no instream flow program, and we have a state senator that's been working on this for several years. We are trying to get to an agreement between all water use sectors and all water users in different parts of the state to move this program forward.

Questions:

John: During the Oklahoma update, there was mention of a statute involving produced water, or in water recycling from water produced. Is that produced water subject to further appropriation in Oklahoma?

Sara: It is not subject to appropriation. We permit the initial diversion of that water, be it groundwater or surface water. Once it goes through the process, whether it's a wastewater discharge that's picked up for some other purpose, or produced water from the oil and gas that is regulated by DEQ, or the Corporation Commission, we still have a few things out there that are still under EPA jurisdiction. I know DEQ is working on that. But OWRB doesn't regulate any of those waters unless they are returned to the stream.

Julie Pack: A question that arose from our field trip yesterday. Of all the water bodies that we visited, what would be considered WOTUS?

Sara: Oklahoma has not strongly participated in a lot of the WOTUS discussions, because we have such an inclusive Waters of the State definition. We have a statute that includes all waters, and then marshes and bogs and anything that is essentially a wetland, they just won't let us call it a wetland. That's a fairly old statute, and I think DEQ has 1CFS as the minimum for permitting discharges.

Shellie: The waters with 1 CFS is the default, if there's not gauged flow, or something that tells us it's more than that. Basically, when it rains, water might run through it, it's probably waters of the state. We issue discharge permits even for something like the bar ditch out front even if it goes through a couple of unnamed tributaries before it gets to a named water body. I'm not even sure when the comprehensive definition got put into the statute that way, it got carried over in 1993, when the DEQ was actually formed and so it got put in those statutes as well. We also have language that talks about groundwater, prairie potholes, basically anything that could possibly convey water falls under OK jurisdiction.

Sara: Oklahoma also has pursued delegation of a significant number of EPA programs. I think at this point, there's a few oil and gas programs out there, and then CWA §404.

WATER RIGHTS SPECULATION IN COLORADO

Kevin Rein, State Engineer/Director, Colorado Division of Water Resources and Scott Steinbrecher, Assistant Deputy Attorney General, Colorado Department of Law, offered a presentation on Colorado's recent efforts to address concerns about water right's speculation.

Kevin talked about traditional legal v. financial investment speculation. Senate Bill 2048 directed a workgroup to consider the prohibition on speculative appropriations of water, to look at whether Colorado's current anti-speculation doctrine and associated laws can be strengthened. Our water users, legislators, and water managers were concerned about speculation activities and they wanted to know if the current laws addressed those concerns.

The workgroup is supported by the Division of Water Resources, the Department of Natural Resources, and the Attorney General's Office. The legislation also called for other stakeholders as needed, which included three from the agricultural community, and two from the environmental and recreational community. We had four private attorneys and two water

providers. For this workgroup, it was so important to have a strong legal representation from our attorneys. The legislation directed the workgroup to submit a written report to one of our legislative committees by August 2021, regarding any recommended changes, if there were any.

Kevin showed a map to illustrate how water flows out of the State of Colorado, which was relevant to this discussion. We needed to look at how this anti-speculation concept originated and some of the events leading up to it. The doctrine currently codified in law also appears on our state constitution, which says that the water of every natural stream is dedicated to the use of the people of the state. It also says that the right to divert the unappropriated waters of any natural stream to beneficial uses may never be denied. An appropriation needs to be for a true beneficial use and we read into that *non-speculative* beneficial use. That is the basis for anti-speculation doctrine in Colorado - that you can come in and appropriate a water right to put it to immediate beneficial use, but you can't appropriate the entire river with the thought that someday you might have a use for it, and so you're going to hold on to it until that use materializes. That's just simply not allowed.

Prolonged drought conditions on the Colorado River and efforts to consider demand management under the Drought Contingency Plan (DCP) really provided the impetus for these concerns. The demand management tool potentially allows water rights to be taken out of consumptive use to address Compact compliance obligations in a voluntary way that would be compensated. The concern people had at a very high policy level and a very on the ground level, was that certain entities would come into Colorado and opportunistically purchase water rights, continue putting them to their decreed beneficial use, thus satisfying the current anti-speculation doctrine, but hold those and sell them or profit in some way from them later, under a demand management program. Not necessarily to any specific person's detriment, but by virtue of doing all that, they would profit from it. That's what gave us Senate Bill 2048. With that, I will turn it over to Scott.

Scott said the first task for the workgroup was to understand what was currently covered under Colorado's anti-speculation doctrine and what the issue was that the legislature had asked us to address. As Kevin has alluded to, traditional anti-speculation doctrine in Colorado really is aimed at preventing someone from hoarding water rights, either without a legitimate use, or a plan to put that water to use within a reasonable time. Colorado law, constitution, statutes, and case law have done a reasonably good job at preventing that type of speculation. We've done that through water court proceedings. When someone goes to appropriate a new water right, or to change an existing water right, there are elements they have to prove in water court to show that they have a legitimate need for that new use, or the change in use, and that they'll be able to apply that water to those beneficial uses within a reasonable time. In contrast, the legislature was focused on asking the workgroup to look at activities that really were outside the realm of the water court review. Colorado water courts aren't involved when a water right is sold, transferred, or leased. As Kevin said, someone new could buy an existing water right, continue its decreed beneficial use, say for agriculture, and never have to go into water court for that. The concern here was people's intentions regarding financial speculation. People were investing in water with the intention of benefiting from the value increasing over time and weren't investing in water because they need it to continue farming, or to use the water for some municipal use. The question the legislature wanted us to answer was if we could prevent people from profiting off of our system of water laws.

The report we put together for the legislature includes a 20-page summary of the existing laws around anti-speculation. That's where our legal group really came together and provided a history and an analysis of what we had existing because we thought it was important for legislators to understand what we could control now and where the law was helpful. We also spent quite a bit of time trying to define the distinction between traditional speculation and investment water speculation, which is a term that we came up with to try to make it a little bit clearer what the difference was between the two. If you look at who was involved in the Committee, you'll see that they were from very different aspects of the economy and from different regions of the state. There was a lot that committee members disagreed on, but we found three things that everyone on the committee agreed on: (1) Coloradans value irrigated lands, safe and reliable drinking water, environmental, recreational and community benefits derived from water resources; (2) Coloradans value water for its beneficial use, and water should not be traded as a commodity for profit; and (3) Coloradans value property rights in the beneficial use of water and the protection of these property rights.

We also spent time trying to identify the possible risks and outcomes of investment speculation in water rights: (1) when an investor holds a large portfolio in a region that influences the market for water rights; (2) when an investor has significant resources to purchase water rights, which drives up the costs; (3) investments that could lead to a large-scale dry up; and (4) where profit drives appropriations of water and impacts subsequent, non-investment oriented appropriation.

The workgroup brainstormed and described 19 concepts and felt it was important to include all of those in the report, even those that the work group pretty uniformly agreed were bad ideas. In the report they described the pros, cons, and how effective they were. Those fall into five categories: (1) concepts modifying existing proceedings or legal standards in water court; (2) concepts promoting the tying of water to the land; (3) concepts specifically relying on identifying investment water speculation at the time of a water rights sale; (4) concepts that would identify and impact the sale of water rights without specially identifying investment water speculation; and (5) concepts that encourage temporary changes in use of water rights and/or ensure that temporary changes do not result in or facilitate investment water speculation.

The group narrowed this down to eight concepts that we recommended for later consideration to the legislature, filtered by those that would involve changes to the law to strengthen anti-speculation on a broad scale. The first four, we detailed a little bit more extensively in the report: (1) prohibits non-diversion; (2) right of first refusal; (3) reduce the agricultural tax benefit for lands from which water is removed; (4) require water to be tied to the land; (5) prohibit investment water speculation; (6) local governments to police investment water speculation; (7) tax the profit; and (8) establish maximum rate of water right price increase. As mentioned, the workgroup could not come to consensus that any one of those eight solutions. Instead, we recommended to the legislature that they could look at each of these and determine to do more constituent outreach and then determine whether any was worth pursuing. The workgroup recommended a lot more research and constituent outreach before doing anything.

Kevin finished up by talking about the subsequent legislation. Senate Bill 29, Investment Water Speculation, was introduced during this last session. A section of the bill prohibits a purchaser of agricultural water rights that are represented by shares in a mutual ditch company from engaging in investment water speculation. Investment water speculation is the purchase of agricultural water rights that are represented by shares in a mutual ditch company in Colorado with the intent, at the time of purchase, to profit from an increase in the water's value in a subsequent transaction or by receiving payment from another person for non-use of all or a portion of the water subject to the water right. Another component of that bill is that the state engineer would have to investigate this, it could either be from a third-party complaint, or the state engineer of his own volition could decide to investigate. But if the transaction met these criteria, there is a rebuttable presumption that the purchaser is engaged in investment water speculation. The state engineer may fine a purchaser up to $10,000 for a violation and require, for a period of up to 2 years after a fine has been imposed, that any sale or transfer of shares in a mutual ditch company to the purchaser be subject to approval by the state engineer. If the state engineer believes that a complaint is frivolous or was filed for the purpose of harassing a seller or purchaser, the state engineer may refer the matter to the attorney general's office to investigate and, if the attorney general determines that enforcement is warranted, bring a civil action in a court of competent jurisdiction alleging the complaint is frivolous or was filed for the purpose of harassment. If the attorney general prevails in the civil action, the court may fine a complainant up to $1,000, prohibit the complainant from filing any complaints alleging investment water speculation for up to one year, and grant attorney fees and court costs.

There was pushback about this intrusion in the market, impacting people's private property rights, impacting the value of water rights. This created a lot of frustration for our legislators, because they were trying to address a problem, but they were not given a clear roadmap from the workgroup from the report. So they adopted a hybrid of a couple of the solutions and it just did not go over well at all. They took a little bit of a beating. I understand their frustration with that. In response to that, there was an amendment to create a new requirement that any transaction would have to be notified to the state engineer and then the state engineer would post this information to the website. That did not address the issue, but rather it raised some of the same concerns about the intrusion on the private market just by making it public. Again, just to emphasize the incredible difficulty with dealing with this situation, where we have those almost diametrically opposed concepts that Scott highlighted, not wanting water treated as a commodity, but at the same time, protecting private property rights. Where are we now? Well, that bill and the edits to the amendment didn't live through the legislature. I think that the legislators want to look at whether they get off to a fresh start this year after sort of a trial run last year.

Questions:

Jeff Cowley: This is not the view of the Wyoming State Engineer's office, this is just my question, because I've heard this discussion before. Does it feel like you're standing at the top of a very slippery slope, telling people they can't make money on something? I mean, if they bought the land last year, is that bad that they make money on it? If their family homesteaded it, it's okay if they make money selling that water. Colorado and Wyoming water law is not the same, but driving to Fort Collins as often as I do, if I was going to buy property, I would buy the irrigated land right

next to Fort Collins, right next to a subdivision because I know they're going to come and try and buy that land from me next year and I'm going to make money on it. So what would your thoughts be on the slippery slope part of regulating profit?

Kevin: You're right on target and consider a couple of variables. One, how are you making the money? You just described the potential selling the water right to a municipality and making money on it. That happens every day in Colorado. As you said, it's the other variable - how long have you had the water right? Did you buy it 20 years ago? You made a real good go of farming, but now you're retired and the kids are gone, or are you from out of state? I think those other variables come into play and it's just that visceral reaction from Colorado.

Scott: Yeah, that's exactly right. And, Jeff, you're right on target. That's something that the workgroup really struggled with. I think the group realize that there becomes a moral question at some point like Kevin's describing, and very, very difficult to legislate.

Renee Spooner: Have any other states really looked at the financial ability of an applicant?

John Simpson: I know in Idaho during the application process to get a new water right there is a part of that review the applicant needs to provide the financial ability to complete the project.

Renee: What do you look at? I mean, what do you expect the applicant to provide?

John: In the cases I've been involved in, there's been some testimony by the applicant describing their financial ability to complete the project. It varies. If the application is not protested, then very little financial capabilities are submitted by the applicant. If the application is protested, then often you'll see protesters grabbing on to any argument they can make, including speculation, including financial capability. It's up to the hearing officer that determines what level of financial capability is sufficient to overcome that issue. Bank statements have often been part of that testimony.

Renee: We're kind of just looking at a project where there is no money and just relying upon investors. There's no hard commitment anywhere.

John: I don't know if other states have adopted that, just in regard to the investment or financial capability.

Shellie Chard: Not exactly the same, but for water, wastewater, solid waste, and hazardous waste facilities that are privately owned, they do have to provide initial assurance that they can operate, maintain, and ultimately close those facilities. It does not apply to publicly owned. I can point you to some language if you think that might be helpful.

Renee: Sure that would be interesting. So then a question to Colorado. Do you think your speculation doctrine is strong enough to stop someone that's trying to divert water under the compact and bring it into Colorado?

Scott: If that application were to come into Colorado water court, certainly anyone in the state could hold them to strict proof that they can and will complete that diversion and that they have legitimate needs for it. We've seen that applied very successfully against other projects that may not have end users or may be claiming certain exceptions. It was applied recently against a group in Colorado that was claiming to be a city provider, essentially, a municipal provider for the entire state. Our Supreme Court said no, you don't have an agency relationship with them so you have to prove like any regular market provider would that you have any contracts in place. So yes, I think Colorado law would apply to a project like that. It would stand up.

WATER AND KANSAS LEGISLATURE

Earl Lewis, Chief Engineer, Division of Water Resources, Kansas Department of Agriculture and Connie Owen, Director, Kansas Water Office gave a presentation on water-related activities in the Kansas Legislature the past couple of years. Earl noted that, typically, water is not a large issue in our legislature, but we've seen a lot of discussion over the last couple of years about some sweeping changes. With revenues strong after the rebound from COVID, the State Water Plan was fully funded, as required by statute, for the first time since FY2008. Over the last 13-14 years, we were about $80M short. The State of Kansas owns storage in 14 of the federal Corps reservoirs and oftentimes a debt goes along with that. The legislature paid off the debt of three of those reservoirs, which was about $81M. Of course, there's also been a lot of focus on federal infrastructure funding.

Our House Water Committee is on a two-year cycle. This year, the Committee tried to pass a 283-page mega water bill (H.B. 2686) to create a new Kansas Department of Water and Environment (KDWE) made up of the Division of Water Resources and the Division of Conservation from the Kansas Department of Agriculture (KDA), the Division of Environment from the Kansas Department of Health and Environment (KDHE), and the Kansas Water Office (KWO). It would also be administered by a Secretary of Water and Environment appointed by the Governor with the consent of the Senate. Earl noted that there was not a primary seat at the cabinet level for water in the State of Kansas.

Our State Water Plan Fund was created in 1989 and is a mix of some demand transfers and various fees, which adds up to roughly $12.6M. Part of the bill proposal was to increase some of those fees, which would generate another $8M. It would be a significant improvement.

Kansas has five groundwater management districts (GMDs) authorized in 1972, with locally elected boards. One of their responsibilities was to develop a management plan for what's going on in their aquifer and then make recommendations by proposing rules and regulations that KDHE or the state engineer could adopt, and then they could collect fees on water use. The GMDs didn't do it. People started having issues with the representation and voting structure of the GMDs. In order to vote, you had to have at least 40 acres of contiguous property, or use at least one acre-foot of water there. Roughly 30-40 people would show up to vote at meetings and the question arose whether people who could vote were engaged or if they represented the public very well. There were also disagreements between GMDs about the right way to organize. The legislature

told them they needed to develop a management plan to address the depletion of the aquifer, or they would have the chief engineer reduce the declines by at least half.

So then it was time to work on the bill and develop an action plan, and the agricultural groups got involved. The House Committee managed to reduce the bill from 283 pages down to 4 or 5. The substitute bill dedicated 1/10 of one cent of existing sales tax to the State Water Plan Fund, which would roughly be $49 million. It also requires annual reporting from GMDs to the legislature. It got to the House floor, but there was never any action on it. The bill never made it to the Senate. The Senate really didn't have any discussion about this as they waiting to see what was going to come out of this whole process. Nothing ever made it over for them to work on. They did authorize a joint interim committee in August. Its purpose was to work on some of these issues and make recommendations back to the full legislature. So the story continues.

The legislature authorized audits of the Groundwater Management Districts. What programs do Groundwater Management Districts (GMDs) administer and are those programs appropriate? Have GMDs identified areas of concern within their districts and do their programs effectively address those concerns? How much did GMDs spend in the most recent year and what percentage was for directly addressing their districts' identified areas of concern? They are in the middle of that right now and it should be finished probably about the time the legislature is starting. I'm sure we'll come back and make recommendations.

Connie said a lot has happened over a two-year period of time, similar to the efforts Colorado just spoke about. The good side of all of this is that this whole process really elevated the conversation in Kansas about water. Suddenly legislators are paying attention to it. We now have some really great reporters that are reporting relentlessly on issues involving water use, water management, and the drought. It's really raised awareness and hopefully that will lead to some public will to support making some bold and meaningful moves that we are going to have to make.

WATERSHED RESTORATION PROJECT FUNDING AND WATER RIGHTS

Paula Cutillo, Sr. Water Resources Specialist, Bureau of Land Management (BLM) and a WestFAST representative, talked about BLM and other federal land management agencies receiving and influx of funding to improve watershed health and build drought resilience on public lands. BLM is prioritizing process-based restoration, with activities in valley floors and wet meadow ecosystems. In planning for these activities, we learned that state permitting requirements for restoration vary considerably from state to state.

Caroline Nash, Principal, CK Blueshift, LLC, and Laura Ziemer, Principal, Culp & Kelley, LLP, talked about working with states to ensure that they are leveraging this new funding for restoration and coordinating efforts to ensure existing water rights are protected. IIJA and IRA funds for FY23-26 include a number of intersections between drought resilience and wildfire prevention and preparedness. There is over $500M in grants to help communities implement and plan for community wildfire defense, where valley bottom restoration that we're talking about not only is a drought resilience strategy, but also a wildfire risk reduction and preparedness strategy.

There's also money for post-fire restoration, which has a really strong intersection for rural communities and municipalities in the West that are dependent on forested watersheds for drinking water supply and in that wildland urban interface. There's over $2B just for ecosystem restoration, focused on wildfire and drought preparedness. The Bureau of Reclamation, Army Corps, FEMA, NRCS , NOAA Fisheries, NMFS, and the U.S. Fish and Wildlife Service also got a tremendous amount of watershed restoration funding. That can come to the states in a variety of ways. There's another $20B for the NRCS through its conservation title programs. This kind of watershed restoration investment is a really good fit for producers who are also looking to invest in some drought resilience on their working lands, particularly for irrigated pasture and cattle operations.

From a hydrologic standpoint, we are looking at natural infrastructure created by human design to reduce the water supply-demand imbalances or risks from droughts and floods. Rivers can provide a series of ecosystem services like overbank, flood flowing, biogeochemical cycles that sequester carbon and create soil texture that holds water and creates fertile soils for farming. A project might involve the reintroduction of beavers that can help maintain the natural processes, for example, and the projects have a range of outcomes that may vary grographically, such as watershed health, fish and wildlife habitat, floodplain reconnection, riparian and wetland restoration, resilience through wildfire and drought, and a reduction in post-wildfire erosion and sediments that impact water quality. Process-based restoration necessarily takes a longer time, but the idea is that the river is given the tools to sort of sustain itself. Historically, humans tend to remove impediments to flow. This causes water to move faster, which leads to erosion and down cutting; draining the groundwater from floodplains; reducing the frequency, or completely stopping the process of over bank flooding, and then causing wetland and riparian plants to die. It creates this sort of self-perpetuating cycle. The idea with these restoration tactics is you reverse that cycle. You slow the water down to induce a series of processes that help bring the channel condition back to what it was.

One restoration project site in Grant County, Oregon served as a fire break for a prescribed fire that escaped, growing from 50 acres to 5000 acres. The firefighting crew was able to put in a dozer line in advance of the fire reaching the meadow, knowing that the meadow would create certain predictable levels of fire behavior. During the East Troublesome fire in Colorado, both natural and restored beaver meadows created pockets of low to no burn severity compared to the surrounding hill slope. Again, creating the opportunities around sediment abatement and management as well as the potential for creating near term local refugia for wildlife in the face of larger and longer fire seasons.

Generalized permitting processes for restoration projects follows standard process that most of us might be familiar with. Federal funding or on federal ground, you start with a NEPA review process. Anyone, whether you're a private landowner with private money, or using federal ground or federal money then requires the Clean Water Act Section 404 permit, which itself requires a pre-construction notice, jurisdictional delineation of wetlands, depending on that year's flavor of WOTUS, and then that Section 404 permit would trigger an Endangered Species Act review, Clean Water Act Section 401 certification, as well as your state historical preservation review. Each of these processes vary state by state, and the degree of coordination among state

and federal agencies varies across states for the Clean Water Act Section 404. But most of these processes have some level of coordination between the two.

What's really new, particularly in the past three years, is the elevation of water rights in the permitting process. Water rights really need to be considered in the planning process, both for private landowners and federal agencies incorporating the water rights review into their timelines and processes at the state level alongside the environmental and cultural compliance we need to do. We're also seeing innovative solutions brought by the states as they grapple with the increasing number of questions around these restoration projects. We've seen guidance issued in Idaho and Utah. Folks in Colorado and Wyoming are starting to consider new approaches to permitting the water rights components of these processes. We've seen issues emerging in California and Nevada raising questions about how these projects are going to play out. There are interesting lessons being learned and approaches being taken on a state-by-state basis. This is where we think that potentially this webinar could create an opportunity for sharing among the Western states for those who are encountering these sorts of issues, from the science to the administration and compliance, to the resources and tools to manage workloads, to the project outcomes.

Questions:

Tom Riley: Just a couple of comments about your water rights components. In Nebraska, I did a lot of restoration projects for our gaming parks and other entities. Many of those structures might have been on the floodplain and resulted in storing quite a bit of water. It took me a long time to convince them to actually seek a water right, because in the prior appropriation system, the small structures which might have been wetland enhancements, were storing water. In Nebraska, if you store more than 50-acre feet, that throws you into needing a permit to store water. I think this is a great consideration to make sure that in the western states, you have water right appropriation set up as part of the process. FEMA floodplain mapping has resulted in streams having a large floodplain. This needs to be redistributed and there is a lot of resistance. It can be very difficult to do.

Jerry Rigby: We represent the surplus and storage users in the Upper Snake, Eastern Idaho. Henry's Lake and park reservoir are both clients of ours. I'm happy to see that you're addressing the water rights issue because although the restoration sounds great, the Nature Conservancy attempted to take away the straight channel, but the problem is the water right holders. Both storage and surface users are saying that's our water and you're stopping it from getting down to us. We need to make sure to recognize the water rights.

Caroline: Thank you, Jerry. That actually was the project that got us thinking. Because everyone knows what's going on in terms of what it looks like now. We need adaptive management to come into play. One example that we saw was a rancher in Oregon who was excited about the project because it increased the forage available to cattle throughout the year. I think really having the ability to have honest conversations with all parties and explore situations where remedial action does need to be taken versus situations where maybe there's no benefits that we can get more partners involved in. But it starts with being frank about what people care about and what the concerns are and what the rules are.

WATER RIGHTS AND THE CHICKASAW NATIONAL RECREATION AREA

Peter Fahmy, Sr. Policy Analyst, Water Rights Branch, National Park Service, Stephen Greetham, Sr. Council to the Chickasaw Nation and Sara Gibson, General Counsel, Oklahoma Water Resources Board discussed water rights and the Chicksaw National Recreation Area.

Peter Fahmy noted that he has been working on the NPS concerns over Arbuckle-Simpson Aquifer management challenges and water rights since 2002. The modern history of the Arbuckle-Simpson Aquifer stretches back to 1803 when the U.S. purchased the French territory of Louisiana. Out of the lands acquired, the U.S. conveyed most of what is today southeastern Oklahoma to the Choctaw Nation in 1830 pursuant to the Treaty of Dancing Rabbit Creek. In 1837 the Chickasaw Nation obtained a district within the lands granted to the Choctaws under the Treaty of Doaksville. Because of the abundant mineral springs in this area, the development of recreational facilities began in earnest during the 1890's. The rampant nature of this development gave rise to efforts to establish measures to prudently manage access to the many mineral springs. These efforts culminated in two deeds (1902 and 1904) that transferred back to the United States the entirety of the interest in the lands and waters that were conveyed to the Choctaw Nation.

In 1904, Congress established the Sulphur Springs Reservation (later Chickasaw National Recreational Area) in order to protect the springs and streams that emanate from the Arbuckle-Simpson Aquifer. A 1906 survey found 33 springs, but by 1988, the USGS could only find 5 of the springs. While drought may have dried up some of the springs, there was also widespread well development. Because of the degraded state of the discharge from the springs within the Chickasaw National Recreation Area, the NPS was particularly alarmed when in 2002 and 2003, nine applications for permits to withdraw ground water from the Arbuckle-Simpson aquifer were filed with the Oklahoma Water Resources Board (OWRB) for about 80,000 acre-feet of groundwater. The nearest application was about two miles west of the park. The applications were prompted by an agreement between the applicants and the Central Oklahoma Water Authority (COWA) to transport groundwater from the Arbuckle-Simpson aquifer to Canadian County, about 70 miles away, near Oklahoma City. Approximately 1,600 protests were filed opposing the approval of these permit applications. Both the NPS and the U.S. Fish and Wildlife Service filed protests. The proposal to export groundwater from the Arbuckle-Simpson Aquifer prompted widespread concern from the current water users and resulted in the formation of a nonprofit organization called Citizens for the Protection of the Arbuckle Simpson Aquifer.

Lobbying by this group led to the passage of Senate Bill 288 in 2003, which applied only to EPA-designated sole source groundwater basins, and imposed a moratoria on issuing temporary permits for any additional municipal or public use of water outside the basin until OWRB determined the maximum annual yield and whether the proposed use is likely to degrade or interfere with springs or streams emanating in whole or in part from water originating from the groundwater basin. The statute was immediately challenged and subsequently upheld by the Oklahoma Supreme Court. The hydrologic study is in phase two, and the state is still grappling with how to manage a very complicated but important aquifer.

Stephen Greetham said the Arbuckle-Simpson region is perhaps the most studied hydrologic resource here in Oklahoma. It also has been the heart of some of the longest standing controversies. Oklahoma's water law is underdeveloped, in part because historically it hasn't had shortages and the conflicts that force the hard decisions. The Arbuckle-Simpson has been a crucible here for Oklahoma to really start dealing with some of that. Oklahoma has an inherently disjunctive management system. Surface waters are considered public waters available for appropriation, based on a prior appropriation model. We also have riparian rights mixed in there and no one really understands how to parse those out, so we tried to ignore them. Groundwater is considered part of the bundle that a landowner gets - you own the groundwater, but you can appropriate the surface water. The law ignores any hydrologic connection. Then we come up with a formulaic way of allocating ownership of groundwater based on an equal proportionate share based on calculating the maximum annual yield and you assume a lifetime for the aquifer. How much do you get to pull out? The aquifer here is very flashy. The top layers of water are really young; deep water is very old. More demand from the aquifer has a very immediate hydrologic impact on streams and springs. There are roughly 200,000 people in south central Oklahoma that rely on these discharges. When those water levels drop down, it can be catastrophic. When folks proposed to move a chunk of water, the community reacted. What came out of that was Oklahoma's first experiment in conjunctive use management. We tried to integrate surface water impacts with groundwater management.

The Chickasaw Nation sued the State of Oklahoma a few years ago over a conflict involving the Kiamichi stream system. That resulted in the first tribal water rights settlement in Oklahoma. Due to the Chickasaw and Choctaw's unique treaty history, we partnered on that. Through that settlement agreement, we also have a new relationship with OWRB when it comes to future permitting of our lands or involving non-Indians based on kind of a sustainability ethic that grows from some of the work that came out of Senate Bill 288. When we were working on our water rights settlement, dealing with the Arbuckle-Simpson was about the easiest part of the negotiations. Rather than invoking sovereignty and separating itself from the state law mechanisms we jumped in and tried to partner with the state on these issues. Our settlement was essentially incorporated into a congressionally-approved water rights settlement based on state law. The goal was to implement the original transaction between the tribes and the U.S. When these lands were being allotted, they were coveted lands. Both tribes looked at the fact that they weren't going to control the allotment process, and they weren't going to be able to control where the lands would go. They were concerned within their own community that the inequitable distribution of these water rich lands would have adverse impacts. These lands had taken on certain cultural value. That's what motivated the tribes to sit down with the feds and create a public use reservation. The lands were conveyed in a public trust to the United States for the protection of the springs and streams, emanating from the surface discharged from the Arbuckle-Simpson. We weren't using those terms at the time, but that's exactly what we were doing. Senate Bill 288 was viewed by the Chickasaws as a continuation of that same kind of effort, working through the relationships in the community and with the state to try to create a new water management system. In our settlement, we tried to build further on that to federalize the water right system so that we have some certainty that our rights are tied to the rules that are going to work for the sustainability

of this area. Sara and I are still going to fight a lot about a lot of details going forward, but the partnership between the state and the Chickasaw Nation, I think has been incredible for the area.

The waters of the Arbuckle-Simpson are still hotly contested. One of the biggest challenges we have remaining is the mining industry. The same geology that creates such a complex groundwater resource also makes excellent material for paving roads. Mines in Oklahoma are a strange relic in our regulatory system. The mines were exempt from Oklahoma's groundwater laws until just a few years ago. One mine, north of Troy, Oklahoma was discharging as "waste" about three times as much water as the City of Sulphur would consume in any given year. It's a management issue that we're still trying to address. The tribes aren't interested in shutting down the mines, but we certainly supported legislation that essentially created a moratorium on new mining activity in the area. Despite the ongoing studies of the Arbuckle, we still don't have the tools to look at the local impacts of groundwater withdrawals. We're trying to look at the groundwater wells as well as the mines to figure out how to do it. We've been looking to the Edwards Aquifer, which also has a lot of that same kind of aggregate mining, to figure out what kind of management principles we could use, but the needs in this area are significant. The data needs the technical analysis and we're grappling with that still. I'm grateful for the partnership with the OWRB, as well as the partnership with the Department of Interior, Bureau of Reclamation, and Army Corps of Engineers, but we still have a lot of work to do.

Sara Gibson noted that in Oklahoma, groundwater is a regulated private property right. The statute provides that there is a temporary amount that is available for permitting - 2 acre-feet per acre of land owned. The maximum annual yield process defines the basin based on saturated thickness. We look at the entire aquifer. Aquifer boundaries do not equal the basin boundaries. For the purpose of our studies, we have to have a certain amount of flow. All of that stuff went out the window with Senate Bill 288.

There was a facial challenge to Senate Bill 288 shortly after its passage. The State Supreme Court found that facially the regulation of groundwater is within the state's police powers and that the OWRB could proceed with the maximum annual yield process as delineated in Senate Bill 288. We finished studies and had hearings in Sulphur. The OWRB's proposal at the end of the day was to set an equal proportionate share – what amount of water each landowner could have was 0.2 acre-feet of water per acre of land. So landowners went from 2.2 acre-feet per acre to .2 acre-feet per acre. There was a judicial review of the OWRB's decision. The district court found that the OWRB's actions were appropriate. The Court of Civil Appeals found that the OWRB's actions were appropriate. The State Supreme Court declined to review the case. Then we moved onto pit water rules for the mining companies, and the additional studies. The other piece of our maximum annual yield process is setting well spacing for the rest of the state. For the Arbuckle-Simpson there are buffer zones from a specified list of springs and streams. There is max pumping amounts from existing wells.

It is interesting working with all the partners involved. Trying to develop statewide policy in Oklahoma is incredibly difficult. Particularly when there are differences across the state. I hope this is a good model for moving forward.

Questions:

Jerry: How is this not a taking? The only thing I can surmise is that the 0.2 acre-feet was considered sufficient to be beneficially applied to the land, and therefore any amount on top of that would be considered excess. Otherwise, how could it not be considered a taking?

Sara: Our state Supreme Court really emphasized that regulation of waters is within the state's police power. It's very interesting that when you talk to certain stakeholders, they really want to emphasize this private property right. But our state Supreme Court seems to hit on the regulated property right. And to what extent you have a property interest in a temporary permit, there's certainly a property interest in the regular permit that is issued after a maximum yield has been done. But what interest exists as part of that temporary permit.

Oklahoma: For the statutory right, the property right you get is provisional, so it's not an absolute property right.

Jerry: Okay, that makes a lot of difference:

Oklahoma: There's one other element, too, and that's the conjunctive aspect that as you're pulling the groundwater out, there are other folks with perfected water rights in the surface water system. So as part of the state's police power to avoid those property conflicts, the court thought that was a legitimate basis for the regulation.

STAFF UPDATES

Michelle stated she wouldn't go into detail given the time, but the legislation/litigation update is under Tab P. If anyone was looking for further information on the summary of the Supreme Court oral arguments in *Sackett v. EPA* on October 3, it can be found in WSW #2526 Special Report.

SUNSETTING POSTIONS FOR SPRING 2023 MEETING

None.

OTHER MATTERS

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