

**MINUTES
of the
LEGAL COMMITTEE
Marriott Pyramid North Hotel
Albuquerque, New Mexico
October 19, 2017**

Table of Contents

Welcome and Introductions	4
Approval of Minutes	4
Sunsetting Positions	4
WOTUS Litigation Update	4
Indian Water Rights Settlement	5
Discussion: Tribal Water Codes	5
WSWC/WestFAST Federal Non-Tribal Water Claims Workshop	6
Discussion: State General Stream Adjudications	6
EPA Water Transfer Rule	9
Legislation and Litigation Update	9
Other Matters	10

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MEMBERS AND ALTERNATES PRESENT

ALASKA	David Schade
ARIZONA	Trevor Baggione Einav Heneson
CALIFORNIA	Jeanine Jones
COLORADO	Patrick Pfaltzgraff
IDAHO	Jerry Rigby John Simpson
KANSAS	Kenneth Titus
MONTANA	Tim Davis Jay Weiner
NEBRASKA	
NEVADA	Jason King
NEW MEXICO	Greg Ridgley Tom Blaine
NORTH DAKOTA	Jennifer Verleger
OKLAHOMA	Julie Cunningham
OREGON	Tom Byler
SOUTH DAKOTA	Kent Woodmansey
TEXAS	John Niermann
UTAH	Norm Johnson

WASHINGTON

WYOMING

Steve Wolff
Pat Tyrrell
Chris Brown

GUESTS

Travis Hyer, Salt Lake City, UT
Elizabeth Weight, NIDIS/NOAA, Boulder, CO
Joe Klein, Alaska Fish and Game, Anchorage, AK
Mindi Dalton, U.S. Geological Survey, Atlanta, GA
Estevan Lopez, Occam Engineers, Inc., Santa Fe, NM
Scott Verhines, Occam Engineers, Inc., Albuquerque, NM
John Longworth, Office of the State Engineer, Santa Fe, NM
Peter Nichols, Berg Hill Greenleaf Ruscitti, LLP, Boulder, CO
Mat Weaver, Idaho Department of Water Resources, Boise, ID
Carlee Brown, Colorado Water Conservation Board, Denver, CO
Stephanie Granger, National Aeronautics and Space Administration, Pasadena, CA

WESTFAST

Roger Pierce, Federal Liaison, Murray, UT
Chris Carlson, U.S. Forest Service, Washington, DC
Patrick Lambert, U.S. Geological Survey, Salt Lake City, UT
Becky Fulkerson, U.S. Bureau of Reclamation, Washington, DC
Doug Cutis, U.S. Bureau of Land Management, Washington, DC
Roger Gorke, U.S. Environmental Protection Agency, Sacramento, CA
Andrew Hautzinger, U.S. Fish and Wildlife Service, Albuquerque, NM

STAFF

Tony Willardson
Michelle Bushman
Sara Larsen
Cheryl Redding
Adel Abdallah (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 in Rohnert Park, California on June 28, 2017, were unanimously approved.

SUNSETTING POSITIONS

Position #374 - Supporting the Dividing the Waters Program, educating judges on water rights adjudications. Michelle gave an update on the program, and provided information on the Texas water conference for judges coming up in November. A motion to renew the position was given with a second, and it was unanimously approved.

Position #375 – Outlining the actions that federal agencies should take to help expedite general stream adjudications. With a motion to renew and a second, the committee voted and unanimously approved the motion.

Position #376 - Supporting Indian water rights settlements. Upon a motion to renew and a second, the committee unanimously approved.

WOTUS LITIGATION UPDATE

Jen Verleger provided an update on WOTUS. The U.S. Supreme Court held its hearing on the issue of the 6th Circuit's jurisdiction, and it sounded like the justices were seriously considering the states' position that the cases belong in the federal district courts. If the 6th Circuit loses jurisdiction, the nation-wide injunction will go away. Folks would need to go back to the district courts to get an injunction, but with the federal agencies' efforts to withdraw WOTUS 1.0, there's less concern. Justice Ginsberg asked whether the case is moot in light of the agencies' recent steps to withdraw the WOTUS rule, but it seems likely that the jurisdictional issue would come up again. There will probably be more intense WOTUS litigation updates in the future, but right now, there is not a lot going on while we wait for a Supreme Court decision. The North Dakota case is the furthest ahead in terms of the District Court cases, but Judge Erikson was confirmed to serve on the 8th Circuit in September, and there's a backlog of DAPL-criminal cases, so we're not sure what's going to happen there.

INDIAN WATER RIGHTS SETTLEMENTS

Greg Ridgley provided an update on the Symposium on the Settlement of Indian Reserved Water Rights Claims, held August 8-10 in Great Falls, Montana. Acting Commissioner Alan Mikkelsen attended, which was very encouraging, and he addressed the notion of using the Bureau of Reclamation Fund for western water infrastructure for the benefit of the tribes and the states. A written summary of the Symposium was also included in Tab K.

Next, Michelle provided an update on Phase I of the Agua Caliente case, which is before the Supreme Court as a petition for certiorari from the 9th Circuit's decision that groundwater can be used to fulfill reserved water rights claims.

DISCUSSION: TRIBAL WATER CODES

Tom Byler: Oregon is grappling with the issue of who manages the water that crosses state-tribal boundaries. In central Oregon we reached a settlement with the Confederated Tribes of Warm Springs. They have a uniform boundary and it's a straightforward issue. With the Umatilla Tribes the area is more patchwork with inholdings, and it's more complicated. Do any of the other states have experience with this? Do you have co-management responsibilities with the tribes?

Jay Weiner: We've had some experience in Montana's compacts. We closed basins to new water rights and used water models to figure out where the water was flowing and in what amounts. With the Confederated Salish and Kootenai Tribe, we have a unitary water code to jointly manage the water in complex jurisdictions. We found ways to improve state law as part of a pilot project based on the reservation water code.

Norm Johnson: In Utah, on the Uintah and Ouray Indian Reservations, the land is heavily checkerboarded with homestead property. Some of the allotments have passed out of the hands of tribal members, so there are non-Indian folks with tribal-derived water rights under the tribal water code. The state has primary responsibility for management and administration of the water rights in the area, though it hasn't been implemented yet. The proposal in the Central Utah Completion Act caused a great deal of controversy, particularly among the tribal leadership and advisors and considering issues of tribal self-determination. There has been a moratorium on tribal water codes for a long time. We checked with the Department of the Interior on this moratorium to find out if it is still valid. We were told it is. One way around that is to negotiate a state-tribal compact, which is drafted but not ratified. Another issue is that the Tribal Constitution requires Secretarial approval for regulation of non-tribal members.

Chris Brown: In Wyoming the Shoshone and Arapaho Tribes have a water code, but the state generally administers the water rights. If the diversion serves tribal lands, then the tribe has jurisdiction, but some diversions on the reservation serve state rights. The State Engineer's

Office also monitors diversions taken by the tribes, but if a dispute arises then the state and tribe have to return to a McCarran court to resolve the dispute.

Tom said he can do some follow up with the folks that chimed in.

WSWC/WESTFAST FEDERAL NON-TRIBAL WATER RIGHTS WORKSHOP

Roger Pierce, WestFAST Liaison, gave an update on the Federal Non-Tribal Water Rights Workshop, “Continuing State-Federal Relationships through the Implementation Phase of Decreed and Adjudicated Water Rights.” The states and federal agencies presented case studies, on Devil’s Hole in Nevada, Crater Lake in Oregon, Quivira Wildlife Refuge in Kansas, and Lake Tahoe on the California-Nevada border. Based on the topics discussed during the workshop, Roger boiled down the presentations to three overarching themes:

1) Communications - it was clear in the case studies of Crater Lake and Devil’s Hole, the National Park Service was talking with the states and attempting to work through the process in a collaborative way that avoided state-federal conflict. Similarly, the communications between the Fish and Wildlife Service and Kansas were extensive as they sought to find solutions that are sustainable. How we handle those state-federal communications makes a difference.

2) Economics – If you can find an economic reason to accomplish what you want to do, you’ve usually got a good foundation to stand on to get things done. In the Kansas wildlife refuge case, the economic perspective is critical to identifying solutions. As a nation we value these species, and we also value agriculture. It can be a balancing act to ensure water is available for species habitat, beautiful parks, and other economic uses. The cost/benefit analysis can inform different approaches to identify workable solutions.

3) Technology - Smart use of new technologies can better inform tough water management decisions. The numerical hydraulic modeling is getting better at letting us know how much water we have under ground and above ground, and where we can locate wells to do the least amount of damage.

The workgroup’s next quarterly call will be scheduled at the beginning of 2018, and we will discuss where we are going next with workshops and coordinating state-federal efforts.

DISCUSSION: STATUS OF STATE GENERAL STREAM ADJUDICATIONS

Tony noted that he is doing a webinar for the Western Regional Partnerships. The audience will be largely representatives from the states and the Department of Defense. They are curious about adjudications – what they are, why they take so long, and the current status of adjudications in each state. His intention is to give them a better understanding, and communicate the complexity and importance of these adjudications.

Montana: Jay Weiner - We have a statewide stream adjudication process that is nearing completion. The water court wants to have final decrees done by 2028. We have 7 compacts with the tribes, 4 have been approved, the others are waiting for Congressional approval. We also have 11 federal enclaves with approved settlements.

New Mexico: Greg Ridgley - Why we do adjudications is such an existential question, I don't know where to start. New Mexico is just about done with our adjudications...as we have been for the last 20 years. My boss has asked these questions for the last 3 years I have worked for him. I'm envious of how other states have approached this. We have 11 pending lawsuits, but no state-wide adjudication process. New Mexico, unlike Montana, adjudicates water rights through permits by the State Engineer. To address pre-code water rights, and federal reserved water rights subject to the McCarran Amendment, we end up bringing all water rights in the area, including permitted rights, into the litigation process, as part of due process for water rights owners. There's a tendency of water rights owners to resist the process.

California: Jeanine Jones quipped "What are they, and why would you do one?" California doesn't have any general stream adjudications.

Arizona: Einav Heneson stated that it's not her area of expertise, but Arizona has been doing them tediously for the past 40 years.

Texas: They had adjudications, but they've been completed for many years now.

Kansas: Kenneth Titus – They don't have any adjudications going on right now, but during the 1940s, existing water rights users had until the 1970s to obtain an administrative grant for their rights.

Colorado: Pat Pfaltzgraff - We have the water courts specifically set aside to handle water resource issues.

Idaho: John Simpson – We have a number of stream adjudications. The Snake River Adjudication was started in 1987. Swan Falls is a McCarran Amendment issue that involved a substantial number of tribal and other federal reserved rights and state-based claims. For due process reasons, it became very costly. They started with some test basins. Final adjudication has been filed with the court, but we have some claims yet to be resolved. Northern Idaho Adjudication rights are being reviewed, and this has about 3 separate adjudications. The Bear River is another potential adjudication. The idea behind the adjudications is you can't administer the water if you don't know what is out there.

Matt Weaver – most basins are over appropriated, and no one knew the extent of the water rights. From a department perspective, there's a statutory obligation to administer these rights, and we have to quantify them first.

Utah: Norm Johnson - we have adjudications. Some are old and were considered comprehensive at the time the decrees were entered, and some are pending and have been for decades. Frankly, they have not pursued some of the adjudications as they have not had the judicial resources. The Department Director is interested in moving things along, and some resources have been secured through the Legislature now. We have a Special Master appointed to work on the old objections, and they're starting to gather information in new areas. A year from now we may have a better sense of whether it does any good to spend the money and other resources on longstanding adjudications.

North Dakota: Garland Erbele - the state has never entered into a state adjudication process.

South Dakota: Kent Woodmansey – We don't have any state adjudications.

Wyoming: Pat Tyrrell - We have one general adjudication, and it is in Water Division 3 area. They passed a statute that was litigated immediately. Tribal request kicked off the adjudication in the 1970s. You want to know what you are administering on the ground. They don't really know how many acres are permitted. We used a 3 phase approach. It's been a bird's nest to unravel. The scientists and other experts have been very detailed, and the due process component has been significant. We go back and forth in the court process. It is a massive clean-up that celebrated 37 years in 2016. Pat also provided a description about lessees and permittees; the water rights are adjudicated to the landowner, not the lessee, focusing on the point of diversion where the beneficial use is made, not the cattle that are putting the water to use. Wyoming also entered into MOUs with the USFS and BLM to clarify the permitting process. Wyoming does not adjudicate either de minimus stock or domestic uses.

Montana: Tim Davis – Quick comment about needing to get \$20 million additional funding and the hope to finish by 2028.

Alaska: David Schade - Trying to figure out how to do this process. We have an administrative process, but at some point we will need to deal with tribal and non-tribal McCarran rights in stream flows that will tie up the municipalities. We will probably do a court process and handle all the rights at once.

Oklahoma: Julie Cunningham – We can do adjudications. In 1963 we passed a water law that had the effect of cleaning up the past mishmash of riparian and appropriation claims by 1968. In 1971 we added rules recognizing domestic water rights and a right to adjudication. Groundwater is private property, but surface water is public and subject to appropriation. Dams and reservoir management were excluded from prior appropriation rights. We set up an administration program to quantify water. We just settled the Choctaw Chickasaw claims with Oklahoma City, which was an adjudication process before the settlement negotiations.

Nevada: Jason King - We have had adjudications. Any stream with flow has already been adjudicated and decreed.

Oregon: Tom Byler - About 2/3 of surface water rights have been adjudicated. The Klamath adjudication started in the 1970s. We're looking at taking a different approach and slicing off some smaller basins to adjudicate. The groundwater code was adopted in 1955, and we need a way to determine pre-1955 uses. We have not adjudicated any groundwater uses in the state, and I can't imagine that we will attempt it any time soon.

EPA WATER TRANSFER RULE

Peter Nichols, Partner, Berg Hill Greenleaf Ruscitti, LLP, provided an update on the EPA Water Transfer Rule. New York State along with several other states filed a petition for certiorari, appealing the 2nd Circuit's decision. Half of the states have now dropped out, and so have several environmental organizations. Communications with the Solicitor's office indicate that an extension will likely be requested, and responses will not be due until Jan 15, 2018.

There is a difference of opinion about whether or not anyone other than United States should respond. Despite the argument that there is a split amongst the circuits, there really is not, and one thought is that we shouldn't turn this into something bigger. New York tried to take a shot at *Chevron* deference. They haven't raised anything very compelling for the court. We will see if there is anything we can add from the West, to fill in any gaps that might not be raised by the United States.

WGA is leading the effort to add the rule into the United States Code. They're working with lobbyists in D.C. to coordinate the strategy, to identify a legislative vehicle and find committee with western folks on it. There seem to be many different Republican parties lately, and it's more difficult than they initially thought.

LEGISLATION AND LITIGATION UPDATE

Michelle provided an update on recent legislation and notable litigation. The Hualapai Tribe Water Rights Settlement Act (S.1770) was introduced in September. The Water and Energy Sustainability through Technology (WEST) Act (H.R. 3275) covers a little something for everyone, from WaterSMART, the energy-water nexus, Circuit Riders, agricultural efficiency, water data, SRFs and groundwater management. There was some discussion with Pat Lambert about a bill establishing USGS Water Science Centers (H.R. 3156), as these centers already exist as an Administration creation. Chris Carlson chimed in about the potential ramifications of the Water Rights Protection Act (H.R. 2939/S.1230) on the operations of the Forest Service and other federal agencies.

OTHER MATTERS

Jennifer Verleger provided an update on the status of the Corps' Water Supply Rule. The deadline for comments keeps getting pushed back. The National Water Supply Alliance has been meeting with the power marketing agencies from the Southeast. There is not as much tension with them as we thought over some key issues, and there is some consensus about going to the Corps to work on a rule that will make everyone a little happier. NWSA is talking about hiring a lobbyist to help draft what we would like to see as a Water Supply Rule, particularly respecting state rights and our prior appropriations framework. The NWSA is considering meeting in Washington, D.C. during the same week as our WSWC-ICWP Roundtable.

Julie Cunningham is the new Chair of the ICWP.

There being no other matters, the meeting was adjourned.