

**LEGAL COMMITTEE  
WORK PLAN  
July 1, 2016 to June 30, 2017**

**1. STATE AND FEDERAL COLLABORATION REGARDING THE  
ADJUDICATION OF FEDERAL NON-TRIBAL WATER RIGHTS**

**Work-to-Date:** The Committee has created a Federal Non-Tribal Water Claims Subcommittee to evaluate ways the WSWC and WestFAST can improve the effective resolution of federal non-tribal water rights claims. The Subcommittee consists of WSWC members and WestFAST members, who serve in an *ex officio* capacity.

The Subcommittee issued a questionnaire in 2012 to WSWC member states, the Bureau of Land Management, the Bureau of Reclamation, the Department of Defense, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the U.S. Forest Service. The questionnaire sought information on ways the WSWC and WestFAST could address the issues and challenges that involve federal non-tribal water right claims,<sup>1</sup> as well as examples of successful state and federal efforts to resolve these claims. Responses indicated a broad consensus that the WSWC and WestFAST could develop a clearinghouse of information to assist states and federal agencies in the effective resolution of federal non-tribal water rights claims.

On July 15-16, 2014, the WSWC and WestFAST held a workshop in Helena, Montana to discuss ways to improve the resolution of federal non-tribal water rights claims and to begin the process of developing a clearinghouse of information that states and tribes can use to resolve these claims. The WSWC and WestFAST subsequently created a joint state-federal workgroup to help develop the clearinghouse and implement the other recommendations that emerged from the workshop.

**2016-2017:** The Committee will work to carry out the recommendations and next steps that emerged from the workshop. Under the direction of the Committee, the workgroup will hold calls on a quarterly basis to discuss the development of the clearinghouse and to serve as a forum for information sharing and relationship building. The Workgroup will also advise the Committee about potential future actions the WSWC and WestFAST may take to address federal water needs and may hold webinars on specific topics of interest. The workgroup will hold workshops on (1) identifying state and federal perspectives of groundwater rights, with case studies as examples of how they've been handled in the past through adjudications, settlements, compacts or statutes; (2) hypothetical or actual examples of how adjudicated or decreed federal water rights will be administered by states, and how state and federal agencies would approach situations like curtailments under the current laws.

**Time Frame:** Ongoing

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<sup>1</sup> For the purposes of the questionnaire, the term "federal non-tribal water right claim" encompassed federal reserved right claims, federal state-based claims, and claims relating to the aforementioned federal agencies that do not involve water right claims made by a tribe.

Federal Non-Tribal Water Claims Subcommittee: David Schade (AK), Jay Weiner (MT), Greg Ridgley (NM), Jennifer Verleger (ND), Dwight French (OR), Todd Chenoweth (TX), Norm Johnson (UT), Buck Smith (WA), and Pat Tyrrell and Chris Brown (WY). WestFAST members and agency staff participating in the Subcommittee in an *ex officio* capacity include: Jana Wilcox (Bureau of Land Management), Marc Kodack (Department of Defense), Andrew Hautzinger (U.S. Fish and Wildlife Service), Donald Anderson and Becky Fulkerson (Bureau of Reclamation), Jeff Hughes (National Park Service) and Jean Thomas (U.S. Forest Service). Other *ex officio* members of the Subcommittee include Kristen Geddes and Susan Joseph-Taylor (NV), Jonathan Allen (OK), Jesse Ratcliff (OR), and Abigail Boudewyns (WY).

## 2. CWA JURISDICTION\*

**Work-to-Date:** In 2011, the EPA and the U.S. Army Corps of Engineers released draft guidance intended to provide clearer, more predictable guidelines for determining which water bodies are subject to Clean Water Act (CWA) jurisdiction, consistent with the U.S. Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006).

In September 2013, the EPA and Corps withdrew the draft guidance. At the same time, the agencies announced that they had submitted a draft rule to clarify the extent of CWA jurisdiction to the Office of Management and Budget (OMB) for interagency review.

In 2013, the WSWC wrote EPA and the Corps a series of five letters requesting greater state consultation in the development of the rule. In addition, the WSWC created a CWA Rulemaking Workgroup to gather information on the WSWC member states' perspectives regarding the rulemaking and to identify further areas of consensus among the western states. In March 2014, the workgroup developed a letter that the WSWC sent to EPA and the Corps, setting forth a list of additional consensus comments on the rulemaking. The Western Governors' Association (WGA) sent a subsequent letter on March 25, 2014, that cited the WSWC's March 10 letter and urged the agencies to consult with the states individually and through the WGA before taking further action on the rulemaking.

On April 21, 2014, EPA and the Corps published a proposed rule in the Federal Register with an initial 90-day public comment period that was later extended to October 20, 2014, following requests from the WGA and other organizations for an extension. Following the rule's publication, EPA and the Corps engaged in a series of calls with the WSWC to discuss the states' questions and concerns about the rulemaking. WSWC Water Quality Committee Chair J.D. Strong of Oklahoma also testified on behalf of the WSWC and the WGA before the House Transportation and Infrastructure Committee regarding the rule on June 11, 2014.

The WSWC adopted Position #369 regarding CWA rulemaking efforts on July 18, 2014, during its summer meetings in Helena, Montana. The resolution replaces WSWC Position #330.5 and served as the basis of a comment letter the WSWC sent to EPA and the Corps on October 15, 2014, Position #373. That letter called for the creation of a state-federal workgroup to refine and revise the rule and set forth a number of requested changes.

On June 29, 2015, the EPA and the Corps published their final rule in the Federal Register. The final rule incorporates some of the changes requested in Position #373.

**2016-2017:** The Committee will continue to work with the Water Resources and Water Quality Committees through the Workgroup to follow and comment on the implementation of the jurisdictional rule and other federal actions regarding CWA jurisdiction in accordance with the WSWC's and WGA's positions.

**Time Frame:** Ongoing

CWA Rulemaking Workgroup: Michelle Hale (AK), Trisha Oeth (CO), Barry Burnell (ID), Tom Stiles (KS), Jennifer Verleger (ND), J.D. Strong (OK), Todd Chenoweth (TX), Walt Baker (UT), Laura Driscoll (WA), and Bill DiRienzo (WY).

\*See Item 3(a) of the Water Quality Committee Workplan

### **3. AD HOC GROUP ON RESERVED INDIAN WATER RIGHTS**

**Work-to-Date:** The Western Governors' Association (WGA) and WSWC have long supported the negotiated resolution of Indian water rights claims (WSWC Position #376). As a result, the WGA and WSWC have worked with the Native American Rights Fund (NARF) for over thirty years as part of an Ad Hoc Group on Reserved Indian Water Rights to promote negotiated settlements.

Over the years, the Ad Hoc Group has carried out a number of activities to support the negotiated settlement of Indian reserved water rights claims, including frequent trips to Washington, D.C. to support policies that facilitate settlements and a biennial symposium on settlements that the WSWC and NARF hold every odd year. The Group has also worked to highlight the need to secure a permanent funding mechanism for authorized settlements and to identify alternative funding sources to help ensure that settlements authorized by Congress and approved by the President will be implemented.

In recent years, the WSWC and NARF have established regular meetings with the Deputy Secretary of the Interior's Office, the Secretary of the Interior's Indian Water Rights Office, and other Interior officials engaged in Interior's Indian water rights efforts. The WSWC and NARF have also held regular meetings with the White House Office of Management and Budget and other White House officials to support the WSWC's settlement policies.

**2016-2017:** The Committee will oversee WSWC's Ad Hoc Group efforts in the following areas: (1) activities to gather support for an appropriate remedy to settlement funding issues, including the development of a permanent settlement funding mechanism, the identification of other possible funding sources, and funding for federal assessment, negotiation, and implementation teams; (2) continue meeting with the Administration via the quarterly conference calls and other face-to-face opportunities to discuss key issues associated with Indian water rights settlements; and (3) hold the 2017 Symposium on the Settlement of Indian Reserved Water Rights Claims in partnership with the Native American Rights Fund.

**Time Frame:** Ongoing

Reserved Rights Subcommittee: Bill Staudenmaier (AZ); Cindy Chandley (AZ); Jay Weiner (MT), Greg Ridgley (NM), and Norman Johnson (UT). NARF members participating in the Subcommittee in an ex officio capacity include: John Echohawk, Joel Williams, Heather Whiteman Runs Him, Steve Moore, and David Gover. Other ex officio members include Susan Cottingham, Nathan Bracken, Stanley Pollack, David Mullon, Ryan Smith, Michael Bogert, Pamela Woodies, and Arianne Singer.

#### **4. U.S. FOREST SERVICE PROPOSED GROUNDWATER DIRECTIVE**

**Work-to-Date:** On May 6, 2014, the U.S. Forest Service published a proposed directive in the Federal Register that would create a “comprehensive direction” for the agency’s management of groundwater on National Forest System (NFS) land. In particular, the directive is intended to: (1) provide for consideration of groundwater resources in Forest Service activities; (2) encourage source water protection and water conservation; (3) establish procedures for reviewing new proposals for groundwater withdrawals on NFS land; (4) require the evaluation of potential impacts from groundwater withdrawals on NFS natural resources; and (5) provide for measurement and reporting to help build the agency’s understanding of groundwater resources on NFS land. Comments on the proposed directive are due August 4, 2014.

According to the Forest Service, the directive will not infringe on state-issued water rights or change how state groundwater and surface water quality regulations affect federal lands. However, while the directive would require the agency to comply with state law when filing groundwater use claims in state adjudications and administrative proceedings, it would, among other things: (1) require application of “...the Reservation or Winters Doctrine to groundwater, as well as surface water, consistent with the purposes of the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act;” (2) require the Forest Service to evaluate all applications to states for water rights on lands adjacent to NFS lands; and (3) would presume that groundwater and surface water are connected unless proven otherwise.

WSWC position #380 notes that no federal court has recognized a federal reserved water right to groundwater, and opposes “...efforts that would establish a federal ownership interest in groundwater or diminish the primary and exclusive authority of States over groundwater.” Similarly, WGA Resolution #2015-08, paragraph B(1)(a) states: “While the Western Governors acknowledge the important role of federal laws such as the Clean Water Act, the Endangered Species Act, and the Safe Drinking Water Act, nothing in any act of Congress or Executive Branch regulatory action should be construed as affecting or intending to affect states’ primacy over the allocation and administration of their water resources.”

On July 2, 2014, the WGA wrote Secretary of Agriculture Tom Vilsack to express concern that the directive “could have significant implications for our states and our groundwater resources.” WGA’s letter also asked Vilsack to respond to a series of questions regarding the directive. The WSWC subsequently sent a letter to the USFS on October 3, 2014 (Position #372) that outlined a number of questions and concerns about the directive, including: (1) its potential to infringe on state water management, (2) questions about the legal basis for the directive; and (3) the lack of state consultation in the development of the directive.

In December 2014, USFS Chief Tom Tidwell indicated that the USFS will not move forward with the directive until after agency personnel have engaged with states and other stakeholders to better understand their concerns. After the USFS has completed this engagement, it will publish a revised directive in the Federal Register for public comment.

At the WSWC's request, the USFS met with the WSWC on February 13, 2015 to discuss the WSWC's concerns regarding the directive. The meeting identified a number of conceptual, consensus-based changes that may be able to address some of the WSWC's concerns.

On June 19, 2015, the USFS published a Notice of Withdrawal of the Proposed Directive in the Federal Register. The USFS acknowledged the States' concerns that the Proposed Directive would exceed USFS authority and infringe on States' authority to allocate water. The withdrawal will allow USFS to engage in further conversations with the States. USFS intends to use the input from States and others to develop new directives that create a consistent approach to evaluating and monitoring the effects on groundwater resulting from actions on USFS lands.

**2016-2017:** The Committee will use the results of the WSWC's February 2015 meeting with the USFS to develop consensus changes to the directive that could form the basis of potential comments for the WSWC to submit once the USFS re-publishes the directive for public comment. The Committee will also continue to monitor this issue and engage with the USFS as appropriate under the supervision of the WSWC and in close coordination with the WGA.

**Time Frame:** Ongoing

## **5. WRDA/CORPS POLICIES**

**Work to date:** The Council has in the past supported regular passage of a Water Resources Development Act (WRDA), and has addressed a number of specific policy issues, while not taking any position on specific project authorizations. The Council has raised concerns with the Corps' approach to identifying and regulating the use of "surplus waters" and Corps drought authorities related to Corps projects. The Council also worked to exclude irrigation water supply canals from any new safety levee safety program.

**2016-2017:** The Council will continue to work with the Congress and Corps on WRDA and Corps-related issues, including the treatment of irrigation canals under the proposed new levee safety program. Further, the Council will continue to work to ensure that state water rights and prerogatives are protected, specifically as it relates to natural flows, Corps storage and other issues.

**Subcommittee:** Jennifer Verleger (ND); Tracy Streeter (KS); and Tim Davis (MT)

### **A. CORPS SURPLUS WATER RULEMAKING**

**Work to date:** A draft Corps surplus water rulemaking is pending. The Flood Control Act of 1944 specifically declared the policy of Congress to recognize the interests and rights of the Missouri River Basin States in determining the development of the watersheds within their borders and likewise their interests and rights in water use and control, and to preserve and protect to the fullest extent established and potential uses of the rivers' natural flows, those flows

that would pass through the states in the absence of the Corps of Engineers dams. The federal government has long recognized the right to use water as determined under the laws of the various states. However, the Corps has indicated that all waters entering its Missouri River mainstem reservoirs are stored waters to be allocated and controlled by the federal agency and does not recognize the States' right to access natural flows, separate from the captured floodwaters stored within those reservoirs.

In October 2015, the Council adopted a resolution (#388) urging the Corps to recognize the legal rights of the States' to allocate water, wrote the Assistant Secretary of the Army for Civil Works regarding its concerns, and has met with Corps officials on different occasions, as well as discussed legislative clarifications with congressional staff. The Council has also surveyed its member states regarding their definition of stored waters and related storage rights.

**2016-2017:** The Committee will continue to work to address this issue and explore alternative solutions, including both administrative and congressional action.