

**MINUTES  
of the  
LEGAL COMMITTEE  
Radisson Hotel  
Bismarck, North Dakota  
July 14, 2016**

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**MEMBERS AND ALTERNATES PRESENT**

<b>ALASKA</b>	David Schade
<b>ARIZONA</b>	Einav Henenson
<b>CALIFORNIA</b>	Betty Olson
<b>COLORADO</b>	John Stulp
<b>IDAHO</b>	Jerry Rigby John Simpson
<b>KANSAS</b>	--
<b>MONTANA</b>	Tim Davis Jay Weiner (via phone) Susan Cottingham (via phone)
<b>NEBRASKA</b>	Jim Macy Jeff Fassett
<b>NEVADA</b>	--
<b>NEW MEXICO</b>	Greg Ridgley John Longworth
<b>NORTH DAKOTA</b>	Garland Erbele Andrea Travnicek Jennifer Verleger
<b>OKLAHOMA</b>	--
<b>OREGON</b>	Tom Byler
<b>SOUTH DAKOTA</b>	Kent Woodmansey
<b>TEXAS</b>	Jon Niermann

	Robert Mace
<b>UTAH</b>	Norm Johnson
<b>WASHINGTON</b>	Mike Gallagher
<b>WYOMING</b>	Steve Wolff Chris Brown

### **GUESTS**

Dave Mitamura, U.S. Army Corps of Engineers, Austin, TX  
Aaron Snyder, U.S. Army Corps of Engineers, St. Paul, MN  
Jim Fredericks, U.S. Army Corps of Engineers, Portland, OR  
Cherilyn Plaxco, U.S. Army Corps of Engineers, Little Rock, AR  
G. Edward Dickey, U.S. Army Corps of Engineers, Dickinson, ND  
Rick Deuell, Wyoming State Engineer's Office, Cheyenne WY  
Shelby Shields, North Dakota Attorney General's Office, Bismarck, ND  
Chaunsey Chau-Duong, Southern Nevada Water Authority, Las Vegas, NV

### **WESTFAST**

Patrick Lambert, Federal Liaison, Murray, UT  
Becky Fulkerson, Bureau of Reclamation, Washington, DC  
John D'Antonio, U.S. Army Corps of Engineers, Albuquerque, NM

### **STAFF**

Tony Willardson  
Michelle Bushman  
Sara Larsen  
Cheryl Redding

### **WELCOME AND INTRODUCTIONS**

Jennifer Verleger, Chair of the Legal Committee, called the meeting to order, and requested introductions be made around the room.

## **APPROVAL OF MINUTES**

The minutes of the meeting held March 22, 2016 in Washington, DC were moved for approval, and a seconded was made. The minutes were unanimously approved.

## **FARGO-MOORHEAD FLOOD RISK MANAGEMENT**

Aaron Snyder, St. Paul District Office, U.S. Army Corp of Engineers (Corps), reviewed a powerpoint presentation on the Corps' Fargo-Moorhead demonstration project aimed at alternatives to get needed infrastructure in place. The Corps' civil works infrastructure systems are aging and experiencing negative performance trends, and demands for maintenance, operations, and capital investment are expanding. Projects can drag on for 15-20 years or more with \$150M price tags for front end costs. Congress does not appropriate money quickly and can't make commitments for future appropriations without up front scoring by the Congressional Budget Office (CBO), and years of underinvestment in infrastructure have imposed massive economical costs. The Corps has been trying to think differently about its approach to both finance and delivery. They are seeking to meet Administration intent while protecting tax payer and federal equities. With public-private partnerships (P3), the front end costs are covered by private investors, with the government paying for the back end costs to maintain the projects.

Current demonstration programs include the Illinois Waterway inland navigation operations and maintenance; Grand Prairie water supply; and the Ala Wai feasibility study to bundling a flood risk project with water quality, ecosystem and recreation features.

The Fargo-Moorhead project was one of only six new construction starts for the Corps, approved by H.R. 2029 (P.L. 114-113). The project will demonstrate proof of concept for both accelerated project delivery and payment mechanisms that include P3, with a viable strategy for reducing the Corps' backlog of projects while also mitigating critical life and safety risks and economic impacts in North Dakota and Minnesota. The area is subject to variable cycles of flooding and dust bowls, with frequent flooding in recent years (flood stage exceeded in 20 of the past 22 years.) There are emergency levees, and the local emergency response is good at fighting floods with sandbags and evacuations, but they have been close to losing the fight several times.

The project includes a 30-mile, 200,000 cfs diversion channel, two aqueduct and two control structures, one diversion inlet control structure, and a southern embankment. It provides benefits to more than 70 square miles of existing infrastructure, with the ability to fight floods up to a magnitude 500-year flood event. Local sponsors of the federal project include the cities of Fargo and Moorhead and the Flood Diversion Authority, with local partners including Cass County, ND and Clay County, MN, as well as the Buffalo-Red River Watershed District and Cass County Jt. Water Resource Board. Local sales taxes, state funding, and special assessment districts have secured the local financial share. The private-public partnership has reduced the number of contracts necessary, enables simultaneous construction of different parts of the project, and allows an optimal delivery schedule of 6.5 years. The Corps functions more as an

advisor on this federal project, handling the NEPA documentation and working with sponsors on the technical requirements, with the local contract and construction risks transferred to the private sector. Corps is trying to learn from this project which risks are best to transfer to the private sector and which should be retained. With the innovative approach, taxpayers will save about \$400 million to be able to build it now rather than over a longer period of time, and the benefits to the population and infrastructure will be realized sooner.

**Questions:**

Mike Gallagher: So there was pretty broad public support for this project?

Aaron: Generally, the project had broad support from the local communities. Landowners impacted by the project didn't all support it.

Mike Gallagher: Assuming a 100-year flood, what is the impacts at the diversion element in the north?

Aaron: There's actually some benefits. The area we see impacts in was the south. That's the purpose of the southern embankment, which functions as a dry dam. During our study we determined it would have the effective of sending a 2' wave all the way into Canada, impacting about 1,500 structures. We had to figure out how to modify the project and offset those impacts. The result was an upstream staging area south of the purple line on the map, impacting less than 100 homeowners, primarily agricultural property. It is designed to only operate in the spring before crops are planted. We've done some assessments on damages due to delayed crop planting. We're looking at some kind of insurance or program for crop damages if that occurs.

Mike Gallagher: The velocity of the water would be slow enough at the outlet that it doesn't just move the flood downstream?

Aaron: Exactly, and that's what the storage does. The velocities in this area are exceptionally slow because it's super, super flat.

John D'Antonio: Is the southern embankment a hydrologically separable element for the project?

Aaron: It is a hydrologically separable element that was not justified on an economic basis. We are pursuing it under traditional work-in-kind authorities. The local sponsors are constructing way more than they normally would.

Tony Willardson: You mentioned the availability payments. Is that a series of payments then?

Aaron: Yeah, so the period of operation and maintenance will be 30 years after construction. And they will make an availability payment each year for 30 years. But you're not paying for all of that money upfront, so you don't have to go out as a state and bond for it. You can spread the

payments out over a long period of time, so the community benefits. In theory a project designed like this will last 100+ years.

Tony: You said there were six new starts authorized. Could you talk about the return on the federal investment?

Aaron: So every Corps project has to go through a cost-benefit analysis, and Congress has all that information, and OMB. I'm not sure how the other five projects were selected, but I know that the alternative financing for this project is what helped it get through. We argued that federal return on investment was a good metric, and that's something were piloting here. It's definitely not something everyone has bought into, but we believe that's a good indicator of leveraging limited federal resources. The federal return was 705%, which includes federal costs and all the benefits from the project. This excludes a lot of the local costs.

### **NATIONAL WATER SUPPLY ALLIANCE UPDATE**

Jennifer Verleger reviewed a portion of the recitals for the recently formed National Water Supply Alliance, and noted that the NWSA is keeping an eye on WRDA and the Corps' pending water supply rule. The NWSA provides a good opportunity for networking and altering us to water supply issues.

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

Pat Lambert, WestFAST Liaison, gave an update on the Federal Non-Tribal Water Rights Workgroup. In 2014, this group was convened to improve our understanding of the potential tools and mechanisms for coming to agreement on federal water rights while avoiding litigation. Since that time, the WSWC has collected materials for a library online. In November 2015 we held a webinar to better understand state and federal perspectives of the McCarran Amendment. The workgroup identified additional action items following the webinar, including the Groundwater workshop held earlier this week. Federal agencies felt somewhat unfettered by their authorizing statutes to seek alternative methods of resolving water rights claims. The workgroup wants to look at the possibility of holding a regular symposium similar to the tribal water right claims, to educate state and federal agencies about the possibilities to work together. We want to look in more detail at the case studies that were presented during the workshop. The workshop was very successful. We will continue on. Those involved in the workshops and webinars have found them very useful.

### **DC VISITS ON TRIBAL WATER RIGHTS**

Jay Weiner and Susan Cottingham provided an update on the WSWC and NARF visits to Washington, D.C. in April, as well as the implications of a memorandum from the Office of Management and Budget (OMB) to the Departments of Interior and Justice regarding OMB's involvement in Indian water rights settlements. We met with several members of Congress and the Department of the Interior. We continue to work with NARF to find possible avenues for

funding water rights settlements, and talked about the possibility of putting together a package of multiple settlements when they're all ready to move. It is still a slow and painful process, and there institutional difficulties to work through. We also discussed transition planning with the incoming Administration.

OMB is stil focused on the cost metrics of the settlements. We are trying to help them understand that settlements are cost effective compared to litigation, but it's difficult to calculate unquantifiable things like the certainty of water rights and peace in the valley as part of the cost-benefit analysis. When it comes to OMB stopping settlements at the back end due to costs, after all other parties have managed to come to an agreement, the settling parties and OMB have experienced frustration on all sides. In the past we've sought to encourage OMB to get involved earlier in the process, and Interior has made an effort to inform OMB about settlements coming down the pipeline. At the end of June, following pressure from Interior and Justice to push through on Blackfeet and Pechanga, OMB sent a letter to Interior and to Justice on how they plan to proceed on settlements in the future. There is a lot of concern that it is much too rigid a process that will hinder the ability of parties to negotiate resolutions, as they purport to require OMB approval of the Administration's negotiation position prior to negotiations commencing. The tribal communities feel OMB's memo is over-reaching, and are frustrated by OMB's failure to consult with the tribes before issuing the memo. The National Congress of American Indians sent a letter with a resolution and asked OMB to withdraw it and to engage in consultation with the tribes. Tony Willardson and John Echohawk are calling OMB next week, and we plan to draft a letter to OMB indicating that we appreciate OMB's willingness to get involved, but that we have concerns about how the nature of their involvement will impact the settlement process.

### **LEGISLATION AND LITIGATION UPDATE**

Michelle Bushman provided an update on recent legislation and litigation. Several Indian water rights settlements are moving through Congress, with the Blackfeet settlement (S.1125/H.R. 5633) recently introduced in the House, and the first settlement to work its way through the Rep. Bishop process to get around the earmark ban in place since 2010. The Pechanga (S.1983) settlement is moving forward, and the Confederated Salish and Kootenai Tribe settlement was introduced in May (S.3013). A modification to the White Mountain Apache Tribe settlement (S.2959/H.R. 5433) would clarify access to authorized funds, and the San Luis Rey settlement is also seeking an amendment (H.R. 1296).

WRDA 2016 is pressing forward in the Senate and the House (S.2848/H.R.5503) with Corps' project authorizations and various other infrastructure elements under consideration. Congress is attempting to overturn the 6<sup>th</sup> Circuit's *National Cotton Council v. EPA*, with the Zika Vector Control Act (H.R. 897), which passed the House 258-156 in May, and the Sensible Environmental Protection Act (S.1500), both of which would clarify that NPDES permits are not required for pesticides authorized under FIFRA. In May the House also passed an amended version of the North American Energy Security and Infrastructure Act (S.2012), which addresses portions of projects in the Klamath and Yakima River Basins.

New legislation recently introduced includes: the Seasonal Forecasting Improvement Act (S.1331) to improve research and data related to seasonal-to-seasonal (S2S) forecasting; the Reservoir Operations Improvement Act (H.R. 5595) directs revisions to the Corps' water manuals for flood control projects; the Western Water Supply and Planning Enhancement Act (S.2902) would keep Arizona-Nevada-California conserved water in Lake Mead rather than allocating the water to junior users; and the Northern Rockies Ecosystem Protection Act (S.3022) proposes new wilderness and segments of rivers and creeks in Idaho, Montana, Oregon, Washington and Wyoming as part of the National Wild and Scenic Rivers system, with a potential for adding to tensions over reserved water rights.

In May, the U.S. Supreme Court ruled on the *Corps of Engineers v. Hawkes* case, deciding that a jurisdictional determination is a final agency action subject to judicial review, making a distinction between preliminary and approved jurisdictional determinations. The Texas Supreme Court ruled in May that the oil and gas "reasonable accommodation" doctrine applies severable groundwater rights, requiring the owner of the groundwater to exercise due regard for the surface estate when accessing the water. The U.S. District Court for the Eastern District of Virginia completed a 4-day trial in June for *Sierra Club v. Virginia Electric and Power Co.*, on the issue of whether groundwater is subject to the Clean Water Act as a point source of pollution. In the WOTUS cases, Oklahoma recently appealed to the 10<sup>th</sup> Circuit on whether the 6<sup>th</sup> Circuit should have jurisdiction rather than the District Court, and the 11<sup>th</sup> Circuit held a hearing on the same issue on July 8<sup>th</sup>.

### **2017 NATIONWIDE PERMITS/WOTUS RULE DEFINITIONS**

Jennifer Verleger described the Corps of Engineers' published notice in the Federal Register regarding Nationwide Permits (NWP). The Corps' proposed rule also seeks input on the impact of the WOTUS rule on various NWPs. North Dakota is preparing to submit a comment letter noting that the WOTUS rule has been stayed from implementation, and informing the Corps that they may not proceed on proposed changes based on the WOTUS rule until the court cases are completed. The comments are due by August 1<sup>st</sup>, and if anyone is interested in joining North Dakota's letter, they are welcome to contact Jennifer.

### **2016-2017 WORK PLAN/SUBCOMMITTEE ASSIGNMENTS**

Chris Brown moved to approve the Work Plan and subcommittee assignments as amended. Norm Johnson seconded. Approved.

### **SUNSETTING POSITION**

Sunsetting Position #358 – for the Fall meeting in St. George



**OTHER MATTERS**

Greg Ridgley: The recent decision by the Special Master in *Texas v. New Mexico* raised the issue and highlighted the need to continue the judicial educational process with the Dividing the Waters program.

Norm Johnson: I know the primary concern for continuing the program is that the Dividing the Waters program is running out of money. If you know of a funding source that could help them out, please let them know.

There being no other matters, the meeting was adjourned.