

**MINUTES
of the
LEGAL COMMITTEE
Grand Hyatt Washington Hotel
Washington, DC
March 22, 2016**

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MEMBERS AND ALTERNATES PRESENT

ALASKA	David Schade
ARIZONA	Tom Buschatzke Cynthia Chandley Einav Heneson
CALIFORNIA	--
COLORADO	Trisha Oeth
IDAHO	Jerry Rigby John Simpson
KANSAS	Tom Stiles David Barfield
MONTANA	Christian Schmidt
NEBRASKA	Jeff Fassett Jim Macy
NEVADA	--
NEW MEXICO	Greg Ridgley John Longworth
NORTH DAKOTA	Jennifer Verleger
OKLAHOMA	Brittnee Preston
OREGON	--
SOUTH DAKOTA	Kent Woodmansey

TEXAS

Jon Niermann
Robert Mace
Jim Rizk

UTAH

Eric Millis
Walt Baker
Norm Johnson

WASHINGTON

--

WYOMING

Pat Tyrrell
Kevin Frederick
Chris Brown (via phone)

GUESTS

Christopher Estes, Instream Flow Council, Anchorage, AK
Jim Rizk, Texas Commission on Environmental Quality, Austin, TX
Omar Saucedo, Southern Nevada Water Authority, Las Vegas, NV
Laura Chartrand, Western Governors' Association, Denver, CO (via phone)

WESTFAST

Patrick Lambert, Federal Liaison, Murray, UT
Jean Thomas, U.S. Forest Service, Washington, DC

STAFF

Tony Willardson
Michelle Bushman
Sara Larsen
Cheryl Redding (via phone)

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 Manhattan, Kansas on October 8, 2015 were moved for approval by Norm Johnson, seconded and passed unanimously.

DRAFT FY2016-2017 WORK PLAN

Jennifer reviewed the main headings in the work plan, which is under Tab F. This will not be passed at this meeting, so if you have comments, please let Michelle or Jen know.

EPA-CORPS CWA LITIGATION UPDATE

Jennifer provided an overview of recent cases involving the Clean Water Act. Written summaries of the cases are included under Tab N.

A. WOTUS Update

The 6th circuit issued a ruling that it has jurisdiction over the WOTUS cases. Three judges made three decision. One judge said they had jurisdiction. One judge said they were bound by the National Cotton Council case, but thought that case should be overturned. One judge said it should be dismissed. North Dakota and other petitioners used this as grounds to file an en banc petition. En banc will hopefully overturn the 6th Circuit National Cotton Council case.

In the North Dakota District Court, the federal agencies filed a Motion to Dismiss. Our response is due this week. There are still motion pending regarding intervention by the Sierra Club, and whether the Corps' memos should be included as part of the record. Oklahoma's case was dismissed following the 6th Circuit's ruling on jurisdiction. The 11th Circuit rescheduled its hearing on a motion regarding which court has jurisdiction.

Questions:

Walt Baker: Why the insistence of the states to go to through the District Courts rather than the Circuit Court, if it is going through the Supreme Court anyway?

Jennifer: Two reasons: (1) from the state perspective, there are a lot of local issues, and we want judges familiar with the local water landscape so the details don't get lost; and (2) as the JPL panel pointed out, differing opinions at the district court levels flesh out the issues. Also, the statute limits direct appellate review to seven circumstances, none of which we believe apply here.

B. Corps jurisdictional determination in *Corps v. Hawkes*

This case is before the Supreme Court, with amicus briefs filed by several states. A peat farmer wanted to produce peat in wet marshy areas that may or may not be under jurisdiction of the CWA. The issue is whether the Corps' jurisdictional determinations are final and appealable. We hope to know more by the summer.

C. EPA Veto – *Pebble Ltd. v. EPA*

EPA has preemptively issued a veto on a §404 permit, blocking the permit before an application is filed. Pebble has appealed that agency decision.

Dave Schade: In the trial court, most of the causes of action were dismissed, but COAs of (1) undue influence by non-profit groups, and (2) pre-emptive violation of rights remain before the court. The trial judge is pro-federal agency, so it mattered that the judge found what he did and allowed those COAs to go forward. On an interesting side note, EPA's prime witness has been unavailable to be deposed, and he was finally tracked down in Australia. We're waiting for the case to work its way through the system. Pebble is in shutdown mode. The State of Alaska has supported Pebble in this action, asserting that the agency cannot make assumptions without the benefit of all the information through the application process.

WATER TRANSFERS LITIGATION UPDATE

Michelle Bushman provided an update on *Catskills Mountains Chapter of Trout Unlimited, et al v. EPA*. The 2nd Circuit heard oral arguments in on December 1. Two of the three panel judges focused on the ambiguity of the CWA and Chevron deference. Peter Nichols, Special Assistant Attorney General for Colorado and New Mexico, was able to highlight the challenges of getting water where it needs to go in the West, and how that differs from concerns in the East. He pointed out that the states have authority under the CWA to manage water transfers if they choose to. He also provided information to the court about the technical and financial impossibility of treating water in transfers to meet every one of three dozen water quality parameters of receiving waters due to Western precipitation patterns and naturally-present constituents, and how this could impact interstate compacts. We don't anticipate hearing anything back until the summer.

WATER SUPPLY USERS MEETING UPDATE

Jennifer discussed the meetings and purpose of a new group that is trying to form relating to water supply and the Army Corps of Engineers rules and regulations. This started out as a brain child of Lewis Jones from Atlanta. It's an ad hoc group of water supply people. Jennifer mentioned some of the other folks who attended the meeting, including North Dakota, Texas,

and Missouri. Most of the attendees were from different water providers and public utilities around the country.

The first meeting was held in Washington, D.C. in December, and it focused on issues and problems that water users are having with the Army Corps of Engineers and water supply, with more high level issues like transparency and communication.

The second meeting was held March 1, in Atlanta, GA, with most topics covered at the 30,000 foot level. Steve Martinko, a government affairs person who formerly worked with the House Transportation and Infrastructure Committee said there was not a specific group available for Congress to reach out to discuss water supply issues when working on the WRDA bill. Dan Inkelas from the Corps discussed the status of the proposed rulemaking and addressed the Corps' authority under §6 of the Flood Control Act as well as the 1958 Water Supply Act. The rule is going before the Pentagon and then OMB before a decision can be made on publication. We talked about the Corps doing negotiated rulemaking with groups like states and WSWC to come up with a joint rule, and how would be go about making that happen if it was even possible.

Talked about the next WRDA bill they're putting together. Both Senate and House committees motivated to pass this year. They want to let people know to reach out to their congressional staff and to get feedback on what this group might be able to help them with.

The next meeting will take place May 4 in Kansas City, and may do a webinar/call setup.

There's no firm timeline or clear direction about the existence of the group going forward, but there were some good nuggets that came out of the meetings. There was some discussion on forming an off-shoot of WSWC or ICWP, but most were opposed to taking that route. They may form a new group, and most want to be an advocacy group. They developed some draft principles for the group, including statements on (1) the Corps' mission, policies, and decision making processes; (2) state primacy and exclusive authority over surface water within their borders; and (3) the Corps' authority to add water supply as an operating purpose at reservoirs, with equitable benefits reflected in transparent and consistent contracts and pricing. Their tentative mission was, "To preserve and enhance the nation's water supply, protect traditional State authorities, and ensure that water supply interests share equitably in the benefits provided by U.S. Army Corps of Engineers' water projects." They will figure out a structure and further develop the principles over the next few months. Kansas and Missouri are part of the group. North Dakota is understaffed and can't participate right now, and is hesitant about whether to be part of the group until we know more about what it is and where they are going. Dave Matamura also attended the meeting.

Lastly, through that group, we received an email from someone in Raleigh, North Carolina about a USGS-EPA Technical Report that's out for a 60-day comment period. Basically the CWA is supposed to regulate water quality, and this proposes using the CWA to regulate water quantity. Therefore the CWA would have water quantity oversight, and this is a concern.

WSWC/WESTFAST FEDERAL NON-TRIBAL WATER RIGHTS WORKGROUP

Pat Lambert, WestFAST Liaison, provided an update on the Non-Tribal Water Rights Workgroup. In 2012, the WSWC sponsored a survey on this issue, where it was determined that significant information, examples and case studies from the state and federal agencies might be useful. The workgroup was assembled and first workshop held in 2014 in Helena, Montana, where we determined to establish a clearinghouse of documents and to look at next steps. We currently have 54 documents in our clearinghouse and we're working on making them searchable. Michelle and Sara are working on an interface to make it easier to access the documents.

Our first webinar on the McCarran Amendment was held in November. (See Tab L.) Understanding of the topic varied among workgroup members. Federal and state presenters provided information about roles and perspectives on both sides. Following the webinar, the workgroup discussed several topics of interest for future webinars or meeting, and we focused on for Workshop relating to state and federal perspectives on groundwater rights in conjunction with summer meeting in Bismarck in July. From WestFAST point of view, the workgroup has engaged in proactive collaboration with good results so far. We see many benefits of coming together on these issues, with a lot of differences in the way different states and also different agencies view these issues.

TRIBAL WATER RIGHTS

Michelle gave an update on recent developments relating to tribal water rights. In February, WSWC and the Native American Rights Fund held a quarterly call with the Department of the Interior regarding the President's FY2017 proposed budget for Indian water rights. Notably, the Secretary of Indian Water Rights office, which has consisted of one person for some time and is viewed as a bottleneck for settlements by DOI, recently expanded to two people, and they are hoping to continue to expand that office to a total of seven personnel. In March, WSWC and NARF sent a letter to members of Congress in support of funding for tribal water rights settlements. The letter did not specify any amounts, but emphasized the importance of these settlements to the states and tribes, and requested appropriate levels of funding.

Tony Willardson commented on the WSWC letters and the continuing process of trying to get a permanent water settlement fund. If this is an issue in your state, you may want to raise it to the Gov's office. WGA's policy, #2015-08, supporting negotiated resolutions to Indian water rights settlements, has almost word for word the language in the WSWC resolution #376.

Legislation introduced by Rep. Rob Bishop (R-UT) in October to change the tribal recognition process (H.R. 3764), proposing to limit DOI's ability to recognize tribes, following the Bureau of Indian Affairs' July 2015 changes to the standards and criteria in the Part 83 regulations. DOI is objecting as they think it will be a step back. Rep. Bishop believes that the

standards and criteria for tribal recognition have been inappropriately relaxed, and that the changes were not authorized by Congress.

WSWC and NARF are scheduling visits with members of Congress and federal agencies in Washington, DC during the week of April 18-22.

A. Pechanga & Blackfeet

The Pechanga (S.1983) and Blackfeet (S.1125) settlements are the first of settlements with a funding mechanism attached to it to face the prospect of going through the Bishop letter process, if and when they move into the House. The Senate Committee on Indian Affairs held hearings on the settlement legislation, and they made several comments on the cost. They're looking for budget offsets that don't take away from other needed funds in Indian country. Will know more by early fall.

B. Agua Caliente

The U.S. District Court for the Central District of California issued a summary judgment decision in March 2015 acknowledging a reserved right to water, and ruling that groundwater is a resource available to fulfill that right. State of CA is not involved in this case. The water district appealed the decision to the 9th Circuit for interlocutory review, and oral arguments are expected to be scheduled sometime in the next few months. The case has been tri-furcated, and the District Court is continuing forward with the second phase of the case concurrently with the 9th Circuit's review.

LEGISLATION AND LITIGATION UPDATE

Michelle Bushman highlighted several recent pieces of legislation and court cases of interest, covered in greater detail in the Legislation and Litigation Update under Tab N.

The Assistance, Quality, and Affordability Act (H.R. 4653) would amend the SDWA and reauthorize and increase funding for the EPA's Drinking Water SRF.

The Grassroots Rural and Small Community Water Systems Assistance Act (S. 611, H.R. 2853) was passed by Congress and signed by the President in December. It reauthorizes the SDWA's technical assistance and training provision for \$15 million per year through 2020, and EPA may use the funds to provide grants or cooperative agreements.

Senator Dianne Feinstein (D-CA) introduced the California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act (S. 2533) in February. Senators Feinstein, Barasso, and Tester are looking for support for broader drought legislation, working to include rural water and irrigation projects.

On the Good Samaritan front, the Abandoned Mine Reclamation Safety Act (H.R. 4323) was introduced in January as part of a package of three reforms that include funding, partnerships, safety, monitoring, and mine clean-up education. Additionally, Colorado Senators Gardner and Bennett and Representative Tipton released draft legislation that would allow state and local governments and other groups to apply for EPA permits, with liability protection for inadvertent damage as long as they abide by the terms of the permit.

The Discouraging Frivolous Lawsuits Act (H.R. 4149) was introduced in December, aimed at limiting settlements that require compensatory mitigation and award attorneys fees, as well as repealing the power of EPA to veto Corps §404 permits under the CWA. The House and Senate passed a joint resolution to express disapproval of the EPA and Corps' Waters of the United States (WOTUS) rule. The resolution was vetoed by the President in January.

In January, the U.S. Supreme Court heard oral arguments on *Sturgeon v. Frost*, regarding an Alaska statute (ANILCA, 16 USC §1301 et seq.) that created exceptions for private and state inholdings when National Park Service lands were created, and whether a nationwide ban on hovercraft applied to the bed and banks of a state river inside the outer boundaries of the Yukon-Charley. Among its other arguments, the NPS said that (1) the navigable waters of the river were never "conveyed" to the State of Alaska; and (2) the federal government holds title to interests in navigable waters under the doctrine of reserved water rights, and therefore (under ANILCA's definition of "public lands," which includes waters), the NPS may regulate those waters.

David Schade: My boss just sent me an update on the case. The Supreme Court decided the 9th Circuit has it backward. So this is going back to the district court for further review. The decision is an interesting, quick read, and a significant ruling that will impact Alaska.

The U.S. District Court for the Eastern District of Virginia denied a Motion to Dismiss in *Sierra Club v. Virginia Electric and Power Company* in November, finding that the Sierra Club had standing to bring a lawsuit alleging that the energy company was discharging coal ash, contaminating groundwater that eventually leads to a navigable body of water. The First, Fifth and Seventh Circuits have each held that the CWA does not cover discharges that enter surface waters through groundwater, but the Sierra Club is arguing that the company's actions were a violation of the CWA and a state-issued pollutant discharge permit because the groundwater acted as a "conduit" for the pollution, reaching the navigable water and creating a point source, requiring an NPDES permit.

Duarte Nursery v. Corps of Engineers, Members of the Board of the Central Valley Regional Water Quality Control Board is a case in California dealing with farming operations and alleged violations of CWA §404 for discharging without a permit, which the plaintiff's attorneys are characterizing as a WOTUS jurisdiction issue. The case is in the summary judgment phase right now.

The Supreme Court denied the petition for certiorari in *Bear Valley Mutual Water Co. v. Jewell et al.*, regarding the validity and enforceability of mutual agreements entered into under habitat conservation plans (HCPs). Another question was whether ESA §2(c)(2) is a meaningless, non-operative statement of policy that fails to create any substantive or enforceable rights regarding cooperation by FWS with state and local governmental agencies to resolve water resource issues arising from administration of the ESA in concert with the conservation of endangered species. WSWC helped craft the 2(c)(2) language.

The BLM's 2015 fracking rule was blocked by a preliminary injunction in September by the U.S. District Court in Wyoming, *Wyoming and Colorado v. US Department of the Interior and Bureau of Land Management*. The Administration failed to fast-track the preliminary injunction into a final appealable decision December, but its motion to reverse the injunction is still pending before the 10th Circuit. The District Court is concurrently continuing to hear the merits of the case.

OTHER MATTERS

There being no other matters, the meeting was adjourned.