

**MINUTES
of the
LEGAL COMMITTEE
Peppermill Resort Spa Casino
Reno, Nevada
May 23, 2023**

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MEMBERS AND ALTERNATES PRESENT (**via zoom*)

| | |
|---------------------|--|
| ALASKA | <i>Julie Pack Tom Barrett Emma Pokon</i> |
| ARIZONA | <i>Trevor Baggione Amanda Long Ayesha Vohra</i> |
| CALIFORNIA | Jeanine Jones |
| COLORADO | Jojo La |
| IDAHO | Jerry Rigby John Simpson |
| KANSAS | Connie Owen |
| MONTANA | <i>Anna Pakenham Stevenson</i> |
| NEBRASKA | Tom Riley Jim Macy |
| NEVADA | <i>Jennifer Carr Adam Sullivan Melissa Flatley</i> |
| NEW MEXICO | -- |
| NORTH DAKOTA | Jennifer Verleger Andrea Travnicek |
| OKLAHOMA | Sara Gibson |
| OREGON | -- |
| SOUTH DAKOTA | Nakaila Steen |

TEXAS

Jon Niermann

UTAH

John Mackey
Sarah Shechter
Todd Stonely

WASHINGTON

Buck Smith

WYOMING

Chris Brown
Brandon Gebhart
Jennifer Zygmunt
Jeff Cowley

GUESTS

Lisa Fong, USDA Forest Service
Stacey Jensen, Army Civil Works
Gretel Follingstad, NOAA-NIDIS
Anna Johnston, USDA Forest Service
Micheline Fairbank, Fennemore Craig
Nicole Bringolf, USDA Forest Service
Tim Newman, U.S. Geological Survey
Kevin Mayes, Texas Parks and Wildlife
Gabriel Venegas, USDA Forest Service
Stephanie Granger, NASA/JPL-Caltech
Matt Bromley, Desert Research Institute
Norm Semanko, Parsons Behle & Latimer
Jaron Ming, U.S. Fish and Wildlife Service
Melissa Roberts, American Flood Coalition
Ayse Kilic, University of Nebraska - Lincoln
Justin Huntington, Desert Research Institute
Christian Dunkerly, Desert Research Institute
Michael Whitehead, Bureau of Indian Affairs
Josephine Axt, U.S. Army Corps of Engineers
Kirsty Bramlett, U.S. Fish and Wildlife Service
Brian Frazer, Environmental Protection Agency
Melissa Roberts, The American Flood Coalition
Richard Allen, Evapotranspiration Plus, LLC
Corey Buffo, Environmental Protection Agency
AJ Jensby, Nevada Division of Water Resources
Erica Gaddis, SWCA Environmental Consultants
Christopher Estes, Chalk Board Enterprises, LLC
Jen Kramer, Nevada Division of Water Resources

Bridget Bliss, Nevada Division of Water Resources
Alex Fragoso, Nevada Division of Water Resources
Keith Conrad, Nevada Division of Water Resources
Chad Walling, Nevada Division of Water Resources
Christi Cooper, Nevada Division of Water Resources
Bunny Bishop, Nevada Division of Water Resources
Lauren Bartels, Nevada Division of Water Resources
Jared McCrum, Nevada Division of Water Resources
James Bolotin, Nevada Office of the Attorney General
Jordan Beamer, Oregon Water Resources Department
Wayne Skladal, Oregon Water Resources Department
Hannah Singleton, Southern Nevada Water Authority
Thomas Pyeatte, Nevada Division of Water Resources
Kelly McGowan, Nevada Division of Water Resources
Malcolm Wilson, Nevada Division of Water Resources
Nicole Goehring, Nevada Division of Water Resources
Henry Brooks, Alaska Department of Natural Resource
Ashton McIntosh, Nevada Division of Water Resources
Caitlan McCartin, Nevada Division of Water Resources
Christopher Thorson, Nevada Division of Water Resources
Cara McCarthy, NRCS National Water and Climate Center
Kathy Alexander, Texas Commission on Environmental Quality
Chad Stephens, Nevada Department of Conservation and Natural Resources
Kristen Averyt, Council on Environmental Quality, Executive Office of the President

WESTFAST

Lauren Dempsey, U.S. Air Force
Mike Eberle, USDA Forest Service
Travis Yonts, Bureau of Reclamation
Mindi Dalton, U.S. Geological Survey
Chad Abel, U.S. Fish and Wildlife Service
Christopher Carlson, USDA Forest Service
Paula Cutillo, Bureau of Land Management
Forrest Melton, NASA Ames Research Center
Roger Gorke, Environmental Protection Agency (Chair)
Madeline Franklin, U.S. Bureau of Reclamation (Liaison)
John Powderly, Federal Emergency Management Agency
Heather Hofman, NRCS National Water and Climate Center
Joe Casola, National Oceanic and Atmospheric Administration

STAFF

Tony Willardson
Michelle Bushman
Adel Abdallah
Ryan James

WELCOME

Committee Chair Chris Brown called the meeting to order.

APPROVAL OF MINUTES

Committee Chair Chris Brown called for a motion to approve the minutes from the meetings held in Sulphur, Oklahoma on October 20, 2022. A motion was offered, seconded, and the minutes passed unanimously.

SUNSETTING POSITION

Position #453, regarding water-related federal rules, regulations, directives, orders and policies

Chris Brown remarked that there were no changes recommended by the Executive Committee to the position, and there were no proposed edits. A motion was offered to recommend #453 for consideration by the Full Council. The motion was seconded and unanimously passed.

Position #449, regarding preemption of state law in federal legislation

A couple of typographical changes were made to the position as contained under Tab C in the briefing materials. A motion was offered to recommend Position #449 as corrected to the Full Council for consideration. The motion was seconded and passed.

NEVADA LEGAL ISSUES

Micheline Fairbank noted that she left the Nevada Division of Water Resources six weeks ago and is now working in private practice with Fennemore Craig. James Bolotin, Senior Deputy Attorney General at the Nevada Attorney General's Office joined her in sharing a PowerPoint [presentation](#).

Nevada has 256 hydrographic basins and has assigned a perennial yield or a number to ensure a sustainable water supply. In the Pahrump Basin, the perennial yield is 20,000 acre-feet. In 2017, the permitted groundwater rights totaled 60,000 acre-feet. The basin has 11,000 exempt

domestic wells that are entitled to withdraw up to two acre-feet without obtaining a permit, and do not have to prove beneficial use and do not have to file precomputation for their point of diversion.

The municipal water supply does not extend to new homes, and the Public Utilities Commission (PUC) requires new growth to pay for itself, so homeowners have turned to the alternative of domestic wells. The basin was experiencing significant drops in groundwater levels, with the prospect of another 8,000 domestic wells representing an additional 16,000 acre-feet on the system, and the potential over-appropriation for that basin was in excess of 77,000 acre-feet. The State Engineer issued Order 1293A, which prohibited the drilling of any new exempt domestic wells without that person going out and acquiring two acre-feet of existing water rights in the basin and relinquishing them to the source.

The water users appealed the Order, and the State Engineer lost at the District Court level, but was able to prevail at the Supreme Court with a unanimous 7-0 decision. One thing that came out of the case was that Prior Appropriation does not guarantee sufficient water to meet every demand. The SE's statutory authority extends to the drilling of wells that would cause interference with existing wells. Importantly, this case reinforces and clearly establishes deference to the SE's technical decisions. Quoting the court: "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential because such conclusions are within the agency's area of special expertise, at the frontiers of science." The SE leaned on a report commissioned by the Nye County Water Board that found vast number of wells were going to fail over the next 50 years if unfettered drilling of domestic wells in the basin continued. We had to make the argument because we had certain interests fighting us; namely, estate agents, property owners, empty lots, etc. finding out about the right to drill domestic wells. We had to focus on what about the people who already domestic wells, whose wells would fail because the State is not allowed to manage the area.

The key finding was that domestic wells are not exempt from Nevada's statutory requirements, including the Prior Appropriation Doctrine. They also found that because the SE was not dealing with established water rights in just limiting new wells, no hearing was required. The Court found: "Order 1293A does not limit established water rights, instead only imposes a condition on the drilling of new domestic wells in the designated basin -- wells for which permit applications had not even been filed. And, under Nevada's system of prior appropriation, the owner of land does not have an established property right in the untapped groundwater lying thereunder."

The second case involves the Diamond Valley Groundwater Management Plan (GMP). The Diamond Valley Basin has a very high concentration of center pivots for agricultural use and has experienced more than 100 acre-feet of declining groundwater levels. Two mechanisms are available to the State Engineer in designating a critical management area (CMA) where groundwater withdrawals consistently exceed perennial yield. First, the State Engineer has discretionary authority to designate a critical management area on his own initiative. The second mechanism is if a majority of the water right holders in any particular basin sign a petition and submit it to the State Engineer. Diamond Valley was the first CMA ever designated in Nevada, and it is the only one, and possibly the last one.

When a CMA is designated, it starts a 10-year timeclock for the local community to develop a GMP that will remove the conditions that led to the CMA designation. Absent a GMP, the State Engineer is required to regulate by priority – first in time, first in right. The State Engineer is required to look at seven different considerations to review a GMP: basin hydrology and physical characteristics of the basin; geographic spacing and location of wells; basin water quality; whether there is an existing GMP; and any other relevant factor. The Diamond Valley community was very proactive, working together to develop a GMP. The plan basically applied only to irrigation and groundwater manners of use. It excluded domestic wells, municipal and industrial use, and those kinds of things. The irrigators, those using the most water, converted water rights into shares set on an annual basis and then are reduced over time. The shares could be used, sold, traded, or banked. They explicitly excluded vested or pre-statutory water rights. They honored senior water rights holders -- a greater number of shares than junior water right holders. Everyone took part and voted. The objective in the Diamond Valley Groundwater Management Plan was to reduce pumping and stabilize the groundwater level decline over a period of 35 years. Throughout the process, there are built-in threshold measurements to track progress. They can accelerate, decelerate, or go back to the drawing board based upon the circumstances. The State Engineer approved the GMP.

When the State Engineer’s decision to approve the GMP was challenged in court, it was upheld by a slim majority (4-3). The decision came about fifteen months after oral arguments because it was such a divided court. The court concluded that Nevada’s CMA statutory water law scheme may legally impair nonvested, statutorily appropriated water rights with GMPs. Those are water rights that were issued subsequent to the adoption of a 1936 law regarding certain types of surface water and groundwater. The dissenting opinions expressed concerns about deviations from the prior appropriation doctrine and created uncertainty, and subsequent lawsuits have followed now that two members of the court have retired.

Senate Bill 113 was introduced in direct response to the court decision and passed in the recent legislative session. It changes the GMP statute to exempt senior permit holders who do not sign the petition from complying with the plan. This creates uncertainty, particularly where there is a moving line between senior and junior users because determining the perennial yield is a growing science. What happens when someone who thought they were a senior user finds themselves on the junior side of the line? The changes have undermined the opportunities for communities to find alternatives to ensure sustainable management of water resources.

Questions

Speaker: It seems like this is pointing toward a statement that strict administration according to priority is the only function of the State Engineer. In the real world, is that really going to happen?

Micheline Fairbank: I think that is going to be the next social experiment.

James Bolotin: SB113 doesn’t undercut some of the other findings of the Nevada Supreme Court decision, which was the overarching finding – that it is possible for the legislature to make adjustments to statutory, permitted rights.

Chris Brown: Wyoming has a similar statute, but it is a little different in that it allows for the opportunity for the appropriators to bring forth a plan. But if they don't, the State Engineer has the authority. There are specifically listed tools in the statute that are outside the doctrine of appropriation that the State Engineer can employ. In one instance in Wyoming, there are well spacing caps, even on existing, very senior rights, and those sorts of things. So there is a statutory authority for the State Engineer to do things that are outside strict priority regulation.

Micheline Fairbank: Yes, but you get to cancel water rights, too, in Wyoming.

Chris Brown: Yes, we do. But we don't do that very often. The state engineers like their jobs.

Question: I had a question about the fact that there's the opportunity to retire existing rights? So, if you want a new well, you have to retire two acre-feet? Is that just two acre-feet of a paper right? Or do you have to demonstrate retiring actual use?

Micheline Fairbank: It is a paper right. It doesn't have to be wet water, so it can be paper water. The idea really was to just cap that number. It wasn't intended to reduce the overall commitment to the basin. As the saying goes, when you get to the bottom of a well, stop digging. Instead of it being that 90% over appropriation, it's instead...

James Bolotin: Yes, because let's not make the problem worse. It is a closed basin so you can't apply for a new permit water right. It was just you have this universe of existing permitted water rights. Drilling a domestic well is a way to allow someone to develop their property and get some of the permitted water rights off the books.

WESTDAAT LEGAL TERMS AND REGULATORY BOUNDARIES

Michelle Bushman and Adel Abdallah provided an update on the Western States Water Data Access and Analysis Tool (WestDAAT). The application is now live on our [website](#), making it possible to look at water rights data from a regional perspective.

Michelle provided an explanation of how WestDAAT is selectively providing "active water rights," defined as rights that legally allow an individual or entity to divert water and put it to beneficial use. It excludes those rights with a status that does not allow diversions and beneficial uses (e.g., abandoned or forfeited rights, rejected permits, retired rights). She noted that there is some gray area during some states' permitting processes where permit holders may be allowed to temporarily divert water and put it to beneficial use to prove that they can, to perfect the right or some equivalent. States have a variety of terms, and WSWC staff have made an initial decision regarding which rights would be considered "active water rights" or not. We will need assistance from members on a state-by-state basis to ensure we have not misunderstood the definition, status, or classification of these rights or permits. This may be more of a policy decision than a data quality control decision. The significance of this effort is to ensure that end users of WestDAAT are only searching those water rights that are currently capable of being put to use.

We have assembled a document containing each state's water right classification terms, with information about where the definitions were derived. Once this has been reviewed by our states, we will make it available to those who use WaDE so that they can understand the significance of the native (state) terms as they search water rights on WestDAAT using the WaDE terminology. One of the things that makes WestDAAT so powerful is that we are making things searchable across different state terms, while still ensuring that everything the states have provided to us is visible. If someone searches a WaDE term such as stockwater, it will show how the term is defined in Wyoming as opposed to how Colorado has defined it, for example.

Once we complete the document, we will give you the WaDE definitions and ask that you look through the document from a policy perspective to prevent misinformation. We are trying to make the metadata as clear as possible.

WaDE is an ongoing, open and collaborative data source, and these are intended to be living documents. If you find that something needs to be changed or we need to revise a category, whether in the next year or ten years from now, please give us feedback so we can make the correction.

Michelle and Adel will reach out to our WSWC members, and asked that if there is someone we should reach out to more directly – regarding the definitions and whether water rights should be categorized differently – that our members identify those personnel.

Questions/Comments

Chris Brown: Are you going to have adequate space on this for a very large disclaimer that my agency folks are declaring that somebody no longer has the legal right to use and use their water.

Michelle Bushman: We are trying to put disclaimers all over the place to be honest. This data is provided to us. We are not declaring this as an adjudication of rights. If you ever see a place where you would like another disclaimer, please let us know.

Adel Abdallah: We have added a disclaimer on every single water right on the page. We copied that disclaimer from your state agency or the folks we worked with. We also provide a hyperlink that defines the water rights system in each state. Hopefully, all are easily accessible to folks who are going to use the data.

Tony Willardson: When you are talking about dividing between active and inactive, on the inactive side, we have terms like conditional or temporary use. Those could be uses. Are we just looking at permanent rights that are active as far as vested or perfected?

Michelle Bushman: That is open for discussion. Right now, the dividing line is just whether water is legally capable of being diverted and put to beneficial use. As part of the permitting process, and I'm using that word loosely – there may be other terms for it – you actually have to put the water to use for a number of months or years before it becomes a permanent vested right. We are

not waiting that long for it to become a permanent vested right. We include in our active water rights anything that legally allows someone to divert water, even if it is a temporary water use.

Tony Willardson: So, Oregon grants a right, for example, 80% of the time being used. But if they are not using it 20% of the time, is that what we are asking? Do you consider that active right now?

Michelle Bushman: That would be considered active until Oregon reclassifies that as an inactive right. For example, if the water right is forfeited because the permit holder hasn't used 80% of it over whatever period of time. If Oregon determines that they can no longer legally divert that water, put it to use, they will reclassify it. The next time WaDE updates, it will be on the inactive side.

Tony Willardson: So, it would be the legal limitation, not the logic.

Michelle Bushman: Correct. It's a legal limitation only. I did not include the instream flows in that. Instream flows don't have to be diverted, but at least we understand the diversion put to beneficial use concept. It would include any instream flows in the active side.

Adel provided a further update on the potential to include regulatory or administrative overlays in WestDAAT, such as groundwater districts, special management districts, basins closed to new water rights. Two possible alternatives are (1) we could provide a polygon shapefile with no direct connection to the water rights, but WestDAAT users could visually assess whether water rights fall within that polygon, with a disclaimer that the polygon boundaries may not be precise or may not apply to all water rights; or (2) if our states have a list of water rights subject to these different regulations or administrative actions, we can tie that information in so users can see it more precisely

Michelle noted that this is another area that we will need feedback on a policy level, particularly since WSWC staff aren't in a position to determine whether particular groundwater or surface water rights are subject to a regulatory or administrative overlay. We do not want to imply the applicability of policies or actions that are inaccurate. She also noted that state interest in this tool may vary from one state to another.

Jerry Rigby gave an example of litigation in Idaho regarding groundwater rights that could be curtailed, which ultimately involves surface water rights as well. He expressed that he believes more data is better, except that it can become very confusing for someone just pulling up information in WestDAAT.

Speaker: I would disagree with Jerry. Getting back to the disclaimer issue, we have some areas where things might apply where they are buffer zones, if you are within so many feet. The maps we use for permitting can be not quite site-specific enough for some users. I think overlaying on this just causes more confusion. Some of it is so site specific that trying to demonstrate it – the disclaimers needed are just not worth it.

Michelle Bushman: We could also selectively do that rather than pulling in all regulatory overlays if there are some where you are not as concerned about that sort of thing. We can selectively include some and not include others. That is an option.

Tony Willardson: The other question is, do we want to do basins? Jerry's example was in the Snake Plain aquifer. Are there other areas that it is clearer? In Kansas, given critical groundwater management areas, or something where the state does have clearly defined boundaries that we could present, if we draw the polygon and you are inside the area, you assume that you are going to be subject to regulations in that area. In Arizona, the active management areas (AMAs), if you are in that area, you should know it, and you are going to be subject to the rules for that AMA. And I think that is much different than if we are talking about an overlying aquifer and the aquifer plan. Or are we talking about the Colorado River Basin as one huge regulatory overlay?

Connie Owen: Tony, that's right for Kansas. We have intensive groundwater use control areas, we have multiple enhanced management areas, and they are very clearly defined. If you are in one, it applies, and if you're not, it doesn't.

Chris Brown: I think it is probably going to have to be a state-by-state sort of thing. Unique regulatory overlays are going to be different. As soon as you draw a line, then automatically there is a right three inches outside and a right three inches inside. So, you've got to make those calls on a case-by-case basis. We are back to the same sort of "ask," as for the first part of the legal terms. Reach out to the states and request that they provide information to identify regulatory overlays, and whether it makes sense. Our largest groundwater control area has clearly defined boundaries, but then it is broken into four separate sections with different impacts. Always do a disclaimer. A disclaimer that notes the polygons are for informational purposes to make you aware that you need to check with the state agency to understand better what the implications are.

WRDA WESTERN WATER COOPERATIVE COMMITTEE STATUS

Jen Verleger reported that she testified to the Subcommittee on Transportation and Infrastructure of the Senate Environment and Public Works Committee on the topic of the Western Water Cooperative Committee (WWCC), water supply issues, and other Corps of Engineers issues. Senator Kevin Cramer (R-ND) and Senator Jeff Merkley (D-OR) were instrumental in getting the WWCC passed in the Senate and included in WRDA 2022. There is a provision in the WWCC legislation that provides for payment of travel costs for those who are appointed. The Corps is looking for funding, and is trying to determine whether the Federal Advisory Committee Act (FACA) rules apply to the WWCC. In our letter to Mike Connor, we indicated that we do not think FACA applies because the appointed members are exempted as state employees.

We are proceeding as if the Committee is established. Michelle has been securing letters appointing two representatives from each Western State appointed by the governor and the attorney general. Tab R of the briefing materials contains a list of members appointed from the western states. Please look through to see if your state is missing any appointments. If you see blanks for your state, please email Michelle and let her know the names that should be filled in.

The Committee is required to meet at least once a year in one of the Western States at a place accessible to the public. The Conference of Western Attorneys General and the WSWC have offered assistance in planning, organizing, and communicating information about this meeting with their members and their respective state appointees. Things are at a standstill until the Corps gets their charter and works through the paperwork, and States provide the names of the appointees.

Questions/Comments

Chris Brown: If the appointees are all State employees, then the FACA determination is an easier decision. If there are some appointees who are not State employees, then it becomes a question. Not all members of the Western State Water Council are State employees. So, take that into consideration if you are still thinking about who your AG rep might be.

Michelle Bushman: If there are any other questions about that, please feel free to forward them to the WSWC or CWAG. We will be happy to communicate with Mike Connor's office, and with Robyn Colosimo.

Question: For the WWCC, is the focus Section 404 permitting of the Army Corps? Or are we talking about flood control projects? Or everything?

Jen Verleger: When the legislation was put together, it was based on water supply issues. However, the legislation is really broad. I would interpret it as if you have a problem with the Army Corps, bring it to this forum to be addressed.

FEDERAL PROGRAMS AND WATER RIGHTS

a. Stream & Wetlands Restoration and Water Rights

Michael Eberle, Water Rights and Uses Program Leader for the U.S. Forest Service and WestFAST member, addressed the Committee regarding an upcoming WestFAST-WSWC webinar series on stream restoration efforts that may impact state water rights and a significant influx of Congressional funds. Recently, there has been a lot of money through the Bipartisan Infrastructure Law (BIL), as well as the Inflation Reduction Act (IRA). Those two bills provide quite a bit of money for the Forest Service and other federal agencies, as well as to States to initiate a number of these restoration activities. Some include the low-tech process-based restoration, including smaller-scale BDAs, beaver dam analogs, or repairing a stream where a ditch was once dug through a wetland for drainage and growing forage for cattle. There are a variety of projects.

WestFAST, in partnership with the Western States Water Council, is putting together a webinar series. We are considering six different webinars between now and the end of the year. We hope to step through the process of what type of restoration activity is being done, and what isn't. The first webinar will be held at the end of June. It will address restoration methods, and

different and typical project structures. For the remaining webinars, we have conceptual ideas at this point.

The second webinar may address hydrology to facilitate the implementation of valley floor restoration projects. For example, how could an area become more of a sponge to hold water back allowing a late season release? The water is usually cooler, so the impacts on water quality impacts are fewer. Also, having that water available for later season use is good for fish or aquatic species. Thus, the second webinar will talk about hydrology overall.

The third will involve the administration of water rights, and how Western States deal with administration differently. We will look to you all to help us explain the different state approaches. Future webinars will discuss permitting requirements, not only water right permits, but also Corps of Engineers permits, or perhaps other state or local permitting processes, depending on the size and scale of the restoration effort and where it is occurring. The series will wrap up with a number of case studies describing where restoration has occurred and, if there is monitoring information available, how it has changed the area. Any of you interested in helping and presenting your state's point of view, please contact me.

Chris Brown remarked that this is certainly an issue in Wyoming that has caused some friction with some of these good restoration ideas and the potential impacts to downstream appropriators. Oftentimes, folks doing stream restoration may backup the water, change the timing, increase evaporation, or do things that might have negative impacts on downstream appropriators. Some of our regulators would be very interested in being part of a discussion to potentially talk about how to mitigate those potential demonstrated impacts on system appropriators. In Wyoming, sometimes friction results because of a lack of communication. Our State Engineer will be very interested in this series. Thank you for the opportunity to be part of the conversation.

b. Drought Resilience, Pumped Storage, Innovative Projects

Roger Gorke: Similar to the stream restoration projects, as we try to advance state-federal drought resilience projects, there are sometimes water rights issues that either we don't know how to get through or issues that come up for which it is unclear how to get through them.

One recent example is Lake Tulare in California and wanting to get as much water as possible from surface water and storing it as groundwater following the flooding. In California, and probably many western states, groundwater recharge is not a beneficial use water. So, there needs to be either a temporary or long-term water rights permit for that usage of the water. California Governor Newsom issued an emergency declaration to expedite that process for using floodwaters for groundwater recharge.

NRCS has a conservation practice for groundwater recharge, and a farmer needs to have a specific water right for doing groundwater recharge on their land. For pumped storage projects, one must have a right to be able to pump storage out of a dam to create electricity which is stored off channel and pumped back up during off peak hours.

There have been several examples that have come up recently, where federal initiatives are discovering that state water rights are required or are potential affected. Are other states seeing these issues? How can we not create a problem? How can we help work through some of these issues and find some best practices for innovative projects to deal with water rights issues? How best can we work with you on other state examples of how to deal with groundwater recharge or other projects?

Chris Brown remarked that Wyoming is experiencing some of these issues, specifically with the pumped storage projects on a completely appropriated system. Where do they find the water? It is not a lot of water, but it is enough water for the uphill reservoir, and the depletion associated with that reservoir. How do you permit it? What impacts might there be downstream? Jennifer Zygmunt has questions about water quality impacts to the best blue-ribbon fishery downstream of that particular project. Issues definitely come up. Regarding the federal funding, in my opinion, it is kind of hard to tell. It depends on the system conservation. How does voluntary reduction of use work in the state process? In the last session of our legislature, a new position was created in our water development office to have a person identify all the potential opportunities for federal funding for different types of water supply and water conservation projects. The idea is to make our folks aware of what is available for them to use in order to conserve water. Especially in our Colorado River Basin and elsewhere in the state, we need to start thinking about doing the same work with less water. I think we will be interested in working with whatever group to help us coalesce this tremendous amount of information, which is coupled with a tremendous amount of money.

BLM AQUATIC RESOURCE PROGRAM POLICY UPDATE

Paula Cutillo, Hydrologist and Senior Water Resources Specialist with the Bureau of Land Management (BLM), and WestFAST member, talked about BLM's updated policy guidance for its Aquatic Resource Program with a [powerpoint presentation](#).

In 2019, the BLM integrated three programs: the water, the riparian, and the fisheries programs and combined them into a single interdisciplinary program that is now called the Aquatic Resources Program. In addition to updating policy for aquatic resources, the BLM is also updating its drought assessment policy, and the policy guidance for aquatic resources and drought. These policy updates have been reviewed by field, state, and national level offices within the BLM and with the Solicitor's Office, and have been included in manuals, handbooks, and directives. BLM management is encouraging us to brief our partners on these policy updates. BLM is also engaging in informal outreach with our partners on a categorical exclusion for certain types of aquatic restoration, basically the types of activities that Mike Eberle just talked about.

Last year, we began integrating the existing policy and updating other policies as needed in response to changing environmental conditions, such as prolonged drought. The revised Aquatic Resources manual will integrate policy for water, riparian, wetland, and fisheries resources. It will emphasize the importance of maintaining or improving habitat connectivity, of conducting watershed assessments for conservation and restoration actions, of implementing low-

tech process-based restoration, of assuring fish and other aquatic species have safe passage where they cross streams and meadows, and for restoring the structure and function of degraded aquatic habitat, improving water quality, ensuring water is physically and legally available for public land management purposes, and protecting habitat for aquatic species. Much of the language comes directly from our Federal Land Policy Management Act. For water quality, BLM policy generally focuses on complying with the Clean Water Act and state water quality standards. The new policy requires water quality monitoring for aquifer recharge activities based on what the BLM is already doing in Idaho. Policy for the management of wildlife and special status species will remain in a separate manual.

The BLM's water rights policy manual was updated in 2013. It will remain a standalone manual, so we are not updating the water rights policy or integrating it into a new one. For water availability, existing water rights policy requires staff to assess water availability in land use plans. The revised manual will require that drought severity and water availability be assessed when authorizing new land uses and implementing existing land use plans. The revised manual ensures that decision makers consider the BLM's sustained yield mission when evaluating rights of way for groundwater pumping wells. A chapter on implementing adaptive management is included consistent with existing DOI policy. It is expected that the revised resources manual will be published before the end of the fiscal year.

New policy guidance for assessing drought severity and water availability is in the revised manual, and it will also be issued through an instruction memorandum, which is the temporary directive. The last instruction memorandum for drought response was issued in 2013 and has expired. Drought policy is being updated to ensure that decision makers consider whether drought or water availability are issues or concerns that need to be addressed in the NEPA process, or when implementing adaptive management plans. Training and tutorials are being developed to ensure that drought severity assessments are based upon multiple drought indicators in addition to field-based data. The climate engine application will be helpful for the lead staff in completing drought severity assessments. Further, we are developing guidance on water availability assessments, and want to ensure that they are informed by water use information provided by the states and the USGS, and that they are informed by policies, designations, and declarations issued by federal, tribal, state, and local water management agencies in response to drought and water shortages. The WestDAAT database will be a helpful tool for informing the water availability assessments.

BLM has engaged in informal outreach (since 2017) on a proposed categorical exclusion for aquatic restoration under NEPA to help streamline our process for implementing riverscape and wet meadow restoration projects without requiring an EIS. The BLM also published a proposed Public Lands Rule on April 3. The rule was developed to conserve intact landscapes and restore degraded habitat and to codify some existing rules into BLM regulation.

Questions/Comments

Chris Brown: I have a question about the new policy. Does that also apply to renewal of existing uses? So if you have a special permit for some use on BLM land, is it going to apply to renewals of those existing special use permits?

Paula Cutillo: No. There is no policy around new permits. I think there was a new policy around water quality monitoring as a condition on a permit for recharge, and that would apply to new renewals.

Chris Brown: I observe that some of the things you discussed regarding policy connect well with what Mike was talking about, and potential impacts or potential water rights issues. For example, in Wyoming, you must have a permit for a BDA.

Paula Cutillo: Exactly. That is exactly why we are collaborating on the webinar. There is a lot of interest in support for restoration. There is new policy and guidance and new funding for it. So, we want to make sure that our staff are aware of state policies and guidelines for doing these activities so they can factor that into their planning timelines for stream restoration, and make sure we can obligate all that Congressional funding. I included a link to all our policy manuals in the presentation. Most manuals are public. When the new manual is finalized, it will also be made available.

STAFF UPDATES

a. Legislation & Litigation Update

Michelle Bushman noted that the legislation and litigation updates may be found under Tab U in the briefing materials. She also prepared a powerpoint presentation which is available [here](#). She provided Congressional updates on WOTUS resolutions and bills, efforts to limit the state CWA §401 authority, Indian water rights settlements, PFAS, amendments to the previous Farm Bill provisions, the REINS Act and the Reclamation Climate Change and Water Program Reauthorization Act (part of the SECURE Water Act.)

Litigation updates included (1) the recent 2023 WOTUS Rule injunctions from the North Dakota and Texas U.S. District Courts; (2) the scope of federal trustee obligations under tribal treaties in *DOI v. Navajo Nation/AZ v. NN* heard by the Supreme Court; (3) the tension between state water rights allocation laws and Reclamation duties under ESA that supersede state law in *Yurok Tribe v. Reclamation*; (4) the DOD's claims to a reserved right to groundwater in the California groundwater adjudication in the Indian Wells Valley Water District—also notable is the issue of *de minimis* uses being included to qualify as a basinwide adjudication for McCarran Act jurisdiction over federal claimants, similar to the issue raised in Idaho; (5) in *Save the Colorado v. DOI*, the U.S. District Court held that Reclamation considered all the relevant alternatives under NEPA and the Law of the River, and the case has been appealed to the 9th Circuit; and (6) New Mexico, Texas, and Colorado have proposed a settlement in *Texas v. New Mexico* on the Rio Grand Compact, a settlement that Reclamation has objected to.

Michelle also noted that a virtual WSWC-NARF Symposium on the Settlement of Reserved Indian Water Rights will be held August 8-9, 2023. We will be highlighting the Hualapai Settlement in Arizona that was passed by Congress, along with some other settlements and related topics. We hope you will join us.

SUNSETTING POSITIONS FOR FALL 2023 MEETINGS

These positions will be considered at the meeting scheduled to be held in Anchorage, Alaska on September 12-14.

Position #454 – Supports Indian water rights settlements

Position #458 – Actions federal agencies should take to expedite state general stream adjudications

OTHER MATTERS

Chris Brown requested that the Committee review the proposed 2023-2024 work plan. It is currently unchanged from last year's work plan. Anyone with thoughts or questions about the Legal Committee's work plan for the coming fiscal year should reach out to Chris or to Michelle Bushman.

There being no other matters, the meeting was adjourned.