

**MINUTES  
of the  
LEGAL COMMITTEE  
Aloft Anchorage Hotel  
Anchorage, Alaska  
September 13, 2023**

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**MEMBERS AND ALTERNATES PRESENT** (\*via zoom)

<b>ALASKA</b>	Tom Barrett Radny Bates Julie Pack Emma Pokon
<b>ARIZONA</b>	Trevor Baggione <i>Kelly Brown</i>
<b>CALIFORNIA</b>	Joaquin Esquivel
<b>COLORADO</b>	Jojo La
<b>IDAHO</b>	Jerry Rigby
<b>KANSAS</b>	Earl Lewis Connie Owen <i>Tom Stiles</i> Matt Unruh
<b>MONTANA</b>	<i>Anna Pakenham Stevenson</i> <i>Jay Weiner</i>
<b>NEBRASKA</b>	Justin Lavene Jim Macy Tom Riley
<b>NEVADA</b>	Jennifer Carr Melissa Flatley Adam Sullivan
<b>NEW MEXICO</b>	
<b>NORTH DAKOTA</b>	Jennifer Verleger
<b>OKLAHOMA</b>	Sara Gibson

**OREGON**

**SOUTH DAKOTA**

Nakaila Steen

**TEXAS**

Jon Niermann

**UTAH**

Candice Hasenyager  
John Mackey  
Sarah Shechter  
Todd Stonely  
*Teresa Wilhelmsen*

**WASHINGTON**

Ria Berns  
Buck Smith

**WYOMING**

Jeff Cowley  
Jennifer Zygmunt

**GUESTS**

Brian Clark, U.S. Geological Survey  
James Davenport, JHDavenport, LLC  
Becci Anderson, U.S. Geological Survey  
Timothy Stryker, U.S. Geological Survey  
Christopher Estes, Instream Flow Council  
Chad Abel, U.S. Fish and Wildlife Service  
*Michael Whitehead, Bureau of Indian Affairs*  
John Trawicki, U.S. Fish and Wildlife Service  
Samantha Owen, McMillen Jacobs Associates  
*Megan Behnke, University of Alaska Southeast*  
*Michael Winfree, U.S. Fish and Wildlife Service*  
*Kevin Mayes, Texas Parks and Wildlife Department*  
*Brian Frazer, U.S. Environmental Protection Agency*  
*Nancy Wainwright, Wainwright Legal Services, LLC*  
Hannah Singleton, Southern Nevada Water Authority  
*Alex Petkanas, Northern Alaska Environmental Center*  
John Plaskett, Anchorage Water and Wastewater Utility  
Jeff Axmann, Anchorage Water and Wastewater Utility  
Jim Rizk, Texas Commission on Environmental Quality  
Kevin Patrone, Alaska Department of Natural Resources  
Tanya Trujillo, New Mexico Office of the State Engineer  
David Persinger, Anchorage Water and Wastewater Utility  
*Sara Hisel-McCoy, U.S. Environmental Protection Agency*  
Mark Corsentino, Anchorage Water and Wastewater Utility

Sharon Ray, National Aeronautics and Space Administration  
Rachel Clark, Montana Department of Environmental Quality  
Courtney Osolnik, Yukon River Inter-Tribal Watershed Council  
Mark Schimscheimer, Anchorage Water and Wastewater Utility  
Kelly Pack, Alaska Department of Environmental Conservation  
Kathy Alexander, Texas Commission on Environmental Quality  
*Jessica Cherry, National Oceanic and Atmospheric Administration*  
Robert Singletary, Oklahoma Department of Environmental Quality  
Shannon Miller, Alaska Department of Environmental Conservation  
Charley Palmer, Alaska Department of Environmental Conservation  
Cari-Michel La Caille, Texas Commission on Environmental Quality  
Christina Carpenter, Alaska Department of Environmental Conservation  
Cathy Erskine, Nevada Department of Conservation and Natural Resources  
*Danika Holmes, Montana Department of Natural Resources and Conservation*

### **WESTFAST**

Lauren Dempsey, U.S. Air Force  
Christopher Carlson, U.S. Forest Service  
Madeline Franklin, Bureau of Reclamation  
Stephen Bartell, U.S. Department of Justice  
*Paula Cutillo, Bureau of Land Management*  
Roger Gorke, U.S. Environmental Protection Agency  
Heather Hofman, Natural Resources Conservation Service  
Gretel Follingstad, National Oceanic and Atmospheric Administration

### **STAFF**

Tony Willardson  
Michelle Bushman  
Elysse Campbell  
Adel Abdallah  
*Ryan James*  
*Andrew Campbell*

### **WELCOME**

Sara Gibson, Committee Vice Chair, called the meeting to order.

### **APPROVAL OF MINUTES**

Sara called for a motion to approve the minutes from the meetings held in Reno, Nevada on May 23, 2023. A motion was offered, seconded, and the minutes passed unanimously.

### **SUNSETTING POSITION**

#### Position #454 – Supporting Indian Water Rights Settlements

Sara mentioned that during the Executive Committee call, Tony and some members discussed changing the word “Indian” to “Native American” throughout the document. Michelle Bushman expressed concern given that “Indian Water Rights” is a legal term of art used by Courts, Congress, and the Administration, and that the WSWC has used it consistently with respect to Indian water rights settlements. Jay Weiner (MT) and Jennifer Verleger (ND) agreed. Jay noted that in representing tribes and tribal governments, there is not a whole lot of consensus as to what term should replace “Indian,” such as native, indigenous, or aboriginal. He added that there is a difference between terms used in federal Indian law and the diversity of opinions on what individuals or groups prefer to be called. Jen noted that legal research on “Indian Water Rights” will bring up all the relevant information, but that Native American water rights will not. Kelly Brown (AZ) was fine with either term, as long as it was used consistently throughout the position. Jim Davenport (former NV member) noted that “Native American” was a term of respect and that the Council should move on from the pejorative terms used in the past by Congress and the Supreme Court.

Julie (AK) raised a concern about the term “water rights,” inquiring if it could be change to “water quantity rights” claims. This clarification is needed in Alaska because it has become an issue in EPA’s recent rulemaking on water quality for other reserved treaty rights, such as fishing rights. Jay voiced concerns about the potential implications of limiting the resolution to the quantity of water, suggesting that it could cause misunderstandings and state-tribal relationship issues. In Montana they call them tribal water rights to get away from any of the questions of what is and isn’t *Winter’s* or aboriginal rights. Sara (OK) agreed with Jay, sensitive to the fact that Oklahoma’s reserved water rights agreements often include other things that are important and beyond just water use. She also acknowledged that Alaska’s concerns about the idea of “reserved water rights” being stretched beyond what is intended are entirely valid. Utah suggested a footnote to clarify the intention to address water quantity and not water quality.

Another change that was made was in the sixth Whereas Clause “water use” was added to the end so it reads “...and has a responsibility to both to assist in resolving such water use conflicts; and.”

Members discussed a motion to have a subcommittee look into the issues and present it to the Full Council for consideration. The motion was seconded and unanimously approved. Michelle was assigned to communicate with volunteers.

Position #458 – Outlining Actions Federal Agencies Should Take to Expedite State General Stream Adjudications

Kelly: The State of Arizona had requested the removal of the last two paragraphs (#6 & #7), simply because we can't make them work for Arizona Department of Water Resources (ADWR). These two provisions are contradictory and/or would not be appropriate for the ADWR to advocate given ADWR's unique role in the Adjudications process as a neutral technical advisor to the court. If the WSWC Legal Committee does not support removing #6 and #7 before going to the Full Council for vote, we would ask that language in the resolution explicitly note Arizona's exclusion from Position No. 458.

Stephen Bartel (DOJ) shared his insights from a federal perspective on those paragraphs. He said the idea of the federal government being singled out to handle water rights claims and processes differently from everyone else is problematic. The resolution seemed to imply that federal claims hadn't been made in good faith in the past.

Jerry Rigby suggested that there was a need for more resources for federal agencies and states to properly evaluate these claims.

After some debate, a motion was made to forward the resolution to the Full Council with Arizona's suggested changes. The motion was seconded and unanimously approved.

### **ALASKA LEGAL ISSUES**

Julie Pack, Alaska Department of Law, provided an update on the legal issues in Alaska, particularly Waters of the United States (WOTUS). The main issue discussed was the potential elimination of a large proportion of wetlands subject to federal jurisdiction under the Clean Water Act (CWA), given that Alaska has over 174 million acres of wetlands. The Supreme Court made a point in *Sackett* to cite Section 101(b) of the CWA, which emphasizes state's primary authority and responsibility to make land and resource use decisions over water and land within its borders. The court also reaffirmed the importance of the word "navigable" in the term "navigable waters." Alaska is looking into what they can do with that growing importance of that word and how it might apply to Alaska in the future. Alaska is still under a preliminary injunction for the Biden WOTUS rule, so the pre-2015 guidance still applies.

Alaska explored the possibilities of assuming CWA §404 authority and a state dredging program, including potential staffing needs and planning for the next legislative session. They also discussed the challenges with the federal government over navigation title and considered various options to address these issues, including a bill asserting management authority over 1,800 waterways in Alaska.

Human health criteria is also an issue for Alaska. The EPA had written a letter threatening to promulgate the human health criteria (HHC) if the State didn't take action itself. This is a big deal for Alaska, because a component of the HHC is something called the fish consumption rate,

which raises questions about how much fish residents eat, where they get it, what kind, and how much time it spends in jurisdictional waters versus non jurisdictional waters. EPA is putting a lot of pressure on Alaska. The authority EPA cited is 303(c)(4)(B), which allows EPA to promulgate water quality standards for the state after they make a so-called necessity determination.

Alaska Department of Environmental Conservation (DEC) went to the Alaska State legislature and requested \$5 million and 28-32 staff positions (compared to the Corps' 40), but it was narrowly voted down due to the lack of federal funding for this program and retaining positions amidst ongoing hiring and retention issues. We're now evaluating the §404(g) regulations.

Alaska is also engaged in EPA's two tribal water quality rules, which are causing significant concern, particularly in relation to their potential economic impact. It was unclear how these rules would apply to all 227 federally recognized tribes in Alaska. EPA's definition of reservations lacks some much needed clarity. States need to be involved at the draft stage of these rules to provide state-specific feedback early in the process.

In July, Alaska filed a motion in the U.S. Supreme Court challenging EPA's usage of the CWA in Alaska. Waiting to hear the decision.

A question was raised about what Alaska's role was going to be in the shift to a renewable energy economy, given its abundance of mineral resources, but there are ongoing permitting issues. Communication is also an issue at the policy level, with the federal government. And it's not just EPA, as you heard from our commissioners this morning. Communication is an issue widespread across our natural resources' agencies. There's a lot of not pretty communications happening between us and federal agencies and we're trying to rebuild that relationship. However, until we can do that, we're having to resort to litigation, which is not our preferred way to go as it's a waste of everyone's resources.

### **Questions:**

?: To follow up specifically on the fish consumption advisories you mentioned. It seems like you're construing it as a federal overreach instead of just a process in which you help protect the health and safety of your citizens?

Julie: That's a great question. That's part of our messaging challenges that we're having. There is a distinction between the advisories that we've put out and the actual criteria that we're promulgating. Fish and Game are the ones who do 100% of the advisories to make sure people are aware of what they're consuming, how much they're consuming, and what potential health effects that could have. That is a distinct question from what level industry may discharge at, when a water body is protected for human health and consumption, which is all bodies of water in Alaska. Those are two distinct questions, advisories and criteria. That's something that we're struggling to distinguish in our messaging.

?: On your first slide, it had 174 million acres of wetlands. What protections does state law provide, or are there no protections for those 174 million acres?

Julie: That's something that we and many other states are discussing right now. It will depend in part on what EPA's implementation guidance looks like, and what the court litigation results are.

Emma Pokon: I'll add to that response. We have an existing state permitting program for discharges. The dredge and fill program is the question mark that we are evaluating. I think it's important that we're careful in that evaluation. This is the sort of thing where we need a minute to think about things before we start putting in new regulatory programs. Just because there isn't an immediate new regulatory program doesn't mean that there isn't going to be something. I also think it's our prerogative to make the decisions and set those policies about what the appropriate level of protection is. Some states may make the decision that they're going to actually go forward with minimal oversight, or no oversight, other states may ramp up and equivalent program. But I think that's the decision for states to make and that's the debate that we're having.

### **FEDERAL LITIGATION UPDATE**

Stephen Bartell discussed his role as an Assistant Chief in the Natural Resources Section at the Department of Justice (DOJ), where he has been practicing western water law for over 30 years. He oversees 12 attorneys who handle water quantity issues and represents the government in environmental and natural resource actions. He explained why the U.S. litigates water claims, emphasizing the government's responsibility to protect natural resources, support military activities, and ensure adequate water for firefighting. He also mentioned some of the challenges they face in court and confirmed his willingness to discuss these issues further.

He discussed various litigation in various states including: Arizona, California, Colorado, Idaho, Montana, Nevada, Utah, and Washington. He highlighted the significant Arizona adjudication, which received a state court recognition of Federal Reserve modeling. In Utah, he reported promising settlement negotiations. In Idaho, there are several ongoing adjudications and a recent challenge to legislation. The DOJ appreciated Washington State's initiative to collaborate before designating new adjudications. He also mentioned DOJ's involvement in new groundwater adjudications in California, and their opposition to a proposed consent decree in a Supreme Court case.

Bartell next discussed the complex issue of federal reserve water rights, particularly as they relate to military bases. He emphasized the necessity of claiming reserve rights to groundwater for the functioning of these bases, despite challenges and competing development interests, while highlighting the importance of comprehensive adjudications in these matters, questioning how they could be complete without considering minor uses. He further discussed the implications of these issues for various states and the limitations imposed by Congress. Lastly, he briefly mentioned the topic of filing fees for new water permits.

### **STREAM RESTORATION WEBINAR SERIES**

Madeline Franklin, WestFAST Liaison, provided an update on the webinar series on stream restoration and water rights. The series started with an introductory webinar in July, followed by a technical overview in September. Madeline invited attendees to engage in the discussions, which will include a focus on state-specific permitting processes and water rights considerations. The recorded past webinars are available on the WestFAST section under the Council's website. The next webinar is expected in October.

### **EXEMPT WELLS**

Anna Pakenham-Stevenson shared Montana's challenges in managing exempt wells, surface water, and groundwater connectivity due to increased population and demand. She mentioned the history of variable regulations and litigation surrounding exempt wells in the state, which has lasted for decades. She talked about the steps taken to engage stakeholders in the policy discussion, leading to revisions in the permit and change process. She revealed that the stakeholder working group is now addressing the issue of exempt wells and will continue discussing the role of the judiciary after the final water rights decrees.

She highlighted the need to reframe the conversation around water policy, focusing not on restrictions, but on identifying the values to be addressed. These values include protecting existing water rights, providing new water for growth, addressing the nexus between water and land use planning, and considering long-term solutions that account for climate change. She also mentioned the State's struggle with data limitations and the need for a collaborative approach to find solutions. Anna concluded by expressing hope that this collaborative approach would lead to a different outcome than the past litigation and failed legislation.

Jerry Rigby discussed the ongoing issue of water usage in the Eastern Snake Plain Aquifer. He highlighted how surface water users are against groundwater users, arguing that increased water usage leads to increased base flows and storage rights. He also brought attention to the homeowner's exemption, which allows for the use of 13,000 gallons of water per day or a half-acre of irrigated lawn with only a well permit. He noted the conflict this exemption creates as it allows for wasteful and inefficient use of water and expressed concern over the influx of new residents from other states punching holes in the ground for water usage.

He discussed the challenges faced in managing water resources, particularly in relation to exempt wells and their impact on the environment. He suggested that companies should be responsible for mitigating the impact they cause, which could involve measures such as drilling another well, paying money to the water board, or providing their own mitigation plan. He also mentioned that there are areas designated as critical groundwater areas where restrictions are in place.

Michelle invited further questions or input and asked for any updates or corrections to the 2011 exempt wells document, which is available on the Council's website.

### **ROUNDTABLE DISCUSSION: GROUNDWATER REGULATION**

Tony - For those of you who may not have been in the Water Quality Committee, I mentioned briefly that there's a New York Times article, actually a series, that is looking at groundwater development. In essence, the theme is that groundwater is being depleted much quicker than it will recharge in groundwater basins, some of which will never be recharged, and actually recognizes that some states do put a time period on permanently depleting those basins. It raises the question of whether or not states are doing enough to manage groundwater and whether there should be more federal regulation of the use of groundwater resources. It is something that we have discussed in the past. Obviously, there are needs and challenges, and each state is working and has been working to address these in a variety of ways. Maybe there's something that we want to look at, again, in light of this being raised publicly.

Michelle - The New York Times article I think brought out a lot of things that were not inaccurate, but they ignored some of the things that are working in the states. They called out Arizona in particular, where in the Phoenix area ADWR has declared that there can't be any more housing built that is relying on groundwater. The tone of the article treated this as a failure, as opposed to treating it as a success of regulation of that groundwater. One of the things that we are concerned about, is there something the Council should be doing to highlight those kinds of things as it comes more to the forefront. Our states have been incrementally working on fixing these problems for decades. There's no one-size-fits-all answer. If anyone has any thoughts on ways we might get out ahead of that, maybe there's some report we should write or have already written that we should let people know about. Let us know we're happy to be a repository of information that you already have. It's probably something we should get out ahead of before Congress decides that they are going to crusade take over regulating groundwater for the states.

Jennifer Verleger: Is that not in our work plan?

Michelle: No.

Jennifer: Maybe that's something we should add.

### **WADE REGULATORY AND ADMINISTRATIVE OVERLAYS**

Adel presented a prototype app that allows users to view different spatial, regulatory, and administrative overlays on top of a map. He is seeking feedback on the utility and desirability of this app, which currently covers 15 states and is not yet live.

Michelle indicated that before making the app live, it will need to be approved by each state and will include appropriate disclaimers to manage expectations about the accuracy of the boundaries.

### **DRAFT FY2023-2024 COMMITTEE WORK PLAN**

If anyone has any thoughts on things that need to be added or removed from the work plan, please let Michelle and Chris know.

### **STAFF UPDATES**

Michelle provided an updated on the recent virtual 18th Biennial Symposium on the Settlement of Indian Reserved Water Rights Claims, which was recorded and is now available on the Council's website. The recordings of the videos are currently password protected until the end of the year, but PowerPoint presentations as well as the materials are available.

There's been a transition in recent years from project-based settlements over to fund-based settlements. In doing that, those tribes that have converted over to fund base settlements are no longer able to access the Reclamation Water Settlements Fund because of the statutory language. That is something the Council has supported for a very long time and so we may want to revisit that at some point and consider how to address our support for the RWSF or other water settlement funds going forward.

Michelle emailed most of those who have been appointed to Western Water Cooperative Committee, with an invitation for those not yet appointed to participate. As a reminder, the Western Water Cooperative Committee is a committee that was created by Congress between Western States and the Corps of Engineers.

Michelle gave a brief legislative and litigation update, with an open invitation for members to send her requests to keep track of specific bills or cases.

### **SUNSETTING POSITIONS FOR FALL 2023 MEETINGS**

Sara asked members to review the following positions that will be considered at the Spring 2024:

Position #465 - Supporting Universal Access to Reliable, Clean Drinking Water for Federally Recognized Indian tribes and Alaska Native Communities

Position #466 - Regarding State Primacy Over Groundwater

Position #467- Regarding the Dividing the Waters Program

### **OTHER MATTERS**

There being no other matters, the meeting was adjourned.