MINUTES
of the
LEGAL COMMITTEE
DoubleTree by Hilton
West Fargo, North Dakota
July 25, 2024

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MEMBERS AND ALTERNATES PRESENT *(*via zoom)*

ALASKA	Christina Carpenter *Tom Barrett*
ARIZONA	*Trevor Baggiore*
CALIFORNIA	Jeanine Jones Joaquin Esquivel
COLORADO	*Lauren Ris*
IDAHO	John Simpson Jerry Rigby
KANSAS	Connie Owen Tom Stiles Earl Lewis *Matt Unruh*
MONTANA	Anna Pakenham Stevenson *Jay Weiner*
NEBRASKA	Tom Riley Justin Lavene
NEVADA	Melissa Flatley Jennifer Carr Cathy Erskine
NEW MEXICO	*John Rhoderick* *Tanya Trujillo*
NORTH DAKOTA	Andrea Travnicek
OKLAHOMA	Sara Gibson

OREGON	Racquel Rancier
SOUTH DAKOTA	Nakaila Steen
TEXAS	Jon Niermann
UTAH	Sarah Shechter Todd Stonely *Candice Hasenyager*
WASHINGTON	*Ria Berns*
WYOMING	Jennifer Zygmunt Chris Brown *Jeff Cowley*

GUESTS

Eric Dodds, AE2S
Jen Verleger, State of South Dakota
Brian Clark, U.S. Geological Survey
Charles Scaife, U.S. Department of Energy
Erica Gaddis, SWCA Environmental Consultants
Andrew Hadsell, SWCA Environmental Consultants
Hannah Singleton, Southern Nevada Water Authority
Jim Rizk, Texas Commission on Environmental Quality
Aubrey Bettencourt, Netafim - Orbia Precision Agriculture
Yaping Chi, North Dakota Department of Water Resources
Alexa Davis, North Dakota Department of Water Resources
Abby Ebach, North Dakota Department of Water Resources
Aaron Carranza, North Dakota Department of Water Resources
Cammie Wright, North Dakota Department of Water Resources
Peter Wax, North Dakota Department of Environmental Quality
Kathy Alexander, Texas Commission on Environmental Quality
George Russell, Oklahoma Department of Environmental Quality
Dehvynne Ashmore, Nebraska Department of Natural Resources
Amy Winkelman, North Dakota Department of Water Resources
George Russell, Oklahoma Department of Environmental Quality
Mark Mayer, South Dakota Dept. of Agriculture and Natural Resources
Trevor Watson, Montana Department of Natural Resources and Conservation
Kathleen Ronning-Schimetz, North Dakota Department of Environmental Quality

WESTFAST

Michael Eberle, USDA Forest Service
Heather Hofman, Natural Resources Conservation Service
Stephanie Granger, National Aeronautics and Space Administration
Madeline Franklin, U.S. Bureau of Reclamation (WestFAST Liaison)

STAFF

Tony Willardson
Michelle Bushman
Elysse Campbell
Ryan James

WELCOME

Chris Brown, Committee Chair, called the meeting to order.

APPROVAL OF MINUTES

Chris called for a motion to approve the minutes from the meetings held on March 14, 2024, in Washington, DC. A motion was offered, seconded, and the minutes passed unanimously.

SUNSETTING POSITIONS

Chris reviewed Position No. 470, regarding Endangered Species and State Water Rights. Nevada had proposed an amendment regarding public ownership of water, but after some discussion with other states elected to withdraw the amendment, as the issue is treated differently in various states. The Committee voted to recommend the position, without the amendment, to the Full Council.

NORTH DAKOTA SOVEREIGN LANDS

Aaron Carranza, P.E., Regulatory Division Director, North Dakota Department of Water Resources (ND DWR), spoke about North Dakota's sovereign lands process, management, programs, and concerns. These lands are for current and future generations.

In 2021, the Legislature (HB 1353) reorganized the Office of the State Engineer and the State Water Commission, creating the North Dakota Department of Water Resources. They appointed a director of the new agency, and made the agency a member of the governor's cabinet.

The State Engineer and associated regulatory roles were placed within a division of the DWR. Other divisions include: Administration; Atmospheric Resources; Planning and Education; Regulatory; Water Appropriation; and Water Development. With the restructuring of the agency, they updated their mission, vision, and values, and developed a 5-year strategic plan.

Sovereign Lands are those areas, including beds and islands, lying within the ordinary high-water mark (OHWM) of navigable lakes and streams. OHWM means that line below which the action of the water is frequent enough to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable waters are considered to be below the OHWM in their entirety. Navigable waters mean any waters which were in fact navigable at the time of statehood, that is, were used or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water. ND DWR has a responsibility and the authority to identify all navigable rivers and lakes in the state based on Federal standards of Equal Footing Doctrine and Commerce Clause. Conclusive determinations of navigability can only be made by courts.

The Army Corps of Engineers (Corps) has certain authorities and responsibilities for waters found to be navigable under the Commerce Clause. The Corps submitted 21 Sovereign Land Permit applications in North Dakota between 1997 and 2018 for the protection of endangered species and to enhance their habitat restoration practices on the Missouri River between Lake Sakakawea and Bismarck/Mandan. The ND DWR supported these efforts by authorizing all but one application (2011 Missouri River Flood). From 2018 to the present, there were zero Sovereign Land Permit applications. The Corps has asserted that under the doctrine of navigational servitude, no authorization from North Dakota was needed. The ND DWR strongly disagreed with the Corps and has been seeking a remedy.

North Dakota case law addresses some related sovereign land issues. In *Reep Ex Rel Irwing v. State* (N.D. 2014), the upland landowners claimed to own mineral interest in the "shore zone" of navigable waters. The Reep landowners claimed state obligations related only to "navigation, boating, fishing, fowling, and like public uses." The state argued its title to navigable waters, and all rights of title, extend from OHWM to OHWM, including all "shore zones." The court's opinion was that state title of navigable waters includes "shore zone" minerals.

Landowners in *Wilkinson v. Board of University and School Lands* (*Wilkinson I*) (N.D. 2017) conveyed property for the Garrison Dam and Reservoir to the United States, but reserved a mineral interest. The property was later determined to be below OHWM on the Missouri River. The landowners argued OHWM delineation was erroneous. The state argued OHWM delineation followed state guidelines and applicable laws. The district court determined the state owned the property and minerals below the OHWM. On appeal, state Supreme Court reversed and the case was remanded back to the lower court.

During the appeal of *Wilkinson I*, the North Dakota legislature passed a new law cementing state ownership of the Missouri riverbed, which was created directly as a result of the disputed property (N.D. Cent. Code §61-33.1). *Wilkinson II* (N.D. 2020) addressed the remand question of whether the new statute actually applied to the disputed property. The district court reversed its

earlier decision and found that the statute did apply, limiting the state's interest in the property to the historical riverbed channel, and that the property at issue was above that historical OHWM and belonged to the private owners . The state appealed the decision, but it was affirmed.

Then a citizen's complaint, *Sorum v. State* (N.D. 2020) argued that the statute was an unlawful "giveaway" of state-owned property. The plaintiffs argued that man-made structures affect state title on navigable waters, and Garrison Dam Reservoir affected title throughout the statutory reach. The plaintiffs argued N.D. Cent. Code §61-33.1 limited the public's ownership of lands and minerals without compensation. The district court determined the statute was constitutional, and the state Supreme Court affirmed the decision.

The last case, *State of North Dakota v. Leland*, is ongoing. The unclear title to parcels along the Yellowstone River included navigability, bank formation, and island formation questions. The state argued that the entirety of the Yellowstone River is navigable in North Dakota. The state also argued all three parcels at issue formed as islands post-statehood. Leland argued all three parcels formed via avulsive events, or abrupt channel relocation across a floodplain. The district court found for the state on navigability, but not on all island formation issues. An appeal is pending.

What does navigability look like today? The state retains title over all "shore zone" areas of navigable waters, including the Missouri River at Lake Sakakawea, and Yellowstone River. The State Engineer has determined eleven waterbodies are navigable under the Equal Footing Doctrine, and therefore sovereign: (1) Red River of the North; (2) Sheyenne River; (3) Pembina River; (4) Mouse River; (5) Lake Metigoshe; (6) Cannonball River; (7) Heart River; (8) Knife River; (9) Long Lake in Bottineay County; (10) Bois De Sioux River; and (11) Yellowstone River.

In 2019, the North Dakota Legislature created a formal protocol to provide transparency on the navigable waters determination process used by the ND DWR. Navigability is supported by evidence. The public is given a 60-day public comment period. The ND DWR issues a final report and provides it to the State Water Commission. All determinations are legally appealable. To aid in the collection of evidence to support navigability determinations, the ND DWR has an active contract to review 6 bodies of water. Once the evidence is delivered to the ND DWR, the public engagement process begins.

Questions:

Chris Brown noted that Wyoming tries to avoid sovereign land issues, and asked Aaron to explain more about North Dakota's objectives in protecting its interests in sovereign lands. Aaron pointed to the state's sovereign control over waters, particularly in relationship to the Corps of Engineers, and the need to ensure that those waters are managed efficiently.

LEGAL CHALLENGES TO FLORIDA'S CWA §404 ASSUMPTION

Justin Wolfe, General Counsel, Florida Department of Environmental Quality, talked about Florida's process of assuming authority for its Clean Water Act (CWA) §404 program. Jeffrey Wood, Partner, Baker Botts, is outside counsel handling the legal challenges to that assumption of authority, and he shared recent developments in the litigation and the ongoing appeal.

Justin: Florida has a lot of great natural resources and an abundance of wetlands and surface waters throughout the state. We have a state wetlands program where we have been permitting the dredge and fill of wetlands, very similar to the §404 program, for decades now. It's actually broader than what the CWA would do. It regulates the isolated wetlands beyond any definition of Waters of the United States (WOTUS) over the time. Additionally, we've had experience dealing with federal programs and implementing delegated programs, including the CWA §402 National Pollutant Discharge Elimination System (NPDES) program, so we felt like we were in a good position to take on the §404 program. Policy makers in the state decided it would be economically and environmentally beneficial to streamline these reviews, with the state evaluating all of the impacts to wetlands and species.

In 2018 the Florida Legislature directed our agency to move forward with assumption of the §404 program. This included a two-year development process that involved creating new regulations, hiring staff, and numerous and endless discussions and meetings with EPA, Corps and U.S. Fish and Wildlife Service on how we were going to interact and how the program was going to work. We really built the program from the ground up. In the end, we developed memoranda of agreement, which is part of the assumption process with these agencies. And we put together the application packet and all the implementing regulations, as laid out in the CWA.

The program faced challenges in developing the §404 program, including defining "retained waters" and addressing Endangered Species Act issues, which were resolved through memorandums of agreement and a biological opinion. Florida applied for the program in August 2020, and it was approved by EPA in December 2020, making Florida the third state to receive authority to implement the §404 program, following Michigan and New Jersey.

Jeff: We've been litigating this case in the District Court of DC and now in the DC Circuit. Notably, Florida was successfully implementing and enforcing the state §404 program for three years. The state was working in tandem with EPA, who has the responsibility for overseeing the program. While there were a few issues along the way that had to be resolved, it was working successfully.

Right around the time that EPA approved Florida's program, there was a change in administration. In January 2021, the environmental community began to urge the Biden Administration to take a look at the recent approval and to reconsider it. In tandem with that effort, they also filed what I would call a kitchen sink complaint attacking basically every aspect of Florida's program. Ultimately, there were 13 claims filed by a coalition of environmental groups in the DC District Court. Curiously, they focused on some pretty obscure procedural aspects early in the litigation and did not seek to block implementation of Florida's program at that point via a

preliminary injunction. Instead, they focused their litigation effort on a couple of procedural claims: (1) that Florida's application was not technically complete, that it needed to provide additional details from what was in the application; (2) that EPA's approval violated the CWA, and that Florida's program didn't meet the CWA requirements. Other claims are related to Endangered Species Act issues and the retained waters list that Justin mentioned briefly.

Outside the court, the environmental community spent three years asking the new administration to rescind Florida's program. To their credit, the current administration has continued to defend EPA's approval of Florida's program and the accompanying biological opinion that supported EPA's approval.

Because they didn't get what they sought politically, the plaintiffs filed a motion seeking a preliminary injunction to block Florida's program, which by that point had been underway for three years. That brings us to where we are this year. The federal district court judge finally ruled in February on the merits of two claims related to Endangered Species Act issues, focused on the biological opinion and whether it was proper, or lawful, for EPA and the USFWS to prepare a programmatic, formal consultation process. The judge decided that the biological opinion was not consistent with what ESA §7 requires. That in itself is an interesting side issue because no party challenged that part of it. With regard to the contents of the biological opinion, the judge decided that it should have considered on a species-specific basis the impacts of Florida's §404 program writ large, and that's because the programmatic process used by the federal agencies in this particular context deferred those species-specific impact reviews to the implementation stage of the program, that was problematic and so on. The judge also decided that the incidental take statement didn't contain adequate provisions to restrict incidental take and didn't include numeric take limits, which the judge thought should have been included.

The judge's opinion rested on a different perspective of what programmatic consultation can look like in this context. When the State of Florida, USFWS, and EPA were talking about what consultation might look like, the model they used was the programmatic biological opinion that was adopted by EPA over a decade ago in conjunction with the cooling water intake structure rule and program under CWA §402. It is implemented primarily by state NPDES programs, and when EPA adopted that rule, the USFWS provided a biological opinion that included a programmatic process, including the technical assistance process that Justin mentioned.

The Second Circuit Court rejected the subsequent challenges, which were nearly identical to the challenges brought in the Florida case, and upheld the programmatic biological opinion that was used in that context. Much to our surprise, the DC District Court judge decided that the Second Circuit decision was fundamentally wrong, and that the agencies who have relied on this programmatic approach were not in compliance with the ESA because they lacked a species-specific review of the front end. The court found that in situations like the cooling water intake structure scenario, as well as the §404 state assumption scenario, where there is no subsequent later consultation because state permits that are not subject to §404, or to ESA §7 consultation in that scenario, there shouldn't be a programmatic consultation. That's a pretty significant departure, not just from what happened in Florida's case, but from the position of the federal government across three Administrations (Obama, Trump, and Biden). If you as far back as 1996,

the Clinton Administration issued the surface mining program biological opinion, which also used a programmatic approach and contained a very similar incidental take statement. We were obviously disappointed by the outcome, and appealed alongside the U.S.

The judge invited the State of Florida to seek a stay of his decision in order to keep the program intact, or at least largely so. The U.S. decided not to support a stay, allowing the program to be returned to the Corps. That's where we are today - the Corps is back to having the primary role of administering the program in Florida, while Florida pursues its appeal. The case is being appealed to the DC Circuit, with a briefing set to begin in August and continue through November. The decision is seen as a threat to cooperative federalism principles and the ability of states to administer environmental programs.

Justin expressed the need for support from other states in defending the cooperative federalism principles of the CWA and ESA to ensure that flexible, workable approaches to assumption can take place and so if anyone would like us to talk about the details of the case, or about ways to support Florida, whether an amicus brief or otherwise, please do reach out.

Questions/Comments:

Chris Brown: Are there any other states who are contemplating seeking §404 delegation?

Tom Riley: Nebraska no longer is. I think, in the last meeting in Alaska, we talked about Nebraska pursuing §404 assumption, and talked about that process. But there's probably three reasons why. First, sometimes permitting is all about people. For twenty years, Nebraska dealt with a Corps Section Chief who was a thorn in everybody's side, unreasonably delaying the permitting process. That drove Nebraska's interest do this from stakeholders and users. About two years ago, a new section chief came in and the difference was night and day. We are able to work through permits quite a bit more quickly. Tagged that along with the cost that the program was going to incur to the state and the realization of permitting these stakeholders that this would cost them a lot more money, those things stacked up together to the point that the governor and the legislature determined it was better not to assume that authority.

COLORADO RIVER OPERATIONS UPDATE

Nicole Klobas, Chief Counsel, Arizona Department of Water Resources, provided an update on the Colorado River Operations.

We are working through the National Environmental Policy Act (NEPA) process for the post-2026 Colorado River Operations, which the Bureau of Reclamation (USBR) initiated in June 2023. I have the Scoping Report: Purpose and Need slide, which I've sent this presentation to be included in the materials so you can read through all of the language. But I will summarize it by saying that we need to figure out how to operate the river. We know there's less water, and we've got to figure out how to manage less water and juggle the various demands that we have on the Colorado River.

One of the things in mind with this process is the USBR selected a wide range of future hydrologies to explore system robustness under different operational strategies. One of the "wetter" hydrologies selected is the Stress Test, which is the natural flow record from 1988 to 2020, with an average flow of 13.2 MAF. We're not going to only be looking at statistical analyses, we're going to be selecting individual traces to see what happens under different scenarios. Overall, the hydrologies cover a wide range of minimum and maximum flow sequences that extend beyond the historical records, especially for the minimum flows. We are anticipating or planning for the worst, but of course, I think it's fair to call it a river with a lot of variation in flow.

Another thing that's unique about this NEPA process is that USBR has two comparison alternatives. The "no action" alternative is a legal framework that would take effect if there is no agreement, and is based largely on the pre-2007 framework; and the "continuing current strategies" alternative, which continues the 2007 guidelines with the more recent drought contingency plans (DCP). Neither alternative will meet the purpose and need. Several other action alternatives have been submitted: Lower Colorado Basin; Upper Colorado River Commission; cooperative conservation alternative; U.S. Fish and Wildlife Service and National Park Service; comments from tribes; and others.

We will be running an additional analysis of the alternatives. One thing I want to be really clear about is that all of these alternatives were submitted for the purpose of analysis. I don't think that any of these alternatives represent a current agreement to implement them as they were proposed. We did hear a comment from a tribal representative that is in the Lower Basin that the tribe has not agreed to the lower basin alternative or the UCRC alternative. I think the modeling results, and the analysis of the impacts that each alternative will create, will provide a foundation for the negotiations and for the decision-making, which is what NEPA is supposed to provide, is a framework and a process to analyze different alternatives and decide what's the best path forward. I think the best way to find the path forward will be consensus. I think that some of the most favorable alternatives for the largest groups of people will likely require federal legislation and agreements among various parties.

General Points of Agreement – we cannot continue under the current operational framework and must develop a framework to avoid "crisis management." We must find a way to reduce use. No one has agreed to anything yet, and everyone reserves all rights to object, disagree, and legally challenge, as well as any other rights that can be reserved.

General Points of Disagreement - who should reduce their uses, when, and by how much? In the face of low flows and substantial reduction, how much water do we use and how much do we set aside?

What's Next with the NEPA process - USBR is modeling the alternatives. After the modeling results are complete, the impacts of each alternative must be analyzed. The Post-2026 Draft EIS is projected to be released at the end of the year. There are ongoing discussions among Basin States, Tribes, and Mexico, as well as intra-state discussions.

NORTHEASTERN ARIZONA INDIAN WATER RIGHTS SETTLEMENT

Ryan Smith, Shareholder, Brownstein Hyatt Farber Schreck, LLP, representing the Navajo Nation, discussed the recent settlement between the Navajo Nation and various parties, including the State of Arizona, which resolves claims to the Colorado River and its tributaries.

In May, the Navajo Nation, the Hopi Tribe, the San Juan Southern Paiute Tribe, and 36 other parties, including the State of Arizona, with Nicole's help leading the way with Arizona Department of Water Resources (AZ DWR), entered into a settlement agreement that would resolve the tribe's claims on the Colorado River, Little Colorado River and to the groundwater in the area.

The settlement includes funding for projects to provide water to the Navajo Nation, Hopi Tribe, and San Juan Southern Paiute Tribe. Approximately 30% of homes on the Navajo Nation lack running water, and many families spend $600 a month on water, which is a significant economic burden. The settlement is expensive at $5B, but is less costly per person compared to past settlements. The settlement includes the Western Navajo Pipeline and funds for groundwater projects on the Navajo Nation, with some funding allocated to the Hopi Tribe and San Juan Southern Paiute Tribe.

The Navajo Nation spans both the Upper and Lower Colorado River Basins, making the settlement complex. The settlement resolves claims to water from the Upper Colorado River, Little Colorado River, Lower Colorado River, and groundwater in both basins. Arizona has an apportionment of 50,000 acre-feet in the Upper Basin and 35,000 acre-feet in the Lower Basin. The Navajo Nation will receive close to 45,000 acre-feet per year from the Upper Basin and 35,000 acre-feet per year from the Lower Basin, with some additional groundwater projects.

Legislation (H.R. 8940 and S. 4633) has been introduced in Congress to authorize the settlement, with bipartisan support from senators and representatives. The bill had a hearing in the House Natural Resources Committee and is expected to have a hearing in the Senate. The settlement aims to remove a cloud over the Colorado River system, making post-2026 operations discussions smoother.

Questions/Comments:

Tanya Trujillo discussed New Mexico's pending Indian water rights settlements and the connections to the current settlement. New Mexico had a previous settlement with the Navajo Nation that authorized the Navajo Gallup Water Supply Project, which has been under construction for 15 years at this point. We're hoping to continue to make progress on that. The Arizona settlement contemplates some interconnections with the Navajo Gallup Project and so we're being extra careful about reviewing both the settlement agreement and the legislation to make sure we can build in some protective caveats or ensure that we can approve any of the required permits and agreements that will be necessary because of that connection. Tanya emphasizes the importance of working with partners in the Navajo Nation and with the State of Arizona to address these issues. I know from an upper basin perspective, there are also concerns about some of the provisions in

the settlement that deal with upper basin water moving to lower basin and of course, we have experience from that going back to our Navajo settlement days too.

Ryan: Thanks for raising that, Tanya. We look forward to working with the State of New Mexico on any questions you all have.

U.S. SUPREME COURT RIO GRANDE DECISION

Jon Niermann and Tanya Trujillo talked about the recent U.S. Supreme Court decision in *Texas v. New Mexico and Colorado.*

Jon provided some background. A little over 10 years ago, Texas alleged that New Mexico was not meeting its water delivery compact obligations under the interstate Rio Grande Compact. Colorado, as a party to that compact, was brought into litigation. The federal government intervened and fast forward over a decade, and many tens of millions of dollars later, the states agreed to a settlement. A special master recommended the settlement to the U.S. Supreme Court, which has original jurisdiction. The court heard oral argument a few months ago on the settlement and finally rendered an opinion.

The important takeaway for states is that Supreme Court will recognize that the federal government may have totally independent claims and interests in interstate compacts, which was somewhat a surprising result to me. What's done is done at the Supreme Court, but the question for me is, what happens next? I understand that the federal government really has no objection to the consent decree, but what they're seeking is some additional concessions from New Mexico. Given that, I will now hand it over to Tayna for her impressions of where we go next.

Tayna thanked Jon for his continued partnership on this issue and other issues. As Jon mentioned, we had a settlement, but unfortunately, the U.S. didn't support it and so the states, without the U.S., submitted a proposed decree. Our Special Master supported it and requested that the Supreme Court approve that decree. But this Supreme Court decided that it couldn't do that over the objection of the U.S. Chris made the made the point that there has been a lot of commentary about what does this decision mean for interstate compacts? Is it something that gives the U.S. a lot more control now over western water operations? I think if folks really look at the opinion, you'll see it doesn't need to be interpreted that broadly. What the Supreme Court's June decision said in a nutshell was that because the court had let the U.S. intervene in the case a few years ago, they could not dismiss the case without the U.S. approval. That was something the states (New Mexico, Texas, and Colorado) did not agree with, nor did over half the states in the nation who weighed in with amicus briefs and said no, Supreme Court, you can go forward and honor this agreement notwithstanding the U.S. position.

This is a very fresh decision. We have just recently received an appointment of a new Special Master because our prior Special Master retired. To Jon's point and question, we haven't heard any official position from the U.S. regarding what the next steps should be. The State of New Mexico has emphasized maintaining the states' agreement and continue collaboration with

the U.S. The State of New Mexico is actively coordinating with federal partners on water management projects and seeks to avoid litigation.

One of the earlier presentations today was regarding federal funding contributions. That's something that we've been targeting specifically for this Lower Rio Grande region. We are partnering with the federal government on agricultural management programs and on water conveyance infrastructure type projects so that we can have a better handle on some of our water capture projects. For example, our surface water stormwater capture projects, groundwater management issues, even things like metering and monitoring. There is lots of good coordination going on in that area.

Questions/Comments:

Jon: Do you have any sense of what the federal government wants in order to resolve this case?

Tayna: We haven't heard any official position from them and so we really don't know yet how their position is going to be articulated to us.

Chris Brown raised the question about the impact of the decision on other compacts, particularly Wyoming's seven compacts and the Colorado River Compact, and whether states should fight tooth and nail to excluded the federal government from participating in lawsuits or agreements. Jon acknowledged that, had they known how this would turn out, Texas probably would have fought harder to exclude Reclamation from intervening in the case. Tayna agreed that states should be cautious about allowing the U.S. role in agreements, given the potential for changing circumstances and administrations. She also thanked the states for their efforts in putting together the amicus brief, and said they still have the potential to be useful in future contexts.

ROUNDTABLE DISCUSSION: NATIONAL GROUNDWATER USE

Chris mentioned that under Tab R there are some materials with regard to the topic on national groundwater use.

Michelle: Back in April, the President's Council of Advisors on Science and Technology (PCAST) solicited information about a national groundwater policy or engagement coordination. The WSWC submitted a letter on July 1, with responses to the specific workgroup questions. Thank you to all the states who provided some specific information to help us with that. Also, thanks to Tony for working very diligently in the 1990s on the WSWC groundwater recharge project reports with the Bureau of Reclamation. Turns out that 30 years later we can still use that same information as it's still valid.

On July 22, the PCAST workgroup held a one-day workshop on Safeguarding America's Groundwater Security: Addressing Challenges and Risks. The workshop convened government agencies, key groundwater users, and community stakeholders to share insights and identify scientific and policy opportunities for enhancing groundwater management.

Notably, the PCAST workgroup has no hydrology or groundwater expertise at all, but they were very careful about acknowledging that groundwater is under state jurisdiction, and that the federal government has no jurisdiction over groundwater. One key phrase that I heard over and over again, which I really appreciate, is that aquifers are heterogeneous and there's not going to be a one-size solution.

PCAST is planning on preparing a report to the White House in November based on all the comments they received in response to their April request, as well as what was provided at the workshop. I feel like workshop participants really drove home the point that this needs to be an opportunity to collaborate with data. Maybe there's a funding component in terms of monitoring and recharge and those type of things. When it comes to governance, many of us emphasized that the federal government needs to defer to states. This was my perception of the workshop, but I welcome any other perspectives. Dan Yates was there from the Ground Water Protection Council, Steve Emmen from the Western Governors' Association, as well as some folks from California and the Texas Water Development Board (TWDB).

This has raised several of our states wanting to have a deeper conversation. Some of our states have expressed interest in doing a workshop on groundwater, covering water quality and water quantity issues sometime in the future. We wanted to go around the room to see if anyone wants to weigh in on the idea. What might we need to do in terms of helping to educate the public about the nuances of water in the west, particularly when it comes to groundwater and jurisdiction? Do states want to share their recent challenges and developments with each other? Thoughts?

Racquel Rancier: I will say for Oregon, unrelated to PCAST, we are interested in having a workshop on groundwater, because we are seeing challenges across the West, and we think there's an interest in making sure that we have the best processes in place. Particularly for what our state calls a "critical groundwater area." Other states have different administrative groundwater areas. We are trying to sort through whether we have the best tools and processes in place, and I know some other states are working to update their processes for their administrative areas. We are interested in a workshop to share what each state is doing, what challenges they've encountered, administration related to overdrawn areas. Groundwater allocation rulemaking, which will result in fewer groundwater permits issued by the state. I think it would provide an opportunity to share best practices, and what the challenges are. There are places in Oregon where we are talking about voluntary shortage sharing agreements instead of critical groundwater areas - we know that we probably need both of those for that to be successful and so we're talking about what the goals of those are.

It would be interesting in learning what is working and what is not. And also learning more about how we can minimize conflict, because we know that is essentially where all groundwater issues are going these days.

I'd also like to talk more about science. Groundwater models are very expensive. We've recently had some pushback from the U.S. Geological Survey (USGS) about doing peer reviews

on some of our groundwater work. We are looking for other opportunities for how we can get peer reviews done and so we're interested in working with other states potentially on that.

Melissa Flatly: Nevada has a Supreme Court decision that affirmed our ability to conjunctively manage surface and groundwater, confirming what we already believed we had the authority to do in the State Engineer's Office. I know that's up for debate in other states. We're also working on some proposals to reduce paper water rights. Our forfeiture process for perfected water rights is not working, so we're looking for some ways to change over-appropriated water basins, and addressing over appropriation problems. There's a couple different angles.

Jeanine Jones: Should you guys be interested, California is coming up on the 10-year mark on our Sustainable Groundwater Management Act (SGMA) implementation, which requires mandatory local agency management of groundwater that created a few hundred new local agencies – many of whom do not like each other—and requires them to manage groundwater. We are experiencing the first litigation against the state by agencies whose plans have been found to be deficient. This could provide some entertaining content for the workshop.

John Simpson: Idaho is figuring out how to deal with that interface between groundwater and surface water under state law, and it has been an ongoing issue. Our code on groundwater was developed in the 1950s and didn't really define groundwater management areas versus critical management areas. We are trying to implement those in a time of crisis in our largest aquifer. There's a lot to explore on how each state is undertaking this process. Factual differences, the modeling differences, and it's almost on a case by case basis, but there are enough similarities in what each state is doing to learn from each other.

Sara Shechter: Utah is heavily involved in managing groundwater. It's a lot to tackle. I'm volunteering to participate.

Dan Yates: We heard about the PCAST solicitation for information through USGS and were able to respond early. The Groundwater Protection Council's letter, which was similar to WSWC's letter, leaned heavily on state jurisdiction. I think there's some additional opportunity for us to use some of our existing efforts to show that groundwater management in the sates is a real thing. There is an existing vast network in the West, nationally, as well of people in state and local governments, consulting firms, that are involved, and local agencies that already do this work. Communicating the layers of things that are already happening to the federal government, and where there are opportunities for them to help could be useful. How can you help us do what we need to do, rather than tell us what you think we need to do, especially. We're happy to be engaged with WSWC in the process.

Tom Riley: Nebraska is in its 20-year celebration of the landmark Nebraska LB 962, which gave the authority for conjunctive management between the Department of Natural Resources and our 23 irrigation districts, which manage our groundwater, and started to manage our groundwater about 50 years ago. Along with other states that are part of the Ogallala Aquifer, we've been working on that groundwater management for a long time – to the point that groundwater levels on average in the State of Nebraska are nearly the same as they were in the 1980s. We're not

excited about the prospect of the federal government getting involved, because we think we've got it covered. We have groundwater models for every major aquifer in Nebraska. The other component is the water quality piece. Nebraska is hosting the meetings next spring, and while I won't be there, this is one of the things that we'd like to talk about - this groundwater relationship and conjunctive management. With the joint system of management, we have a little more flexibility to address some of these things.

Anna Pakenham Stevenson: I wanted to tie these two things together - the desire of states to get together and learn from each other, policy and science, and the need to explain to the federal government and educate people who don't deal with water, so they know what we are doing. This is a good opportunity to host this workshop. We can share lessons learned with each other, and also report out. What are the resources we do need as states, particularly around science, technology?

Chris: It sounds like there is adequate interest in exploring this groundwater issue further. In Wyoming, we see recent challenges with regard to groundwater. I would suggest that we include in our workplan that we work with our Water Resources and Water Quality Committees in identifying who would like to participate in a workshop. We can reach out and try to set up time to virtually plan that out a little bit better for folks who want to participate. Do we have it a day early ahead of our meetings, or do we set aside a different day and hold it virtually?

My proposal is to **amend our work plan** to allow us to reach out and identify the folks who want to participate. There was a motion. Second. Motion unanimously approved.

STAFF UPDATES

Michelle Bushman briefly mentioned the Legislation and Litigation updates included in the briefing book, and highlighted the pending Indian water rights settlement legislation, as well as legislation to fund the settlements once they are authorized.

SUNSETTING POSITION FOR FALL 2024 MEETINGS

Position #476 - regarding States' Water Rights and Natural Flows.

OTHER MATTERS

There being no other matters, the meeting was adjourned.