

**MINUTES  
of the  
LEGAL COMMITTEE  
Hard Rock Hotel & Casino Tulsa  
Tulsa, Oklahoma  
April 16, 2015**

**Table of Contents**

Welcome and Introductions .....	3
Approval of Minutes .....	3
Sunsetting Positions .....	4
2015-2016 Draft Committee Workplan .....	4
Indian Water Rights Settlement Update .....	4
Discussion and Update: USFS Proposed Groundwater Management Directive .....	6
Update: WSWC-WestFAST Federal Non-Tribal Water Rights Workgroup .....	8
Litigation and Legislation Update .....	8
Other Matters .....	8

**MINUTES  
of the  
LEGAL COMMITTEE  
Hard Rock Hotel & Casino Tulsa  
Tulsa, Oklahoma  
April 16, 2015**

**MEMBERS AND ALTERNATES PRESENT**

<b>ALASKA</b>	--
<b>ARIZONA</b>	Cynthia Chandley Tom Buschatzke
<b>CALIFORNIA</b>	Jeanine Jones
<b>COLORADO</b>	Trisha Oeth
<b>IDAHO</b>	Jerry Rigby
<b>KANSAS</b>	Tom Stiles Chris Beightel Tracy Streeter
<b>MONTANA</b>	Tim Davis
<b>NEBRASKA</b>	--
<b>NEVADA</b>	--
<b>NEW MEXICO</b>	Greg Ridgley Tom Blaine
<b>NORTH DAKOTA</b>	Jennifer Verleger
<b>OKLAHOMA</b>	JD Strong
<b>OREGON</b>	Tom Byler
<b>SOUTH DAKOTA</b>	Kent Woodmansey
<b>TEXAS</b>	Robert Mace
<b>UTAH</b>	Norm Johnson Eric Millis

**WASHINGTON**

--

**WYOMING**

Pat Tyrrell

**GUESTS**

Gary Rowe, NAWQA - USGS, Denver, CO  
David Mullan, Venable LLP, Washington, DC  
Chris Carlson, USDA Forest Service, Washington, DC  
Mike Mathis, Continental Resources, Oklahoma City, OK  
Carlee Brown, Western Governors' Association, Denver, CO  
Rudy Herrmann, Oklahoma Water Resources Board, Tulsa, OK  
Brittnee Preston, Oklahoma Water Resources Board, Washington, DC  
Mary Schooley, Oklahoma Water Resources Board, Oklahoma City, OK

**WESTFAST**

Patrick Lambert, WestFAST Liaison, Salt Lake City, UT  
Jean Thomas, U.S. Forest Service, Washington, DC  
Becky Fulkerson, Bureau of Reclamation, Washington, DC  
Andrew Hautzinger, Fish and Wildlife Service, Albuquerque, NM

**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 Scottsdale, Arizona in October 2014 were moved for approval, seconded and passed unanimously.

### **SUNSETTING POSITIONS**

The Committee reviewed one sunseting position, Position #340 – Supporting State Primacy Over Groundwater. Nathan stated that the WSWC has a companion policy that was adopted at the last meeting and that these positions are meant to be read in conjunction. We have proposed changes by the Executive Committee.

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

### **2015-2016 DRAFT COMMITTEE WORKPLAN**

Nathan reviewed the workplan tasks, noting that these are proposals to be fleshed out and finalized at the Summer meeting in July.

The State and Federal Collaboration effort was put on hold until Nathan's replacement gets on board, so they can give their own input.

Nathan proposed deleting the Water Conservation item, since it has been continually put off during Nathan's tenure with the WSWC.

The Clean Water Act item may need to be revised prior to the next meeting.

### **INDIAN WATER RIGHTS SETTLEMENT UPDATE**

David Mullon, Venable, LLP (in Washington, D.C.) provided an updated on Indian Water Rights Settlements and the earmark ban. His remarks focused on a recent letter from the House Natural Resources Committee to the U.S. Attorney General. The letter is recognized as trying to create a path forward for Indian water rights settlements, given the House earmark ban. He read directly from the letter, signed by Chairman Rob Bishop (R-UT). (See powerpoint presentation posted on [www.westernstateswater.org](http://www.westernstateswater.org)).

Through the letter they are trying to demonstrate that tribal settlements are not an earmark, and that this it is not an exception to the earmark ban. It is a benefit to the entire nation (all American taxpayers). They reference the settlement criteria adopted in 1990, now 25 years ago. The statement in the letter is changing the manner for considering proposed legislation that would approve an Indian water right settlements.. The control over the content of a settlement is being shifted to the Administration and to the Office of Management and Budget (OMB).

The responsibility of driving a settlement forward is now placed on the Administration – at least while Chairman Bishop is in leadership. Mullon spoke briefly about Senator Kyl and

Senator Toomey's colloquy agreeing that funding negotiated settlements is not an earmark. Senator Kyl emphasized the American taxpayer being the beneficiary of the settlements. This was not going to work on the House side.

The letter is not just the Chairman's letter. It was heavily vetted among various members. They want to maintain the integrity of the earmark ban, but they want to allow Indian water right settlements to get through.

### **Questions and Answers**

Jay Weiner asked if he had visited with the Department of Justice (DOJ) and Mullan responded he had not. DOJ has not been ready to talk. They are not willing to give us their views. Nathan explained about some of the discussions WSWC has had with the Native American Rights Fund (NARF) and others, and a meeting with Kiel Weaver and other House staffers.

Greg Ridgley: It seems like the House is giving up a lot of control? Why?

David: I don't think they are giving up authority. The earmark ban is driving things. The letter says if you want a water rights settlement approved, you have to do what this 1990 criteria says you have to do. They are not giving up power, but they are saying there will be no settlements unless you do this. The ultimate authority for approving legislation is the U.S. Congress, but they are asking that the DOJ express their support for legislation to implement negotiated settlements.

Greg: You also pointed out that a couple of requirements are to be done in the adjudication court. How many have been done without a water adjudication proceeding.

Cindy Chandley: Hualapai. It isn't done yet.

David: It doesn't meet the express definition of an earmark. There are broad definitions of an earmark. It does not appear to be what is being addressed. It requires a specific amount of money being in there.

Cindy: It is a phased settlement.

David: The House of Representatives and the Senate are both political bodies, and they can make their arguments.

Norm Johnson: The idea of taking it to the courts before Congress will approve the settlement may be problematic. That was not like the process that is described. We don't have pending litigation in the Utah Navajo situation.

David: In Utah, as these settlement processes go forward, you'll have to decide how that situation falls within this letter. You may want to remind Kiel Weaver about the phrase in the letter where it says, "rather than litigation," to see how much wiggle room there is.

Cindy: As I look at this letter, I feel like we'll never get another settlement through. The game has changed now, with including the Administration before considering a bill. With Justice and Interior, they don't always tell each other everything. Where is Congress in all of this? How do we find our leverage point now?

David: There are two houses. There is the Senate. You can do a lot of pushing and pulling on the Senate side. It doesn't mean that no one can have a role in pushing the Congress forward.

Tony: I asked that same question in our conversation with the House staff. What if the bill comes from the Senate? It didn't appear they had considered that. One way that Congress might still pull some is for the Congress to put pressure on the Administration to send it settlements for approval.

David: There was a lot of chatter about the Crow deal, and I know there was no question that if this letter had been in force, you would have needed to have the tribe on board before the settlement is completed. DOJ will not sign anything, nor will Interior unless the tribe is on board. I was involved in settlement discussions with the Choctaws and it will be challenging. It can be done, but it is trickier.

Jay: This letter is going to require more creativity.

### **USFS PROPOSED GROUNDWATER MANAGEMENT DIRECTIVE**

Nathan Bracken reviewed the background of the dialogue between the WSWC and the U.S. Forest Service (USFS) and a February in-person meeting. He expressed the importance of continuing it. We were able to come up with consensus areas to begin the process of fixing the document.

Now that this has been stopped, can we go back and continue making consensus changes? Jean and Chris are going to look into this. We may want to try a new dynamic. We may be able to have more engagement and additional time to work through the issues.

Nathan asked about the time line. Chris replied that he believes that as long as the Chief is allowing the stop, he is willing to listen to comments, and give us more time to work through the issues. Part of the problem with the directive is the authority section. We talked about a way to add disclaimers to the document, and having protective language elsewhere.

Nathan went through the edits that have been suggested by states. Key changes were made to Section 2560.02, Objectives, on page 8, regarding management authority and state

primacy over water rights allocation, administration and regulation. The Policy Section 2560.3, subsections 2(a) and (b), also on page 8, address water resource connectivity. There was a lot of concern about assumptions that groundwater and surface water are connected. The USFS is saying they are not going to change anything we are going to do. On page 14, Washington Office, Staff Director – Oklahoma suggested a general responsibility statement of non-interference with state authority, cross referencing the other disclaimers in the document. South Dakota commented on the unclear meaning of “timing of groundwater.

The definitions section was something we dealt with extensively. We felt it was necessary to define the term “manage.” We used the term used by Tidwell in his testimony. That particular term may need more work. Oklahoma suggested edits to Section 2561 on pg 24, Consideration of Groundwater Resources in Forest Service Projects, Approvals and Authorizations.

Oregon and Oklahoma suggested extensive edits to Section 2567 on pg 40, Legal Considerations in Management of Groundwater Resources. Recent decision by California federal district court, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, et al.*, highlights concern, because a federal district court is recognizing groundwater as part of federal reserved water rights on an Indian reservation.

The last section is 2568 on pg 41, Strategies for Sustaining Groundwater Resources. Recommended changes give the USFS tips on how to deal with the states.

JD brought up several changes to the Authority section, 2560.01, starting on page 4. JD’s point would require a fair amount of work. Jean Thomas gave her opinion on the Authority section. The Forest Service needs to make sure the water is okay.

Nathan: Politically, we made our comments very surgically.

JD: If we have the liberty of more time, it may be a good exercise to go through the language. New Mexico found themselves having to defend themselves on CERCLA. The language should be very specific. It should be specific to the expanse of the authority.

Chris: I think we should sit down and go through this. I would guess that we have very different perspectives on who has authority from the Forest Service side. It would not be a fun exercise, but it would be useful.

Nathan suggested that maybe what we should do is decide how we can move forward. A stoppage may remove some of the politics. If we can take a fair amount of time to chat with the Forest Service that may change the process. I would suggest that we will probably need a subcommittee of folks to sit down and work through this. Nathan thanked Chris for sitting down and talking with us on this issue.

Tony said he would presume that we can still have conversations though the directive is stopped. Tony also mentioned Sara's work in putting together a mapping tool on wells. We can do some technical support work to help the states and USFS better define what the problem is and what they want. Greg Ridgely, New Mexico; JD Strong, Oklahoma; Kent Woodmansey, South Dakota; Jennifer Verleger, North Dakota; Tom Byler, Oregon; Pat Tyrrell, Wyoming, and Norm Johnson, Utah, are all willing to be part of a work group. Further, the Legal Committee generally is interested in working on the comments on the document further.

Chris Carlson: The Chief is willing to allow some room to reach agreement on some of the issues that were raised with the draft. We are ideally trying to do this in the most efficient manner possible.

Nathan said there may be efforts to also look at MOUs, or give more help to the Forest Service on similar efforts.

### **WSWC-WESTFAST FEDERAL NON-TRIBAL WATER RIGHTS WORKGROUP**

There has been some continuing discussion regarding appropriate next steps, building on past work, including the possibility of some webinars or workshops to educate and provide a forum for further discussions on ways to meet non-tribal federal water needs with the context of state water law. Given Nathan's departure from the Council, further work will be delayed somewhat pending hiring of his replacement.

### **LEGISLATION AND LITIGATION UPDATE**

Nathan described *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, et al.*, the California case that is included in Tab U, related to a federal district court's recognition of a federal reserved right to groundwater.

Jeanine talked about the Coachella Valley in California's southeast section. Groundwater is recharged extensively by Colorado River water. There are two primary water districts that overlie this area and it is a special act district, i.e., they were given special authority to manage groundwater. This has been an area where there was already management in place. The tribe that filed the action is a "casino" tribe. They are one of several bands of Indians that have small claims throughout the valley. They own much of the land in Palm Springs. The basin is groundwater dependent and over the long-term that has been significant depletion of groundwater, which is why the local management power was given. The judge recognized there were many different opinions on this issue, and realizes he could potentially be overturned. Therefore, he stayed his decision pending appeal.

Regarding regulatory authority, Representative Paul Gosar (R-AZ) introduced a bill (H.R. 594) to withdraw EPA's Waters of the United States (WOTUS) jurisdiction rule, and require EPA and the Army Corps of Engineers to come up with a new rule. This new bill is

focused on the process. It was reported out of committee yesterday and is expected to pass the House easily. It could pass the Senate as well, but that is not known.

**OTHER MATTERS**

There being no other matters, the meeting was adjourned.