

MINUTES
of the
LEGAL COMMITTEE
The Coeur d’Alene Resort
Coeur d’Alene, Idaho
October 25, 2018

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MEMBERS AND ALTERNATES PRESENT

ALASKA	--
ARIZONA	Einav Heneson
CALIFORNIA	Jeanine Jones
COLORADO	Amy Moyer
IDAHO	Jerry Rigby John Simpson Mat Weaver
KANSAS	Kenneth Titus
MONTANA	Jan Langel
NEBRASKA	Steve Goans
NEVADA	--
NEW MEXICO	Greg Ridgley Tom Blaine
NORTH DAKOTA	Jennifer Verleger Garland Erbele
OKLAHOMA	Sara Gibson Raquel Rancier
OREGON	--
SOUTH DAKOTA	Kent Woodmansey
TEXAS	Jon Niermann
UTAH	Alan Matheson

Norm Johnson
Eric Millis

WASHINGTON

Buck Smith
Mary Verner

WYOMING

Steve Wolff
Kevin Frederick
Chris Brown

GUESTS

Alf Brandt, Dividing the Waters, Reno, NV
Steve Snyder, Diving the Waters, Reno, NV
Sarah Higer, Idaho Power Company, Boise, ID
Jama Hamel, U.S. Bureau of Reclamation, Boise, ID
Albert Barker, Idaho Water Resources Board, Boise, ID
Darrell Early, Idaho Attorney General's Office, Boise, ID
Paul Arrington, Idaho Water Users Association, Boise, ID
Stephen Bartell, U.S. Department of Justice, Washington, DC
Honorable Eric Wildman, Idaho District Court, Twin Falls, ID
Rosemary Demond, Idaho Department of Water Resources, Boise, ID
Marcel Aillery, USDA Economics Research Service, Washington, DC
Stephen Wallander, USDA Economics Research Service, Washington, DC
Laura Watson, Washington Assistant Attorney General, Seattle, WA (via phone)

WESTFAST

John D'Antonio, WestFAST Liaison, Murray, UT
Roger Pierce, Former WestFAST Liaison, Denver, CO
Chris Carlson, U.S. Forest Service, Washington, DC
Patrick Lambert, U.S. Geological Survey, Salt Lake City, UT
Roger Gorke, U.S. Environmental Protection Agency, Los Angeles, CA (via phone)

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 in Newport, Oregon on August 2, 2018 were unanimously approved.

SUNSETTING POSTION

Position #388, regarding States' Water Rights and Natural Flows, was updated to reflect the Corps' proposed rule and its definition of surplus water that includes control over the natural flows of the river, and to emphasize the states' legal right to control and allocate surface waters, including natural flows. The Committee voted to recommend the position with the proposed changes to the Full Council.

WASHINGTON V. UNITED STATES

Laura Watson, Washington Assistant Attorney General, Ecology Division (via phone) provided an overview and background information for the 9th Circuit's decision in *Washington v. United States*. This is a sub-proceeding from litigation that started 48 years ago (a tribal fishing case filed in 1970) and deals with culverts built by the state to federal design standards. These culverts would often partially or completely block fish from traveling up or down stream. Washington has a number of threatened or listed fish species that need that passage open. Washington developed passages to simulate the conditions of the streams, retrofitting culverts with fish-friendly features, but the tribes wanted the state to move more quickly so they sued the state on the grounds that the culverts violated the treaties. The 1976 decision held that the tribes were entitled up to 50% of the harvestable fish under the treaties, and the tribes argues that the culverts reduced fish populations in violation of the treaties. In 2001, the tribes argued that the treaties require the tribes to be able to make a moderate standard of living, and the court provided a diminishment standard. The state attempted to settle with the tribes but was unsuccessful.

By the end of the case, the court concluded that 800 of the state's highway culverts would have to be retrofitted or replaced by 2030. The rest would have to be replaced at their life end. Parks Department culverts have now been replaced. A construction boom in Washington has made it difficult to find contractors interested in relatively small projects. The cost of the 800 culverts is in the billions of dollars and grows continually, and not all watersheds would receive the same level of benefit. Not all culverts are state owned, and there may be county, city, or other culverts that are also blocking fish.

The opinion was appealed to the 9th Circuit. The court applied the moderate living standard, ignoring the many other factors that can affect the number of fish in the stream. The court

also expanded the reserved water rights doctrine beyond the amount of water to support the purposes of the reservation to the question of whether there is enough water to support fish. The court assumed that 200,000 + fish have been impacted, relying on a study that was excluded from the record at the lower court.

The 9th Circuit denied en banc review. The panel agreed that the culverts violate the treaties. There was no conclusion on the number of fish that would allow a moderate living, and the panel walked back its position noting that not every human cause of diminished fish was covered, but they did not draw a bright line. The Supreme Court granted certiorari, but came back with a per curiam 4-4 split (Justice Kennedy recused himself), and therefore the 9th Circuit was confirmed.

The funding task for the State of Washington continues to be enormous. Washington anticipates additional impacts of the case, beyond the application to culverts. Comments from the tribes on dams, state permits for developments, instream flows, fish habitat, and human health criteria for toxins in fish have crept in as other potential treaty violations.

DIVIDING THE WATERS: GROUNDWATER BENCH BOOK

Steve Snyder, Executive Director of the Dividing the Waters (DTW) Program, provided an update on the program, and discussed the DTW groundwater bench book along with Alf Brandt, Editor (and former Executive Director) and Judge Eric Wildman from the Idaho District Court.

Dividing the Waters is a water adjudication education program for judges by judges. It offers conferences and workshops for judges dealing with water management disputes, as well as written and electronic resources and networking opportunities between judges. It was founded in 1993, started by Arizona Water Master John Thorson, initially funded by the Ford Foundation, and operated out of the Arizona Supreme Court. Since 2007 the National Judicial College has provided funding and affiliation support, and they have been transitioning to new sources of funding. Other supporting networks include law schools, water foundations, and the American Bar Association. The states of California and Nevada have each directed \$25,000 in funding to support the program.

The new Adjudicating Groundwater bench book arose out of a unique scientist-judge collaboration that began during the 2017 Conference in Texas. Existing references on groundwater modeling were limited and were mainly written for those with scientific or engineering backgrounds. Some of the presentations and educational materials were difficult for non-scientist judges to follow. DTW participants thought it would be helpful to provide a layman's guide for groundwater conflict cases. Judge Wildman noted that many of the judges also handle non-water cases, so their time to get up to speed on important concepts is limited, and they offered input into which concepts needed to be written more clearly.

The bench book is broken down into discreet sections that explain groundwater hydrogeology, groundwater modeling tools and how to evaluate them for evidentiary purposes. It offers a judge's perspective and includes a judicial checklist for adjudicating groundwater for quick reference, and a glossary of unfamiliar terms. This was made as a quick "go to" reference

for judges, advocates or any other decisionmakers in need of simplified but substantive information.

Alf Brandt noted that the bench book has gone out to judges who are in the middle of groundwater adjudications. He said DTW would like to see the bench book used more broadly, and the Water Foundation is willing to send hard copies of the book to the state agencies. California water users are using the book as a reference. He asked if the WSWC can include support for the use of this resource in the DTW position.

Steve Snyder, who served as a special master in New Mexico for 14 years, added that the program is also a great value to those who are serving as water masters. He urged the water department directors to help support the program financially. DTW also publishes a monthly newsletter, The Network Note. More information is available at www.judges.org/dtw, and Steve and Alf are happy to answer any questions.

The next conference will be held in Stanford in April of 2019. Stanford is providing resources to help put on the conference.

IDAHO LEGAL ISSUES

Darrel Early, Natural Resources Division Chief, Idaho Attorney General's Office discussed current legal issues in Idaho. On the water quantity side, they are working on the adjudication of the Coeur d'Alene-Spokane River Basin. There is a case pending on the reserved water rights claims of the Coeur d'Alene Tribe. The southern 1/3 of the Coeur d'Alene Lake (bed and banks) is owned by the tribe, as well as various tributaries inside the reservation boundaries. The tribe has made claims for irrigation, hunting fish and wildlife (habitat), instream flows, DCMI (domestic, commercial, municipal, and industrial), religious-cultural, recreation, and lake level maintenance. One argument that has been advanced is that the *U.S. v. New Mexico* case addressing primary versus secondary purposes of reservations only applies to federal statutory reservations such as forests, not to treaty tribes. The appeals and cross-appeals will be heard before the court in a couple of weeks. Other states may be interested in weighing in at the next level.

As noted on the field trip yesterday, the Coeur d'Alene Lake quality is impact by mining waste metals, with 80 million tons of contaminated (lead, arsenic, cadmium, zinc) sediment at the bottom of the lake. While Idaho is diligently working on projects to reduce metals upstream, the contaminant reduction increases the complexity of lake management. Non-point source runoff adds nutrients to the lake, but the past contaminant levels have prevented the growth of harmful algal blooms. As aquatic plant production increases, the decomposition and changing oxygen levels have the potential to mobilize the metals at the bottom of the lake. They are working to increase public awareness, strengthen partnerships, collect data, and implement a nutrient reduction action plan.

The Department of Fish and Game is facing a challenging invasive species issue. Non-native Northern Pike have been introduced into the system and are competing with the native species. They are a popular trophy catch among sport fishermen, who unfortunately prefer to catch-

and-release in their tournaments so that the fish get bigger. The tribe has an aggressive eradication program involving netting, but extending that program is presenting legal challenges.

Yesterday during the grazing water rights workshop, Gary Spackman described *Joyce* decision and federal ownership of stock water rights where federal agencies don't own the livestock. The legislature passed a bill requiring the Idaho Department of Water Resources (IDWR) to generate a list of all federal stock water rights to present to the Governor. Forfeiture actions on the adjudicated water rights will likely result in legal challenges.

Idaho is working on conjunctive management of groundwater and surface water. They have designated groundwater management areas that require a plan, and this has been challenged by irrigators and cities. They've reached a settlement with the irrigators, but the cities are still challenging the decision. The cities want to be able to expand, to grow into their reasonably anticipated needs, and they want to be able to pump more water going forward, not cut back. The cities have agreed to provide a specified amount of groundwater mitigation.

The Boise River Basin litigation over refill of onstream reservoirs has been settled, with contingencies. The water right specifies a certain quantity during a storage period, but there was interest in diverting and storing additional water if the federal agencies release water from storage for flood control purposes.

Idaho is also wrestling with the interpretation of the reset date for non-seasonal water rights when refilling reservoirs (2nd fill) at the end of the irrigation season. The water rights are measured in acre-feet, and once the quantity has been met, the water right holder goes out of priority. But the question raised was when the water master starts counting the fulfillment of those rights, at the end of the irrigation season or at the beginning of the new calendar year. IDWR made an administrative decision on the implementation of those rights, but some water users want this reflected in their water right. Idaho is concerned about making changes to decreed water rights, whether this has implications or sets a precedent for reopening the adjudication of 159,000 water rights claims that took 30 years to reach a final decree. Procedural Rule 60 allows for reconsideration of court decisions under specified grounds, but it is intentionally a high hurdle to reach. Some mistakes were made and found later, and some people want to use Rule 60 to change the things they don't like. Idaho is trying to determine how to handle necessary changes after the adjudication is done, and move forward with the administration of those rights.

The Washington culverts case may have wide-reaching implications for Idaho. The tribes are likely going to challenge Idaho's human health criteria for water quality and fish consumption—not yet approved by EPA—and they think it will be on the same grounds as the Washington case broadly interpreting the Steven's Treaties. The tribes are likely to argue that the criteria are a treaty violation, that they have an enforceable treaty right to eat a certain amount of fish without accumulating toxins, and the right to a moderate standard of living.

The 9th Circuit *County of Maui* case involving Clean Water Act jurisdiction over indirect discharges of pollutants through groundwater has implications for Idaho's managed aquifer

recharge program. Idaho is engaged in substantial water recharge, and obtaining NPDES permitting would make their program of water resource management cost prohibitive.

He concluded with a quick recap of the Conservation League's three legal challenges to Idaho's assumption of NPDES authority from EPA.

WSWC-NARF TRIBAL WATER RIGHTS AD HOC GROUP

Michelle and Tony provided an update on the Ad Hoc group's visits to member of Congress, the Department of Interior Secretary's Indian Water Rights Office, and the Office of Management and Budget. The list of visits is located under Tab O. Senator Tom Udall (D-NM) introduced S. 3168 to amend the Omnibus Public Land Management Act of 2009 (P.L. 111-11) to make the Reclamation Water Settlements Fund permanent (currently, it terminates at the end of FY2034), and the Ad Hoc Group emphasized support for this bill.

REPORT ON GRAZING WATER RIGHTS WORKSHOP

Chris Brown provided a report on the Stock Water Rights for Grazing Livestock on Federal Lands workshop. We heard from several different states. Generally the issue is, who has the ownership of stock water rights on federal lands. Is it the federal government, or is it grazing stock owners? That's where the problem lies.

We heard from John D'Antonio, the WestFAST Liaison. He related some of his experiences as the New Mexico State Engineer. On the last day of being the New Mexico State Engineer, he said he had 1,100 outstanding licenses that generally had to do with stock rights on federal lands in New Mexico.

Pat O'Toole joined via phone. He stressed that relationships were very important to the local stock owners, and when you have changes at the federal agencies, or those folks at the local level federal agencies, that causes concerns. He also expressed some concern about federal control over the state water rights.

Gary Spackman gave an overview of the issues in Idaho. They had stock rights that were claimed by the federal government and adjudicated as part of the general adjudications, and then later the Idaho Supreme Court in the *Joyce* decision said those water rights are actually held by the people that own the cattle. Now you have the problem where you have water that's been adjudicated to the federal government and the Idaho Supreme Court and the Idaho legislature saying the federal government can't hold them.

Norm Johnson discussed three different areas in Utah that historically didn't need to have a water rights. Then the federal government made claims for stock rights on federal lands, which were granted, and more recently there has been a movement to try to get more ownership and control over the grazing water holders through legislative changes.

Chris Brown talked about Wyoming and mentioned they are not currently having any stock water right issues. They have MOA's with the Forest Service and the Bureau of Land Management (BLM) so any new water rights application provides notice, then the adjudication process and we'll generally identify the federal agency as a co-owner on those new permit applications. The federal agency committed in the MOA to seeking the consent of the allotment holder before anything can be changed to the existing rights. We also have an adjudication that adjudicated numerous stock water rights to the federal agencies that reached in our Big Horn River Basin. In Wyoming, stock rights often aren't adjudicated. They are permitted, but they don't have to be adjudicated, but if they are, they are adjudicated in the name of the land so stock rights on federal lands are adjudicated in the name of the federal government.

Greg Ridgley talked about New Mexico and the long history of disputes over use of federal lands. New Mexico recognizes rights in the name of the federal agencies and in the name of an individual. The state recently provided an opportunity in a National Forest to file stock water rights. The legislative efforts in New Mexico generally put more control of those rights into the hands of individuals.

Chris Carlson and Doug Curtis provided a brief presentation from the Forest Service and the Bureau of Land Management. They understand that there are some challenging issues around grazing on federal lands, but they are committed to maintaining the sustainable grazing on federal lands, and they are committed to working with the states under the state laws with regards to stock water rights.

I think the overall takeaway is that relationships are incredibly important, and the general consensus was that often these stock water rights disputes arise out of a different kind of dispute. Communication and education with regard to these stock water rights is important, and getting stock holder involvement in this process matters.

SURPLUS WATER RULE

Jen Verleger gave an update on where the Army Corps of Engineer's Surplus Water Rule stands. It is still on the regulatory calendar, but we're hearing that they might not do anything with it until next Fall. The expanded comment period on the proposed rule closed November 16, 2017. John D'Antonio noted that he had reached out to several folks at the Corps of Engineers headquarters, particularly their senior water rights policy person and another technical person on the committee that handles this issue. All of them said they were looking forward to working with the states. They're still reviewing the comments. John suggested that WestFAST help engage with the states. There are a lot of issues the states are concerned about. After hearing the discussion in the Water Quality Committee on the WOTUS rule, there's a lowest common denominator there. One size doesn't fit all. He's looking at how best to engage with the Corps, and maybe there are some specifics for the Missouri River Basin States and how to deal with those reservoirs. John will continue to work on this so there can be some meaningful state discussion with the Corps folks and see if we can get somewhere.

LEGISLATION AND LITIGATION UPDATE

Michelle provided a brief overview of new content in the Legislation and Litigation Update under Tab P. Congress passed America's Water Infrastructure Act (AWAI) (S. 3021) and a White Mountain Apache technical change to a water right's settlement (S. 2850); both bills were signed into law by the President. The Farm Bill (H.R. 2) has been in conference between the House and Senate, and both the WSWC and WGA sent letters supporting the provisions in each version of the bill that are important to our Western states. The Kickapoo-Kansas and Navajo-Utah water rights settlements were each introduced in the House following the Administration's issuance of the "Bishop letter," and both bills have passed out of the Senate Indian Affairs Committee with approval. Also introduced was a bill (S.3303) that proposes to modify CWA §401 Certifications in timing and content. WSWC testified at the Senate Environment and Public Works hearing on the bill, noting the critical importance of CWA §401 to the states and providing some of the greater historical context relating to dam (re)licensing and bypass flows, and the tension between federal water projects and state water resources.

Litigation highlights included an update on the challenges to 2015 WOTUS Rule, currently stayed in 26 states by federal court order in North Dakota, Georgia, and Texas. The issue of whether groundwater is subject to Clean Water Act jurisdiction when it is a conduit for the indirect flow of pollutants to navigable waters is making its way to the Supreme Court, with recent Circuit Courts issuing a variety of opinions in the 4th, 6th, and 9th Circuits; the *County of Maui* and *Kinder Morgan* cases have been appealed to the Supreme Court. Also of note, there are two federal cases in California challenging the Trump Administration's rescission of the 2015 Fracking Rule. *Sturgeon v. Frost II* is scheduled for Supreme Court hearing on November 5, 2018.

Michelle also briefly touched on two state court cases in Arizona (regarding unquantified federal reserved rights) and California (regarding the applicability of the public trust doctrine to groundwater).

SUNSETTING POSTIONS FOR SPRING 2019 MEETINGS

There are no sunseting positions that will be brought up at the 2019 Spring meetings.

OTHER MATTERS

There being no other matters, the meeting was adjourned.