

**MINUTES**  
**of the**  
**LEGAL COMMITTEE**  
**Abbey Inn Hotel**  
**St. George, Utah**  
**September 29, 2016**

**Table of Contents**

Welcome and Introductions .....	3
Approval of Minutes .....	4
Sunsetting Positions .....	4
Utah Water Rights Settlements .....	4
Dividing the Waters Program .....	6
<i>Texas v. New Mexico</i> .....	6
<i>Mississippi v. Tennessee</i> .....	7
Tribal Water Rights Update .....	7
Legislation and Litigation Update .....	8
2017 Nationwide Permits, WOTUS Rule Definitions .....	8
Discussion: Preparing for Administration Transition Team .....	8
Other Matters .....	8

**MINUTES  
of the  
LEGAL COMMITTEE  
Abbey Inn Hotel  
St. George, Utah  
September 29, 2016**

**MEMBERS AND ALTERNATES PRESENT**

<b>ALASKA</b>	Dave Schade Christopher Estes (via phone)
<b>ARIZONA</b>	Einav Henenson
<b>CALIFORNIA</b>	Jeanine Jones Tom Howard Betty Olson
<b>COLORADO</b>	James Eklund
<b>IDAHO</b>	Jerry Rigby
<b>KANSAS</b>	--
<b>MONTANA</b>	Jay Weiner (via phone)
<b>NEBRASKA</b>	Jeff Fassett
<b>NEVADA</b>	--
<b>NEW MEXICO</b>	--
<b>NORTH DAKOTA</b>	Jennifer Verleger Garland Erbele
<b>OKLAHOMA</b>	--
<b>OREGON</b>	--
<b>SOUTH DAKOTA</b>	--
<b>TEXAS</b>	Jim Rizk Jon Niermann

**UTAH**

Walt Baker  
Norm Johnson  
Eric Millis  
Erica Gaddis  
Boyd Clayton

**WASHINGTON**

--

**WYOMING**

Steve Wolff  
Pat Tyrrell  
Chris Brown (via phone)

**GUESTS**

Jim Fredericks, U.S. Army Corps of Engineers  
Jeff DenBleyker, CH2M HILL, Salt Lake City, UT  
Nathan Bracken, Smith Hartvigsen, Salt Lake City, UT  
Jordan Bunker, Las Vegas Valley Water District, Las Vegas, NV  
Don Barnett, Colorado River Basin Salinity Control Forum, Bountiful, UT

**WESTFAST**

Patrick Lambert, Federal Liaison, Murray, UT  
Becky Fulkerson, Bureau of Reclamation, Washington, DC  
Chris Carlson, U.S. Forest Service, Washington, DC

**STAFF**

Tony Willardson  
Michelle Bushman  
Sara Larsen  
Cheryl Redding  
Carly Hansen (intern)

**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 July 14, 2016 in Bismarck, North Dakota were moved for approval, and seconded. The minutes were unanimously approved.

### **SUNSETTING POSITION**

Sunsetting Position #358 supports legislation and administrative solutions to allow the federal government to pay state filing fees in state general stream adjudications, and affirming deference to state water law.

Jerry Rigby stated that this has been a general position of the Council. Idaho took the issue to the Supreme Court and lost, and the Council has continued to support the position since action by Congress would overturn the court's decision. Whether for general adjudications, or smaller resolutions of water rights claims, the federal government should pay their way. We still believe that in Idaho, and I think the Council should as well.

Tony Willardson: The Executive Committee recommended the position be readopted.

David Schade: In Alaska, we have this problem not only with federal claims in general adjudications, but also a refusal to pay for state-based claims. So far it hasn't been worth while to fight them on it, but it's still a continuing process.

Jennifer Verleger: In North Dakota we get letters talking about comity, which we think that they're misspelling.

Motion to recommend approval to the Full Council, seconded and approved.

### **UTAH WATER RIGHTS SETTLEMENTS**

Norm Johnson, Assistant Attorney General, Utah Attorney General's Office, provided an overview of recent cases and water settlements in the state. The Utah Court of Appeals issued an interesting decision in *HEAL Utah v. Kane Co. Water Conservancy District*, 2016UTApp153, affirming the approval of change applications to divert water upstream for a proposed nuclear power plant, rejecting arguments that the Green River is over apportioned and that the change would harm the natural stream environment contrary to the public welfare. A change application cannot be rejected without showing that vested rights would be substantially impaired. A lot of thoughtful work went into this decision, both on the change application statute and on the Colorado River matters. We haven't had any court decisions on change applications for quite some time. It's not perfect, but it's a pretty good decision that I'm sure will be cited in the future. One of the things *HEAL Utah* repeatedly asked for was a nuclear referendum on change applications. Both the rights downstream were for coal fired power plants, and the change would

be for cooling purposes in the new nuclear power plant. Notwithstanding a few words in the statute, the State Engineer was not authorized, nor in a good position, to consider all of the things the environmental group wanted this case to be about. The Nuclear Energy Regulatory Commission takes care of the federal law requirements, and the State Engineer determined that change application was simply a question of whether a water right could be moved upstream for a different purpose.

Utah is working on adjudicating on a smaller scale. The legislature recently agreed to allocate funds to address a backlog of objections in some long-pending general adjudication cases and proposed determinations from the State Engineer. Unlike our friends in Idaho that have dedicated the resources to get these cases to move along more quickly, we are just getting started. Money was appropriated to hire a special master in the 3<sup>rd</sup> District Court in Salt Lake City. The legislature wants to see how much progress can be made before appropriating more funds. A special master with water law experience was recently appointed, and has started the process of dealing with our older cases. He issued orders to show cause to those who filed objections to proposed determinations, and we'll see if they still object and are interested in participating, or if they'd rather have their objections dismissed by the court. We're trying to find a middle ground between pushing these through and letting them languish. Jerry, how long did it take you to finish your water rights in Idaho? Have you finished your panhandle rights?

Jerry Rigby: Not in the panhandle. We've officially been at it for 27 years.

Norm: And how much money have you spent?

John Simpson: \$90 million.

Jerry: Wow. But we're done! It's nice that everyone has a water right in the Snake River area, which is about 70% of Idaho.

Norm: See what we have to look forward to and why we're going slow! That's a long time and a lot of money.

Utah is close to reaching a water rights settlement with the National Park Service on Bryce Canyon National Park. The last settlement reached was over Arches National Park in 2014. The settlement document is going through the federal approval process, which tends to take a really long time. At the same time, we've been explaining the settlement to the local folks who are impacted by it, and getting a pretty good response.

Utah has several tribal water rights settlements as well. The Shivwits Band of the Paiute Tribe of Utah has a reservation area with a settlement that was completed about 20 years ago, about the same time as Zion National Park. We have another older settlement that we work on continuously it seems like with our Uintah and Ourey Reservation, which is northeast Utah in the Uintah Basin area, very large reservation diminished through homesteading, checkerboard land

ownership, lots of issues over criminal jurisdiction. We continue to chip away at the implementation of the compact that was reached in 1990, ratified by Congress in 1992.

We also have a settlement in principle with the Navajo Nation, completed for several years. Negotiations started in 2003, with a settlement in 2008. We begged and pleaded for a federal negotiating team, which was appointed in 2014. That team is still reviewing and evaluating the settlement. We've been working with our own delegation to get a bill introduced to Congress for approval. You'd think that would be easy when you have the Chairmen of the Senate Finance Committee and the House Natural Resources Committee, but it hasn't been as easy as we had hoped.

### **DIVIDING THE WATERS PROGRAM**

Nathan Bracken, Of Counsel, Smith Hartvigsen, provided an update on the Dividing the Waters Program. The WSWC adopted a position (#374) supporting this program in Scottsdale, AZ. The program was started to provide judges a forum to obtain education on western water law and adjudications from executive agencies. The program has been effective, but has run into critical funding problems. It now has funding through Fall of 2017, and sponsors are helping host the program next year in Texas. After that, the future of the program is very much in doubt.

What can Council members do? The states generally cannot provide funding themselves, although if any states find they can do so, the funding would be welcome. Most of the time it has been funded by institutional sponsors, most recently the Bechtel corporation. We are trying to get help from people in your position to put us in touch with people in your states who have an interest in water, and the ability to provide additional funding. We need help reaching out to foundations who can support these judicial education sessions. Making connections with people in the communities has proven very helpful.

### **TEXAS V. NEW MEXICO**

Michelle provided an overview of the claims at issue in *Texas v. New Mexico*, and a brief summary of the Special Master's recommendations to the Supreme Court in the June 28 draft of his first special report. The report denies New Mexico's motion to dismiss Texas' complaint under the text and structure of the Rio Grande Compact, and denies the water districts' motions to intervene, as they failed to meet the burden to establish compelling interests separate from the states' interests. The report notes that Reclamation's claims are outside the Compact, but recommends the Supreme Court exercise its discretion to hear the claims together since they impact the same project.

### **MISSISSIPPI V. TENNESSEE**

Michelle provided an overview of this Supreme Court case involving state ownership of groundwater. Mississippi is suing Tennessee over a pumping operation in Memphis that Mississippi argues is depleting water from the aquifer beneath Mississippi's territory, subject to its ownership and control. The Special Master's recent Memorandum of Decision notes that the doctrine of equitable apportionment applies to interstate water resources, as the amount of water to which each state is entitled must be allocated before one state can sue another for invading its share. He recommended a limited evidentiary hearing on the issue of whether the groundwater constitutes an interstate resource, as Mississippi argues it is not an interstate resource and has explicitly disclaimed a request for equitable apportionment.

Tony noted that this is the first equitable apportionment case to look at groundwater.

### **TRIBAL WATER RIGHTS UPDATE**

Michelle and Tony provided an update on tribal water rights issues. On June 23, the Office of Management and Budget (OMB) sent a memo to the Departments of Interior (DOI) and Justice (DOJ) about the review process for proposed Indian water rights settlements, offering what appears to be a new interpretation of the *Criteria and Procedures (C&P) for Indian Water Rights Settlements* adopted by the DOI in 1990. OMB stated that they are not getting substantive information about the proposed settlements until the very end, and they expect more regular updates and to have a say in approving any negotiating position. Several tribes sent letters in response to the memo, regarding the failure of the Administration to consult with the tribes as required by Executive Order 13175. WSWC sent a letter, expressing concern about how the process would work and whether it would unduly delay settlements, particularly since the parties don't necessarily know their ultimate negotiating position until after negotiations have begun. OMB sent a response that the memo merely clarifies "the existing, routine expectations for internal coordination and communications on draft settlement proposals, as established by the 1990 policy statement." The tribes received a similar response from OMB.

We continue to seek legislation with Reclamation Fund language. Specific Indian water rights settlements authorize a transfer of funds between 2020 and 2029 (43 U.S.C. § 407), and we are seeking to get those transfers from the Reclamation Fund extended. Tony met with Rep. Ryan Zinke's (R-MT) staff, as they are currently working on getting the Blackfoot Nation's settlement through Congress.

We've also talked with the Native American Rights Fund and will work with them in providing a transition document on the importance of tribal water rights settlements.

## **LEGISLATION AND LITIGATION UPDATE**

Michelle provided a brief overview of the differences between the House and Senate versions of the Water Resources Development Act (WRDA) (H.R. 5303 and S. 2848), as well as covering some of the amendments to the introduced versions, particularly: (1) the removal of provisions in the House bill relating to Corps reservoirs, water control manuals and rule curves for dam optimization during prolonged drought; and (2) the addition of several Indian water rights settlements to the Senate version. She noted the introduction of the New WATER Act (H.R. 6022), which addresses funding critical water infrastructure through secured loans for certain projects, and the Energy and Water Research Integration Act (H.R. 5979), which directs DOE to integrate water considerations into its energy projects. The House passed the Bolts Ditch Access and Use Act (H.R. 4510). The Senate and House are in conference to reconcile the different versions of the Energy Policy and Modernization Act (S. 2012).

Jennifer provided an update on the status of the WOTUS cases, including recent motions and hearings in the 10<sup>th</sup> and 11<sup>th</sup> Circuits. The National Association of Manufacturers petitioned the U.S. Supreme Court for a writ of certiorari, appealing the 6<sup>th</sup> Circuit's jurisdiction of the consolidated cases under 33 USC §1369.

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

Jennifer gave a brief overview of the WOTUS definitions included in the Corps' proposed 2017 Nationwide Permits (NWP). On August 1, the North Dakota Attorney General sent a letter to the Corps, opposing the proposal to incorporate elements of the WOTUS rule into the 2017 NWPs given the current court proceedings and stay. The letter was signed by several states including: Arizona; Arkansas; Colorado; Idaho; Louisiana; Montana; Nebraska; Nevada; South Dakota; and Texas. She believed that a separate letter was also sent by a coalition of other states, but could not recall whether any of WSWC states were included in that letter.

## **DISCUSSION: PREPARING FOR ADMINISTRATION TRANSITION TEAM**

The Executive Committee is working on topics to raise to the transition teams, so be sure to let your Executive Committee member know if there are important issues for your state.

## **OTHER MATTERS**

There being no other matters, the meeting was adjourned.