**LEGAL COMMITTEE**

**WORK PLAN**

**July 1, 2014 to June 30, 2015**

**1.** **STATE AND FEDERAL COLLABORATION REGARDING THE ADJUDICATION OF FEDERAL NON-TRIBAL WATER RIGHTS**

**Work-to-Date:** The Committee has created a Federal Non-Tribal Water Claims Subcommittee to evaluate ways the WSWC and WestFAST can improve the effective resolution of federal non-tribal water rights claims. The Subcommittee consists of WSWC members and WestFAST members, who serve in an *ex officio* capacity.

The Subcommittee issued a questionnaire in 2012 to WSWC member states, the Bureau of Land Management, the Bureau of Reclamation, the Department of Defense, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the U.S. Forest Service. The questionnaire sought information on ways the WSWC and WestFAST could address the issues and challenges involving federal non-tribal water right claims,[[1]](#footnote-1) as well as examples of successful state and federal efforts to resolve these claims. Responses indicated a broad consensus that the WSWC and WestFAST could develop a clearinghouse of information to assist states and federal agencies in the effective resolution of federal non-tribal water rights claims.

On July 15-16, 2014, the WSWC and WestFAST held a workshop in Helena, Montana to discuss ways to improve the resolution of federal non-tribal water rights claims and to begin the process of developing a clearinghouse of information that states and tribes can use to resolve these claims.

**2014-2015:** The Committee will work to carry out the recommendations and next steps that emerged from the workshop. Namely, the Committee will work with WestFAST to develop a workgroup of state and federal experts to guide the development of the clearinghouse. Under the direction of the Committee, the workgroup will hold calls on a quarterly basis to discuss the development of the clearinghouse and to serve as a forum for information sharing and relationship building. The Workgroup will also advise the Committee about potential future actions the WSWC and WestFAST may take to address federal water needs and may hold webinars on specific topics of interest, where appropriate.

**Time Frame:** July 2014 – December 2014

Federal Non-Tribal Water Claims Subcommittee: Melissa Hornbein (MT), Greg Ridgley (NM), and Dwight French (OR). WestFAST members participating in the Subcommittee in an *ex officio* capacity include: Lee Koss (Bureau of Land Management), Marc Kodack (Department of Defense), Andrew Hautzinger (U.S. Fish and Wildlife Service), and Jean Thomas (U.S. Forest Service).

**2. CWA JURISDICTION\***

**Work-to-Date:** In 2011, the EPA and the U.S. Army Corps of Engineers released draft guidance intended to provide clearer, more predictable guidelines for determining which water bodies are subject to Clean Water Act (CWA) jurisdiction, consistent with the U.S. Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001),and *Rapanos v. United States*,  [547 U.S. 715](http://en.wikipedia.org/wiki/Case_citation) (2006).

In September 2013, the EPA and Corps withdrew the draft guidance. At the same time, the agencies announced that they had submitted a draft rule to clarify CWA jurisdiction to the Office of Management and Budget (OMB) for interagency review. In addition, EPA announced that its Science Advisory Board is developing a report on the connection between different bodies of water. EPA released the report for public comment in September 2013, and has indicated that the final connectivity report will inform the final rule.

In 2013, the WSWC wrote EPA and the Corps a series of five letters based on WSWC Position #330.5 to: (1) express concern about the agencies’ process in developing the rule; (2) urge them to engage in greater consultation with the states and to comply with the state consultation criteria of Executive Order 13132; and (3) to comment on the draft connectivity report.

In addition, the WSWC created a CWA Rulemaking Workgroup to gather information on the WSWC member states’ perspectives regarding the rulemaking and to identify further areas of consensus among the western states regarding the rulemaking. In March 2014, the workgroup developed a letter that the WSWC sent to EPA and the Corps on March 10, setting forth a list of additional consensus comments on the rulemaking, including a list of waters and features that should be excluded from the rule’s definition of “waters of the U.S.” The letter also asked the agencies not to publish a proposed rule for public comment until the connectivity report is final. The Western Governors’ Association (WGA) sent a subsequent letter on March 25, 2014, that cited the WSWC’s March 10 letter and urged the agencies to consult with the states individually and through the WGA before taking further action on the rulemaking.

On April 21, 2014, EPA and the Corps published a proposed rule in the Federal Register with an initial 90-day public comment period that was later extended to October 20, 2014, following requests from the WGA and other organizations for an extension.

The WSWC adopted a resolution regarding CWA rulemaking efforts on July 18, 2014, during its summer meetings in Helena, Montana. The resolution replaces WSWC Position #330.5 and is based on the WSWC’s letter regarding the rulemaking as well as letters and testimony from the WGA.

**2014-2015:** The Committee will continue to work with the Water Resources and Water Quality Committees through the Workgroup to follow and comment on the development of a jurisdictional rule and other federal actions regarding CWA jurisdiction in accordance with the WSWC’s and WGA’s positions.

**Time Frame:** Ongoing

CWA Rulemaking Workgroup: Michelle Hale (AK), Mike Fulton (AZ), Trisha Oeth (CO), Barry Burnell (ID), Tom Stiles (KS), Jon Patch (ND), Bill Schuh (ND), J.D. Strong (OK), Todd Chenoweth (TX), Walt Baker (UT), Laura Driscoll (WA), Stephen Bernath (WA), and Bill DiRienzo (WY).

\*See Item 3(a) of the Water Quality Committee Workplan

**3. AD HOC GROUP ON RESERVED INDIAN WATER RIGHTS**

**Work-to-Date:** The WGA and WSWC have long supported the negotiated resolution of Indian water rights claims (WSWC Position #336).As a result, the WGA and WSWC have worked with the Native American Rights Fund (NARF) for over thirty years as part of the Ad Hoc Group on Reserved Indian Water Rights to promote negotiated settlements.

In recent years, the Group has highlighted the need to secure a permanent funding mechanism that will ensure that settlements authorized by Congress and approved by the President will be implemented. The Ad Hoc Group has also initiated quarterly conference calls or in-person meetings with the Department of Interior to discuss key issues associated with Indian water rights settlements.

In 2013, the WSWC and NARF held their 13th biennial Symposium on the Settlement of Indian Reserved Water Rights Claims on August 13-15, 2013, at the Pojoaque Pueblo near Santa Fe, New Mexico. Over 160 state, tribal, federal, and other experts participated.

In March 2014, the Ad Hoc Group met with Congressional and Administration offices in support of Indian water rights settlements, including officials from the White House, the Office of Management and Budget, the Council on Environmental Quality, and the Department of the Interior.

**2014-2015:** The Reserved Rights Subcommittee, working with WGA staff, will oversee WSWC efforts in the following areas: (1) activities to gather support for an appropriate remedy to settlement funding issues, including efforts to support the Reclamation Water Settlements Fund, the Authorized Rural Water Projects Completion Act (S. 715), development of a permanent settlement funding mechanism, and funding for federal assessment, negotiation, and implementation teams; and (2) with the Ad Hoc Group, continue meeting with the Administration via the quarterly conference calls and other face-to-face opportunities to discuss key issues associated with Indian water rights settlements.

**Time Frame:** Ongoing

Reserved Rights Subcommittee: Bill Staudenmaier (AZ); Cindy Chandley (AZ); Jay Weiner (MT), and Norman Johnson (UT).

**4. Water** **Conservation**

**Work-to-Date:** The WSWC has carried out a number of projects involving water conservation over the years. In 1983, it published its report “Water Conservation and Western Water Resource Management,” which discussed the various aspects of water conservation, its potential benefits and limitations, as well as its role in western water law and management. The report also summarized water conservation activities in sixteen western states. Subsequent WSWC efforts include a 1993 update to the report as well as various roundtables, workshops, and symposia focused on conservation, among other efforts.

The current WGA/WSWC position on conservation is found in Paragraph B(3)(c) of WGA Resolution #2014-3, which states: “Western Governors encourage adoption of strategies to sustain water resources and declining and inconsistent snowpack, including the use of water conservation…. The Governors encourage the use of and research into promising water-saving strategies*.*”

**2014-2015:** The Legal Committee will develop a report on agricultural and urban water conservation that will focus on the issues associated with improving or implementing a conservation program at the state level. In particular, it will: (1) include a literature review of existing legal research related to water conservation; (2) describe concerns related to abandonment and forfeiture and discuss existing state protections for conservation; (3) describe issues and state efforts regarding consumptive use requirements as they pertain to conservation; (4) describe issues and state efforts regarding adverse impacts to water right holders associated with conservation; (5) carry out case studies of existing water conservation and salvage programs in California, Montana, Oregon, Utah, and Washington to identify the “lessons learned” from these programs; and (6) identify policy options for states to consider when working to implement or improve a conservation program at the state level.

The report will build upon past WGA and WSWC conservation efforts, including but not limited to the 1983 report, the 1993 update, and the 2012 WGA-WSWC Water Transfers report. As a first step, WSWC staff will work with the Committee’s Water Conservation Subcommittee to define the term “conservation” for the purposes of the report. Past WSWC reports have defined the term “water conservation” as “decreasing water withdrawals and/or consumption by reducing demand through the appropriate and more efficient use of available water supplies.” In addition, the report will recognize that conservation is a means to an end and not an end in and of itself, and will consider third party impacts and unintended consequences.

WSWC staff will develop the report under the guidance and direction of the Committee’s Water Conservation Subcommittee and the Water Resources Committee's Water Use Efficiency/Conservation Subcommittee. Rather than issue a survey to gather the necessary information, WSWC staff will rely on independent research and focused telephone interviews with select staff from the applicable WSWC state agencies. It is also envisioned that WSWC member states will review the report to ensure its accuracy. Additional outreach may be conducted with other stakeholders in the environmental, urban, and agricultural communities on an as-needed basis.

**Time Frame:** August 2014 to January 2015.

**Subcommittee:** Jeanine Jones (CA), John Simpson (ID), and Greg Ridgley (NM)

**5. U.S. FOREST SERVICE PROPOSED GROUNDWATER DIRECTIVE**

**Work-to-Date:** On May 6, 2014, the U.S. Forest Service published a proposed directive in the Federal Register that would create a “comprehensive direction” for the agency’s management of groundwater on National Forest System (NFS) land. In particular, the directive is intended to: (1) provide for consideration of groundwater resources in Forest Service activities; (2) encourage source water protection and water conservation; (3) establish procedures for reviewing new proposals for groundwater withdrawals on NFS land; (4) require the evaluation of potential impacts from groundwater withdrawals on NFS natural resources; and (5) provide for measurement and reporting to help build the agency’s understanding of groundwater resources on NFS land. Comments on the proposed directive are due August 4, 2014.

According to the Forest Service, the directive will not infringe on state-issued water rights or change how state groundwater and surface water quality regulations affect federal lands. However, while the directive would require the agency to comply with state law when filing groundwater use claims in state adjudications and administrative proceedings, it would, among other things: (1) require application of “…the Reservation or Winters Doctrine to groundwater, as well as surface water, consistent with the purposes of the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act;” (2) require the Forest Service to evaluate all applications to states for water rights on lands adjacent to NFS lands; and (3) would presume that groundwater and surface water are connected unless proven otherwise.

The proposal further indicates that it “…would not have substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.” Consequently, the agency has determined that the directive complies with the federalism principles set forth in Executive Order 13132 and that no further determination of federalism implications is necessary. Although the proposal does not contemplate state consultation, it does indicate that the agency has begun consultation with tribes pursuant to Executive Order 13175.

WSWC position #340 notes that no federal court has recognized a federal reserved water right to groundwater, and opposes “...efforts that would establish a federal ownership interest in groundwater or diminish the primary and exclusive authority of States over groundwater.”

Similarly, Western Governors’ Association (WGA) Resolution #2014-03, paragraph B(1)(a) states: “Nothing in any act of Congress or Executive Branch regulatory action should be construed as affecting or intending to affect states’ primacy over the allocation and administration of their water resources.”

On July 2, 2014, the WGA wrote Secretary of Agriculture Tom Vilsack to express concern that the directive “could have significant implications for our states and our groundwater resources.” WGA’s letter also asked Vilsack to respond to a series of questions regarding the directive.

**2014-2015:** The Committee will review and monitor this issue, developing comments for the WSWC to consider where appropriate, and working to support the WGA’s efforts. The Committee will also work to support any comments or positions the WSWC may adopt.

**Time Frame:** Ongoing

1. For the purposes of the questionnaire, the term “federal non-tribal water right claim” encompassed federal reserved right claims, federal state-based claims, and claims relating to the aforementioned federal agencies that do not involve water right claims made by a tribe. [↑](#footnote-ref-1)