

MINUTES
of the
LEGAL COMMITTEE
Hard Rock Hotel & Casino Lake Tahoe
Stateline, Nevada
July 9, 2015

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MEMBERS AND ALTERNATES PRESENT

ALASKA	David Schade
ARIZONA	Tom Buschatzke
CALIFORNIA	Jeanine Jones Betty Olson
COLORADO	Trisha Oeth Hal Simpson
IDAHO	Jerry Rigby
KANSAS	
MONTANA	John Tubbs Susan Cottingham
NEBRASKA	
NEVADA	Jason King Roland Westergard
NEW MEXICO	Tom Blaine Greg Ridgley
NORTH DAKOTA	Michelle Klose Andrea Travnicek Jennifer Verleger
OKLAHOMA	J.D. Strong
OREGON	Tom Byler
SOUTH DAKOTA	Kent Woodmansey

TEXAS

Robert Mace
Stephen Tatum

UTAH

Norm Johnson
Walt Baker
Eric Millis

WASHINGTON

Buck Smith

WYOMING

Sue Lowry
Pat Tyrrell

GUESTS

Alexandra Davis, Denver, CO
David Moon, The Water Report, Eugene, OR
Susan Cottingham, WSWC Consultant, Helena, MT
Carlee Brown, Western Governors' Association, Denver, CO
Joan Card, U.S. Environmental Protection Agency, Denver, CO
Christopher Estes, Chalk Board Enterprise, LLC, Anchorage, AK
Don Ostler, Upper Colorado River Commission, Salt Lake City, UT
Jordan Bunker, Southern Nevada Water Authority, Las Vegas, NV
Steve Wells, Chief, BLM Division of Fluid Minerals, Washington, DC

WESTFAST

Patrick Lambert, Federal Liaison, Murray, UT
Jean Thomas, U.S. Forest Service, Washington, DC
Anita Thompkins, U.S. Forest Service, Washington, DC
Becky Fulkerson, U.S. Bureau of Reclamation, Washington, DC

STAFF

Tony Willardson
Michelle Bushman
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 Tulsa, Oklahoma on April 16, 2015 were moved for approval, seconded and passed unanimously.

UPDATE: USFS PROPOSED GROUNDWATER MANAGEMENT DIRECTIVE

Anita Thompkins, Assistant Director, U.S. Forest Service, reviewed the Forest Service's withdrawn proposed groundwater directive and their intent to continue conversations with states and work toward agreements with individual states. She noted that the Forest Service's intent was not to take rights away from states, but rather to provide a consistent, credible framework for their personnel responsible for monitoring water to follow. The Forest Service is working on greater transparency, trying to prevent groundwater contamination, and monitoring the effects of activities on the groundwater.

The Chief withdrew the directive after realizing that the language of the directive created confusion and did not articulate the Forest Service's intent. They believe they've made some progress in working with the states to understand their perspective, and plan to continue those efforts. In particular, they are changing their language from "management" of water resources to "stewardship." Noting that there will be changes in the Administration and indicated that the Forest Service wants to continue the conversation in the interim. There were nine main issues between the states and the Forest Service, and they were able to get through seven of them and see eye to eye. On the other two issues, for now the parties have agreed to disagree. There is the potential for states to come up with a template for individual state-Forest Service agreements/MOUs.

Comments:

J.D. Strong: I just want to say "Thank You." Hope that other agencies will follow Forest Service example. We'll work on going forward now that the proposed directive has been withdrawn.

David Schade: It was refreshing that our comments were heard, and believe there are some real positives that can come out of this. Thank you.

INDIAN WATER RIGHTS SETTLEMENT SYMPOSIUM

Susan Cottingham, Consultant with WSWC and Montana Water Rights Compact Commission, provided some details about the upcoming Symposium. Referencing the agenda, she noted that the Pyramid Lake Paiute Tribe is hosting the event as well as the cultural activity. The Congressional committee panels will take place on the final day of the Symposium. She reminded everyone of the early registration deadline, and noted that the Symposium usually draws more than 250 attendees.

ARCHES NATIONAL PARK WATER RIGHTS AGREEMENT

Norm Johnson, Utah Assistant Attorney General, provided a summary of the recent Arches National Park Water Rights Agreement between Utah and the National Park Service, which took thirteen years to complete. This is the tenth reserved water rights settlement that has been completed in Utah. The state has made the choice to negotiate the reserved water rights claims to provide greater certainty for water users, and, continuing the momentum, is currently working on a settlement for Bryce Canyon National Park as well as the Navajo Nation.

The Arches agreement preserves in situ uses as diligence claims, and creates a protection zone outside the Park based on sound science. With past settlement experiences, the state-federal relationship of trust has developed over time. Reaching the agreement required significant patience and flexibility, and communications with local water users and legislative officials, some of whom have very strong ideas about federal lands within the state.

Question/Answers:

Jason King: Where does this settlement fit with the McCarran Act and adjudication?

Norm: We will take the settlement to the court that has general adjudication authority in that area, and we will make a determination, which is the State Engineer's recommendation to the court of what the right should be. If it follows the pattern that the Zion National Park water rights settlement did, it was the only set of rights included in that proposed determination. We'll present the determination to the court, and the court will then publish that notice to all the other water users, who then can come in and object if they choose. Then we would have to work out the objections before it becomes an interlocutory decree, with the intent that it would become part of the final decree when the adjudication is finished. Our adjudications move very slowly in Utah. When we did Zion National Park, we had some objections we spent quite a bit of time resolving, but we were able to do it without litigating. Hopefully, in this case, there's been so much work with the local people that most of them understand and would not object to the settlement because they had some feeling that this settlement already protects their water rights.

Buck Smith: Arches started out as a National Monument before it was a Park. What was the priority date used for the settlement?

Norm: There were about six different reservations of different parts of the Park, and we agreed to use one date for the priority of the water right.

Greg Ridgley: How did you approach the quantification of the rights?

Norm: It takes 128 acre-feet to provide for all the administrative uses and protect the in situ uses. It took the technical personnel quite a bit of work to come up with those numbers for the settlement.

WSWC-WESTFAST FEDERAL NON-TRIBAL WATER RIGHTS WORKGROUP

Michelle Bushman and Pat Lambert reported on the quarterly meetings of the workgroup and efforts to put together a webinar on the McCarran Amendment for Fall 2015 to facilitate conversations and improve state-federal relationships concerning federal water rights in state adjudications.

BLM HYDRAULIC FRACTURING RULE

Steve Wells, Chief, BLM Division of Fluid Minerals, gave a presentation by phone on BLM's new hydraulic fracturing rule, Published March 26, 2015, which was scheduled to go into effect on June 24, now postponed due to the court injunction. The rule addresses groundwater quality concerns about inter-well communications, particularly with chemicals and additives in large volumes of fracturing fluids. The rule requires public disclosure of chemicals on the FracFocus registry, documentation of wellbore integrity, and safe management of recovered fluids.

Horizontal drilling and hydraulic fracturing have place the U.S. in the top third of the world's major energy reserves. The emergence of these innovative technologies come with some concerns about the protection of groundwater and surface water. As a land manager for the public, BLM wants to ensure that these concerns are addressed through reporting, documentation, and safe management. Steve presented additional details about the rule requirements once they go into effect, noting that certain operations will be grandfathered in. He also provided information regarding operator requested variances that can apply to wells statewide or across tribal lands. He described isolation of usable water to prevent contamination, and stated that the rule adopts state and tribal decisions on underground sources of usable water that don't need to be isolated and protected. He noted that the new rule explicitly does not preempt state regulation, and that many states have MOUs with BLM to streamline and coordinate information sharing, with the intent to work together to decide whether MOUs need to be updated to make sense.

ROUNDTABLE: 50 YEARS OF WESTERN WATER LAW

Roundtable discussion of what has happened in the development of state and federal water law over the past fifty years, and a chart that shows various water-related events in the Western U.S.:

Roland Westergard: In NV and perhaps across the West, our predecessors in State governments have been very thoughtful and resourceful through the years. The sound basis should be subject to review only if those changes were necessary. Take a good hard look at the processes under which you operate, and maybe use some constraint. Minor modifications and fine tweaking may be necessary, but end results are not always what you intended if you make more serious changes.

Jason King: I agree with what Roland just said. In over appropriated basins we are seeing sometimes that people pump just to retain their water rights. The stress on the resource is reaching critical mass. Sometimes 5 af or less of water are becoming very litigious. We spend a lot of time in the courts.

Hal Simpson: The State of CO was not included in the listing, and there should be some important groundwater and conjunctive use features.

Greg Ridgley: This is a fascinating document. I think it would be valuable for all of the states to give their input, and it would be very useful to give new lawyers in our office the big picture.

Tom Blaine: There has been a lot happen just in the last six months, which is my tenure in this position. I echo Jason's sentiments.

Jeanine Jones: I see this document as a chronological example of things that have happened in water law over the years.

Jerry Rigby: I can see that this document could be useful for the states to see how things have developed over time.

Stephen Tatum: TX is flush with water right now. We got enough rain this spring and summer to cover the entire state in nearly 8 inches of water, and so we have climbed out of the drought. We need to make sure that when the next drought hits, we are more prepared to deal with it.

Dr. Mace: I think history is important, and we will provide some comments.

J.D. Strong: This is a great start. Maybe we should mark it "draft," until we get it in shape. If it is to mark the major milestones in western water law, we should make sure that the major elements are included.

Chris Brown: WY would be happy to give our input.

Norm Johnson: I agree with all that has been said, and I agree with Roland on the beneficial use. We have made a lot of progress here since the WSWC's inception and I think we should include the progress with the federal gov't as well.

David Barfield: In KS, we have a bullet list that is 5 pages alone, so trying to determine what should and what should not be included will be difficult.

Susan Cottingham: I agree that since history is supposed to help shape the future and will help instruct the Council's vision for the future. Tribal settlements are supposed to give finality.

Jeanine: We should think about why we are doing this

Carlee: I think you may want to consider farming this out to a University or something where they have the time and resources to complete it.

Jerry: I think this document is and can be very useful. But I agree with Jeanine that we need to decide the parameters. I think we started something here, and we ought to continue the process.

Norm Johnson: I think we need to be really careful with overburdening the staff with something like this.

Jeanine: I appreciate the effort, but I don't think we should spend a lot of staff time. If with the 50th anniversary in mind, this could be nice to emphasize a short bullet list.

John Tubbs: We may want to put a star next to the items we think the WSWC influenced, and make it so that it could be useful for our governors.

Pat Tyrrell: This has the makings of a National Geographic graphic.

Jennifer: Thank you, and we will take your comments and report back at a future meeting.

LEGISLATION AND LITIGATION UPDATE

Michelle Bushman provided a summary of the Legislation and Litigation Table included in the Briefing Book. Since the last update at the Tulsa meeting, three bills passed (S. 653, S. 611, and H.R. 1030). Several bills were introduced (or made further progress) relating to EPA's Waters of the U.S. rule (House: H.R. 2705, 2599, 1732, 1830, 1935; Senate: S. 982, 1045, 1140, 1178, 980.) There were also several bills relating to Bureau of Reclamation infrastructure

(House: H.R. 2489, 2273, 2029; Senate: S. 1305, 1291, 1552, 1365, 1533) and Indian water rights settlements (H.R. 1406, S. 501, and S. 1125)

Other recent bills from the House include H.R. 2227 (extreme weather events), 1060 (Sacramento Valley Water Storage), 1710 (expands infrastructure financing options during declared drought), 1709 (risks of drought to drinking water), 1705 (financial assistance for municipalities/sewer authorities for CWA compliance, and modifies effluent limitations for peak wet weather events), 1668 (suspends ESA application to water storage during declared drought emergency), 1623 (amend CWA NPDES permit cycle from 5 to 20 years)

Other bills from the Senate include S. 1416 (limits Fed Reserved Water Rights for new national monuments)

Notable litigation since March includes (1) at least six WOTUS cases filed against the EPA and US Army Corps of Engineers including 28 states (among them AK, AZ, CO, ID, KS, MT, ND, NE, NM, NV, OK, SD, TX, UT, WY) and 14 industries (farming, ranching, forestry, mining, petroleum, transportation, building and manufacturing); and (2) a case opposing BLM's new hydraulic fracturing rule (including CO, ND, UT, WY)

In the *Catskills* water transfers (NPDES exception) case, the briefing was completed in January 2015, and the parties continue to wait for the 2nd Circuit court to schedule a hearing.

Requests were made to include updates on *Aransas Project v. Shaw* (5th Cir.) (whooping cranes and water diversions); *Texas v. New Mexico and Colorado* (S. Ct.) (Rio Grande Compact); *In re Katrina Canal Breaches Litigation/St. Bernard Parish v. U.S.* (U.S. Corps of Engineers liability for canal breaches in New Orleans during Hurricane Katrina); and *Chickasaw and Choctaw Nations v. Gov. Fallin, OWRB, and Oklahoma City*

2015-2016 DRAFT COMMITTEE WORKPLAN

The revisions to the workplan were reviewed and one change was made to remove a portion of the new paragraph under item 2, CWA Jurisdiction. In the second sentence, a period was inserted after "The final rule incorporates some of the changes requested in Position #373" and the remainder of that sentence was deleted. With that modification, a motion was made and seconded to approve the workplan, and the Committee unanimously approved.

OTHER MATTERS

There being no other matters, the meeting was adjourned.