

**MINUTES
of the
LEGAL COMMITTEE
Talking Stick Resort
Scottsdale, Arizona
October 9, 2014**

Table of Contents

| | |
|---|---|
| Welcome and Introductions | 3 |
| Approval of Minutes | 3 |
| Sunsetting Positions | 4 |
| Proposed Position Supporting the Dividing the Waters Initiative | 4 |
| General Stream Adjudications in Arizona | 4 |
| Surplus Water Update | 5 |
| Indian Water Rights Update/2015 WSWC-NARF Symposium | 6 |
| Next Steps Regarding the USFS’s Proposed Groundwater Management Directive | 7 |
| WSWC-WestFAST Federal Non-Tribal Water Rights Workgroup and Clearinghouse | 7 |
| Litigation and Legislation Update | 7 |
| Other Matters | 8 |

**MINUTES
of the
LEGAL COMMITTEE
Talking Stick Resort
Scottsdale, Arizona
October 9, 2014**

MEMBERS AND ALTERNATES PRESENT

| | |
|---------------------|---|
| ALASKA | -- |
| ARIZONA | Michael Lacey Mike Fulton Cynthia Chandley |
| CALIFORNIA | Jeanine Jones |
| COLORADO | -- |
| IDAHO | Jerry Rigby John Simpson |
| KANSAS | David Barfield |
| MONTANA | Tim Davis Anne Yates (via phone) Jay Weiner (via phone) |
| NEBRASKA | Jesse Bradley |
| NEVADA | Roland Westergard |
| NEW MEXICO | Greg Ridgley Amy Haas |
| NORTH DAKOTA | Michelle Klose Jennifer Verleger Todd Sando |
| OKLAHOMA | J.D. Strong |
| OREGON | Tom Byler |
| SOUTH DAKOTA | Kent Woodmansey |

TEXAS

Carlos Rubinstein

UTAH

Eric Millis
Norman Johnson

WASHINGTON

--

WYOMING

Patrick Tyrrell
Chris Brown (via phone)

GUESTS

Chris Carlson, USDA Forest Service, Washington, DC
Carlee Brown, Western Governors' Association, Denver, CO
Alex Davis, Colorado Parks and Wildlife, Denver, CO
Curtis Seaton, Texas Water Development Board, Austin, TX

WESTFAST

Patrick Lambert, WestFAST Liaison, Salt Lake City, UT
Jean Thomas, USDA Forest Service, Washington, DC

STAFF

Tony Willardson
Nathan Bracken
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

Jennifer Verleger, Chair of the Legal Committee, called the meeting to order.

APPROVAL OF MINUTES

The minutes of the meeting held in Helena, Montana in July were moved for approval by J.D. Strong. Norm Johnson seconded the motion, which passed unanimously.

SUNSETTING POSITIONS

The Committee reviewed two sunseting positions.

A. #335 - Recommending Policy Changes at the Federal Level in Expediting State General Stream Adjudications

The Committee considered revisions to the position intended to incorporate findings from the July WSWC-WestFAST workshop on the resolution of federal non-tribal water rights, namely that federal agencies should place greater emphasis on educating their leaders and staff regarding western water rights and should consult with states before asserting water rights claims.

Norm Johnson moved to recommend that the WSWC adopt the position as revised, J.D. Strong seconded, and the motion passed unanimously.

B. #336 - Supporting Negotiated Settlements of Indian Water Rights Disputes

Amy Haas asked that the first “WHEREAS” clause and the first “RESOLVED” clause be revised to replace “Indian water rights disputes” with “disputed Indian water rights claims.” J.D. Strong moved to recommend adoption of the position as amended, Jerry Rigby seconded, and the motion passed unanimously.

PROPOSED POSITION SUPPORTING THE DIVIDING THE WATERS INITIATIVE

Norm Johnson introduced a new resolution supporting the Dividing the Waters Initiative, an effort within the National Judicial College to educate judges regarding legal disputes involving water. Norm noted that funding for the initiative is “drying up.” While the WSWC is unable to provide financial support, Norm said the initiative could use an endorsement from the WSWC to seek additional funding. Norm mentioned that the initiative has been successful in Utah and that it has been helpful around the West.

Norm moved to recommend that the WSWC adopt the resolution, Jerry Rigby seconded, and the motion passed unanimously.

GENERAL STREAM ADJUDICATIONS IN ARIZONA

Cindy Chandley gave an overview of the Gila River and Little Colorado General Stream Adjudications in Arizona, which involve around 85,000 and 14,000 claims, respectively. Cindy said the adjudication process has been slow, due in part to the state’s adjudication statutes, which were amended in 1985, and were based on the litigation of “hypothetical” facts. As a result,

Cindy said the statutes do not function that well and have “prolonged the process.” Cindy also said court requirements for the Arizona Department of Water Resources are not feasible.

Tony asked about reserved water rights. Cindy said the Arizona Supreme Court found that such rights are entitled to greater protection than other rights. She also said that rights are not required to withdraw groundwater outside of the state’s Active Management Areas.

Norm asked about the Arizona Supreme Court’s conclusion in a 2001 ruling that Indian reservations were established as permanent homelands and that the measure for determining reserved water rights is based on tribal economic development plans, cultural needs, and historic water uses. Cindy said it was a good ruling because the alternative is the practicably irrigable acreage (PIA) standard, which for some tribes would mean very little rights.

Nathan Bracken asked about efforts to change the current process. Cindy said there has been some discussion and communications with the court. However, she also said “this is the problem with long adjudications because the judges retire and you lose your institutional memory.” Cindy was hopeful that there will be new push to amend the legislation.

Mike Lacey said there is an effort to deal with this issue. In particular, retired Senator John Kyl is interested in the issue and is creating an institute for public policy to focus on water.

Greg asked how the state is responding to de minimis use. Cindy said there have been efforts to identify things that can be taken out of the adjudication, such as stock ponds and similar uses. She further noted: “A lot of things that people are trying to get the court to rule on are guideposts. Most things are issues of first impression, which means that everyone wants to litigate over someone’s stock pond.”

SURPLUS WATER UPDATE

Michelle Klose gave an update on efforts by the U.S. Army Corps of Engineers to develop a rulemaking regarding access to surplus water and to develop surface water reallocation studies in the Missouri River Basin. In the meantime, the Corps has claimed control over water stored in its reservoirs regardless of whether that water would exist without the Corps’ dams. In explaining this position, Michelle opined that the Corps believes it owns 100% of the land located within in the boundaries of its reservoirs, even though the states own and maintain the lands. North Dakota is working on a paper to point out that it is not the Corps’ responsibility to balance the interests in the basin – it is the states’ responsibility. North Dakota is seeking input and asked Michelle asked ther other members to contact her or Jennifer Verleger if they are interested in providing input. The state will be working on a draft in the next few months.

Michelle also said the surplus water rulemaking will likely seek to address some the issues involved in the dispute between Georgia, Alabama, and Florida in the Apalachicola-Chattahoochee-Flint (ACF) Basin.

Nathan noted that Lewis Jones, an attorney from Georgia working on the ACF dispute, met with the WSWC yesterday to discuss a request that Rep. Bill Shuster (R-PA), Chair of the House Transportation and Infrastructure Committee, has requested assistance in educating members of his committee regarding water issues. WSWC agreed to work with Lewis to set up a meeting with Shuster to discuss water supply issues. Other Congressmen may attend. Shuster would like to return to regular order for the Water Resources Development Act (WRDA) and feels that more education is needed for his Committee's membership.

INDIAN WATER RIGHTS UPDATE/2015 WSWC-NARF SYMPOSIUM

Nathan provided an update on Indian water rights, noting that Congress passed two settlement bills, neither of which included any federal funding and relied on private funding instead.

The first settlement bill pertained to the Hualapai Tribe in Arizona and approved settlements involving the tribe's objections to a proposed water rights transfer sought by Freeport McMoRan, a mining company. Under the agreement, Freeport and the United States would acknowledge the tribe's right to 694 acre-feet of water per year in the basin. Freeport would also implement certain protections for the tribe's water uses on culturally significant lands, and make a financial contribution into the tribe's Economic Development Fund. The tribe would use this money to address water needs on its main reservation along the Colorado River. The settlement does not involve any federal funding and does not resolve the tribe's outstanding water rights claims regarding its main reservation.

The second settlement bill authorizes an agreement between the Pyramid Lake Tribe in Nevada and a private water company. The agreement would resolve the tribe's objections to a project the company is developing that could potentially send up to 13,000 acre-feet of groundwater per year to the Reno, Nevada area. As part of the settlement, the company would make a number of payments to the tribe for various purposes. While the agreement does not involve any federal funding, it does require Congressional authorization for the tribe to execute certain waivers and releases of claims.

Next, Nathan outlined various activities the WSWC is undertaking to support the negotiated resolution of Indian water rights claims, including: (1) the development of possible bill language to permanently extend the Reclamation Water Settlements Fund (RWSF), which sets aside \$120M per year from the Reclamation Fund starting in 2020 for certain authorized settlements, but is set to expire in 2035; (2) the next biennial Symposium on the Settlement of Indian Reserved Water Rights Claims, which the WSWC will co-sponsor in the summer of 2015 with the Native American Rights Fund, possibly in Reno in conjunction with the Pyramid Lake Tribe; and (3) consultation with the Department of the Interior regarding its efforts to re-evaluate its approach to settlements.

Nathan noted that Cindy Chandley developed the draft legislative language for the RWSF, located under Tab Q of the briefing books. Nathan requested comments on the language

and explained that the intent is to begin a discussion about what such language could potentially look like.

NEXT STEPS REGARDING THE USFS'S PROPOSED GROUNDWATER MANAGEMENT DIRECTIVE

The Committee skipped this topic in light of the U.S. Forest Service's earlier presentation and the related discussion that took place during the Water Resources Committee meeting.

WSWC-WESTFAST FEDERAL NON-TRIBAL WATER RIGHTS WORKGROUP AND CLEARINGHOUSE

Nathan reported on the next steps that have emerged from the July workshop the WSWC and WestFAST held to discuss ways to improve the resolution of federal non-tribal water rights claims. The workshop was held in conjunction with the WSWC's summer meetings in Helena and brought together over 40 state and federal experts from around the West. Next steps that emerged from the workshop include the establishment of a state-federal workgroup to foster collaboration and relationship building, as well as the development of a clearinghouse of relevant information.

To carry out the deliverables that emerged from the workshop, the WSWC and WestFAST have convened a state-federal workgroup that will hold quarterly calls. The workgroup will hold its next call in November to discuss the development of the clearinghouse and to identify specific topics, such as the McCarran Amendment, that may warrant more focused discussion, including possible webinars. Nathan and WestFAST Liaison Pat Lambert have also begun the process of coalating materials for the clearinghouse.

LEGISLATION AND LITIGATION UPDATE

Nathan gave a brief update on notable legislation and litigation, referring members to a detailed written summary under Tab T.

In particular, he discussed *San Luis Delta Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014), a recent 9th Circuit decision that upheld a biological opinion (BiOp) the Fish and Wildlife Service (FWS) issued regarding the impacts of the Central Valley Project and the State Water Project in California on the threatened Delta smelt. In upholding the the BiOp, the 9th Circuit reversed a lower court decision that had struck down the BiOp, finding that the court erred in admitting testimony from experts that the parties had retained instead of deferring to the FWS' scientific judgement. The 9th Circuit also held that the FWS was not required to consider economic and technological feasibility in developing the BiOp. Plaintiffs, which include federal and state water contractors, are now appealing the decision to the U.S. Supreme Court and are

seeking amicus support. Amicus briefs are due on October 21. Notably, the states of Alaska, Kansas, Oklahoma, Nebraska, South Carolina, and Wyoming had filed earlier amicus briefs before the 9th Circuit asking it to rehear the case but the 9th Circuit declined the request.

OTHER MATTERS

Michelle Klose noted that the Bureau of Land Management recently published surveys claiming ownership of mineral resources located beneath property claimed by North Dakota. Michelle indicated that the surveys may pertain to other states as well, and asked if any other members had further information.

Nathan noted that Brian Dunnigan in Nebraska (who was not present at the meeting) had received a request from the Office of Homeland Security for comments on a report describing water resources policies relating to the Ogallala aquifer and the Platte River. The Office of Cyber Security and Infrastructure Protection within the National Protection and Programs Directorate prepared the report with assistance from Sandia National Laboratories. At Brian's request, Nathan asked if any other members had seen the report or had any additional information. None of the members present at the meeting indicated that they had any additional information. Pat also indicated that he circulated a request for information among the WestFAST agencies but had not received any additional information either.

There being no other matters, the meeting was adjourned.