

MINUTES
of the
LEGAL COMMITTEE
Best Western Agate Beach Inn
Newport, Oregon
August 2, 2018

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MEMBERS AND ALTERNATES PRESENT

ALASKA	David Schade
ARIZONA	Einav Heneson
CALIFORNIA	Jeanine Jones
COLORADO	--
IDAHO	Jerry Rigby
KANSAS	Tracy Streeter Ken Titus (via phone)
MONTANA	Jan Langel Jay Weiner (via phone)
NEBRASKA	--
NEVADA	--
NEW MEXICO	Greg Ridgley
NORTH DAKOTA	Garland Erbele Jennifer Verleger
OKLAHOMA	Sara Gibson (via phone)
OREGON	Tom Byler Jennifer Wigal
SOUTH DAKOTA	--
TEXAS	Jon Niermann

UTAH

Eric Millis
Norm Johnson

WASHINGTON

Mike Gallagher
Buck Smith
Mary Verner

WYOMING

Pat Tyrrell
Steve Wolff

GUESTS

Phil Ward, Oregon
David Moon, The Water Report, Eugene, OR
Larry Moffett, Daniel Corker Horton & Bell, Oxford, MS
Ward Scott, Western Governors' Association, Denver, CO
Laura Watson, Washington Ecology Division, Olympia, WA
Mat Weaver, Idaho Department of Water Resources, Boise, ID
George Neville, Mississippi Attorney General's Office, Jackson, MS
Christopher Estes, Chalk Board Enterprise, LLC, Anchorage, AK (via phone)

WESTFAST

Roger Pierce, Federal Liaison, Murray, UT
Doug Cutis, U.S. Bureau of Land Management, Washington, DC
Deborah Lawler, U.S. Bureau of Reclamation, Salt Lake City, UT
Roger Gorke, U.S. Environmental Protection Agency, Sacramento, 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 Arlington, Virginia on March 14, 2018 were unanimously approved.

U.S. ARMY CORPS OF ENGINEERS

Jennifer talked about the U.S. Army Corps of Engineers (Corps) engaging in elutriate testing of sand bars for bird habitat to comply with the Endangered Species Act requirements. The Corps won't get permits from the state despite state ownership of the beds. North Dakota is putting together a complaint to sue the Corps, but would like to work the issue out instead. It seems the Corps would also like clarity on the extent of their responsibility and authority under the statutory purposes of the dams. How broad is the navigation servitude to build the sandbars? Are any other states having similar issues regarding permitting? North Dakota's communications with the Corps are included under Tab P in the briefing materials.

MISSISSIPPI V. TENNESSEE

Mike Ellingburg, representing the State of Mississippi, provided an overview of the interstate groundwater case, *Mississippi v. Tennessee*, currently before the U.S. Supreme Court. This is the first interstate water dispute over groundwater before the Supreme Court. Mississippi wants to assert control over its own resources as a natural resource belonging to the people of the state. Equitable apportionment is not the ideal doctrine for dealing with groundwater. The aquifer is anisotropic and heterogenous, and the pristine deep confined aquifer would not move into Tennessee but for their excessive pumping near the state border. Although Tennessee has attempted to simplify the groundwater system, it is complex and still a mystery in most places. The complexities don't allow a simple formula for apportionment of groundwater between the states. The case has the potential to impact other states as they deal with interstate groundwater disputes, and they may wish to weigh in with amicus briefs as the Special Master concludes his findings and report by the beginning of 2019. Mississippi would like to resolve this with Tennessee, but Tennessee currently has no incentive to see Mississippi's point of view.

Greg Ridgley: I'm interested in how this compares to the *Sporhase v. Nebraska*, 458 U.S. 941 (1982) case.

Mr. Moffett: Where the state has a reasonable regulatory regime, the state has authority to prevent the water from going somewhere else. The issue is the right to control the water within the borders of Mississippi, not an issue of selling the water. There is no commerce clause issue in this case.

Pat Tyrrell: Can you quantify the injury and damages from drawdown? Who is using the water in Mississippi?

Mr. Moffett: It costs more money to produce the good water from the deeper aquifer. The deeper drawdown is causing impairment of the groundwater quality in Mississippi.

Garland Erbele: Does Mississippi have a regulation and permitting process in place?

Moffett: Mississippi learned about this in the 1990s and attempted to get cooperation on some studies. Mississippi has regulation and permitting.

OREGON LEGAL ISSUES

Tom Byler talked about recent regulatory wrinkles in Oregon's Petitions for Judicial Review (PJR). The regulation (536.075 (5)) has existed for a long time, and provides due process protections when determining water use priority. The water master issued final orders "regulating" (curtailing/shutting down) junior water users in favor of senior users. The junior users have the opportunity to contest these orders, which includes a stay of enforcement pending the judicial review. The process has only recently been used, primarily in the Klamath Basin, where 11 new PJR's were filed. From an enforcement standpoint, the regulation undermines the doctrine of prior appropriation. Those PJR delays can be significant to senior water users.

Oregon is also working its way through the physical takings compensation case, *Bailey vs U.S.* The Oregon Water Resources Department filed an amicus brief with the U.S. Court of Appeals, asserting that the Court of Claims 2017 conclusion is flawed and misrepresents the legal status of water rights in Oregon. While the Klamath, Hoopa, and Yurok Tribes had federal reserved water rights, those rights were not quantified and legally enforceable under state law for the Upper Klamath Lake in 2001. Contrary to the Claims Court's conclusions, no federal reserved rights could have made a call for water in 2001.

WSWC-NARF TRIBAL WATER RIGHTS AD HOC GROUP

Tony provided an update on the Ad Hoc Group efforts to find more permanent funding mechanisms for approved settlements in Congress. Senator Udall introduced S. 3168 to amend the 2009 Omnibus Public Land Management Act to make the Reclamation Water Settlements Fund permanent. The Fund currently terminates at the end of FY2034. The Senate Indian Affairs Committee held a hearing on the bill on July 18th.

Norm Johnson provided an update on the Utah-Navajo Nation settlement. The State has been working with the tribe for about 15 years. They are using a funds-based approach for this settlement, which differs from the usual project-based approach for Indian water rights settlements. The Bureau of Reclamation was worried about cost overruns. They started a development fund, and the State has already contributed \$200 million. The bill was introduced in the Senate. Senator Hatch is taking more and more interest in this. The settlement makes sense from many different perspectives, including concerns about Utah's portion of the Colorado River Compact. A letter

from the Administration to comply with Rep. Bishop's requirements is in process, which will allow the House version of the bill to make it through the House's earmark ban.

Greg Ridgley: What is your understanding of why the Navajo Nation became comfortable with a fund-based approach rather than a project-based approach?

Norm: I'm not sure I can answer that from their perspective. These are drinking water projects by the way. The projects would make it more convenient for them to access water. Once the accounting is appropriately done and accounted, Utah is okay with that.

Greg Ridgley: In the Aamodt case, cost overruns are creating problems for settlement implementation. It is making the funding-based solution more attractive.

Tony: This may become a policy position of the Federal government moving forward. For now they are considering fund-based settlements on a case-by-case basis.

Norm: Senator Hatch may be trying to find some offsets for this settlement.

WSWC-WESTFAST NON-TRIBAL FEDERAL WATER RIGHTS WORKGROUP

Roger Pierce provided an update on the Workgroup's recent efforts. A workshop on implementation of decreed rights was held last fall in Albuquerque. We will have a teleconference to talk about the remaining topics, but we are on track to hold a workshop on grazing water rights in the fall with our meeting in Coeur d'Alene.

DISCUSSION: CALLS AND CURTAILMENTS

Council staff prepared a draft survey for the states on their laws and processes to enforce priority water rights in times of water shortage. Tony asked whether this would be of benefit to the members, to gather info on calls and curtailments. The states may need some clearer definitions in terms of regulations and curtailments, since they don't all use the same terminology. Pat Tyrrell said he believes this is a useful exercise. Tom Byler noted that it would be difficult to make any changes to the state surface water regulations on based on the survey results. Groundwater is a different matter. David Schade agreed that it would be more helpful for the states to know what each other are doing when it comes to groundwater curtailments. Norm recommended paring the questions down to about 10.

LEGISLATION AND LITIGATION UPDATE

Michelle provided a brief overview of new content in the Legislation and Litigation Update in Tab T. She highlighted the introduction of the WRDA bills (H.R. 8 and S. 2800) and the Farm

bill (H.R. 2). She pointed out the inclusion of EPA's Water Transfer's Rule that would be codified by S. 2563. In the *Florida v. Georgia* equitable apportionment case, the Supreme Court remanded to the Special Master to make an equitable-balancing inquiry and determine whether Florida's harms may be redressed by a court decree, assuming the Corps voluntarily cooperates with the decree. She noted that there are additional cases on the issue of the Clean Water Act's applicability to indirect discharge to navigable waters through groundwater, which also appear to be making their way up to the Supreme Court along with the *Hawaii Wildlife Fund v. County of Maui* case.

Jennifer provided an update on WOTUS and talked about the recent *Georgia* case decision to stay the 2015 Rule. The judge found that the states were likely to prevail on the merits, and that the 2015 Rule contains similar broad language to the definition invalidated in *Rapanos*, leaving wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water.

Michelle noted that we try to stay on top of the significant cases and Congressional bills that are tied into the work plan topics. If anyone is aware of cases or proposed legislation that is missing and would like us to keep track, please let us know.

Dave Barfield asked a follow up question on the *Mississippi v. Tennessee* case regarding what Mississippi hopes to get out of the case. Mr. Moffett said that injunction and damages would be potential remedies. The wells in Tennessee could be spaced further apart, and pumped at different intervals, alleviating some of the drawdown problems.

Tony noted that we had a request from Brittnee Preston (Oklahoma) regarding legislation for more transparent billing from the Power Marketing Administrations. The Environmental Compliance Cost Transparency Act (H.R. 5556) would require an estimate of the customer's share of direct and indirect costs for compliance with any relevant federal environmental laws impacting the conservation of fish and wildlife. She expressed some concerns about the impact on the wildlife side of things.

SUNSETTING POSITIONS FOR FALL 2018 MEETINGS

Tab XYZ of the briefing materials contains sunseting positions that will be brought up at the 2018 Fall meetings.

OTHER MATTERS

There being no other matters, the meeting was adjourned.