

**LEGAL COMMITTEE  
WORK PLAN  
July 1, 2018~~7~~ to June 30, 2019~~8~~**

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

**Work-to-Date:** The Committee 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.

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. The WSWC and WestFAST subsequently created a joint state-federal workgroup to help develop the clearinghouse and implement the other recommendations that emerged from the workshop. On November 10, 2015, the workgroup held a webinar presentation on state and federal perspectives of the McCarran Amendment. On July 13, 2016, the workgroup held a workshop in Bismark, North Dakota on Groundwater and Meeting Federal Water Needs. [On October 18, 2017, the workgroup held a workshop in Albuquerque, New Mexico, on Continuing State-Federal Relationships through the Implementation Phase of Decreed and Adjudicated Water Rights.](#)

**2017-2018:** The Committee will work to carry out the recommendations and next steps that emerged from the workshops and webinar. 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. The workgroup will hold a workshop on ~~how states and federal agencies approach grazing water rights, hypothetical or actual examples of how adjudicated or decreed federal water rights will be administered by states, and how state and federal agencies would approach situations like curtailments under the current laws.~~

**Time Frame:** Ongoing

Federal Non-Tribal Water Claims Subcommittee: David Schade (AK), Jay Weiner (MT), Greg Ridgley (NM), Jennifer Verleger (ND), Dwight French (OR), Todd Chenoweth (TX), Norm Johnson (UT), Buck Smith (WA), and Pat Tyrrell and Chris Brown (WY). WestFAST members and agency staff participating in the Subcommittee in an *ex officio* capacity include: ~~Jana Wileox~~ (Bureau of Land Management), Marc Kodack (Department of Defense), Andrew Hautzinger (U.S. Fish and Wildlife Service), Donald Anderson ~~and Becky Fulkerson~~ (Bureau of Reclamation), Jeff Hughes (National Park Service) and Chris Carlson (U.S. Forest Service). Other *ex officio* members of the Subcommittee include Kristen Geddes ~~and Susan Joseph Taylor~~ (NV), Jonathan Allen (OK), Jesse Ratcliff (OR), and Abigail Boudewyns (WY).

## 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 (2006). This was followed by the WOTUS Rule, finalized on June 29, 2015 (80 FR 37054). Many of our member states filed lawsuits challenging the WOTUS Rule in federal court. [Subsequent motions centered primarily on the issue of which courts had jurisdiction to hear the lawsuits, and the procedural matter is now before the U.S. Supreme Court. In 2018, the U.S. Supreme Court held that challenges to the WOTUS Rule belonged in the federal District Courts, overturning a 6th Circuit decision to consolidate the cases. National Association of Manufacturers v. Department of Defense \(#16-299\)](#)

WSWC adopted positions #369 and #373 regarding CWA rulemaking efforts and state-federal collaboration. [Position #369 was revised and readopted as Position #410, while Position #373 was allowed to sunset and acknowledged as a letter with continued historical value.](#)

On February 28, 2017, the Trump Administration issued an Executive Order, *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule*, directing the EPA and Corps to review the WOTUS Rule for consistency with the stated policy of keeping the navigable waters free of pollution while also promoting economic growth, reducing regulatory uncertainty, and respecting the roles of Congress and the States. The EO specifically directs the agencies to interpret "navigable waters" consistent with the opinion of Justice Scalia in the *Rapanos* case. On March 6, 2017, the agencies published a *Notice of Intention to Review and Rescind or Revise the Clean Water Rule* in the Federal Register, 82 FR 12532. [WSWC submitted a letter on June 19, 2017, outlining the states' federalism concerns and requesting continued dialogue and collaboration throughout the development of a new WOTUS rule. WSWC also submitted comments on a proposed rule \(82 FR 34899\) re-codifying the pre-2015 WOTUS Rule regulation, intended to maintain the status quo. WSWC has continued to engage with the agencies at each outreach opportunity during the rulemaking process.](#)

**20187-20198:** The Committee will continue to work with the Water Resources and Water Quality Committees through the Workgroup to follow and comment on federal actions regarding CWA jurisdiction in accordance with the WSWC's and WGA's positions.

**Time Frame:** Ongoing

CWA Rulemaking Workgroup: Michelle Hale (AK), Trisha Oeth (CO), Barry Burnell (ID), Tom Stiles (KS), Jennifer Verleger (ND), Julie Cunningham (OK), Todd Chenoweth (TX), Laura Driscoll (WA), and Kevin Frederick (WY).

\*See Item 2(a) of the Water Quality Committee Workplan

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

**Work-to-Date:** The Western Governors' Association (WGA) and WSWC have long supported the negotiated resolution of Indian water rights claims (WSWC Position #[412376](#)). As a result, the WGA and WSWC have worked with the Native American Rights Fund (NARF) for over thirty years as part of an Ad Hoc Group on Reserved Indian Water Rights to promote negotiated settlements.

Over the years, the Ad Hoc Group has carried out a number of activities to support the negotiated settlement of Indian reserved water rights claims, including frequent trips to Washington, D.C. to support policies that facilitate settlements and a biennial symposium on settlements that the WSWC and NARF hold every odd year. The Group has also worked to highlight the need to secure a permanent funding mechanism for authorized settlements and to identify alternative funding sources to help ensure that settlements authorized by Congress and approved by the President will be implemented.

In recent years, the WSWC and NARF have established regular meetings with the Deputy Secretary of the Interior's Office, the Secretary of the Interior's Indian Water Rights Office, and other Interior officials engaged in Interior's Indian water rights efforts. The WSWC and NARF have also held regular meetings with the White House Office of Management and Budget and other White House officials to support the WSWC's settlement policies.

**20187-20198:** The Committee will oversee WSWC's Ad Hoc Group efforts in the following areas: (1) activities to gather support for an appropriate remedy to settlement funding issues, including the development of a permanent settlement funding mechanism, the identification of other possible funding sources, and funding for federal assessment, negotiation, and implementation teams; (2) 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, including possible modifications to the Criteria & Procedures; and (3) hold the [20197](#) Symposium on the Settlement of Indian Reserved Water Rights Claims in partnership with the Native American Rights Fund.

**Time Frame:** Ongoing

Reserved Rights Subcommittee: Bill Staudenmaier (AZ); Cindy Chandley (AZ); Jay Weiner (MT), Greg Ridgley (NM), and Norman Johnson (UT). NARF members participating in the Subcommittee in an ex officio capacity include: John Echohawk, Joel Williams, Heather Whiteman Runs Him, Steve Moore, [Dan Lewerenz](#), and David Gover. Other ex officio members include Susan Cottingham, [Nathan Braeken](#), Stanley Pollack, [David Mullen](#), Ryan Smith, [Michael Bogert](#), [Pamela Woodies](#), [Vanessa Ray-Hodge](#), [Jacob Schellinger](#), [Melanie Stansbury](#), and Arianne Singer.

### **4. WRDA/CORPS POLICIES**

**Work to date:** The Council has in the past supported regular passage of a Water Resources Development Act (WRDA), and has addressed a number of specific policy issues, while not

taking any position on specific project authorizations. The Council has raised concerns with the Corps' approach to identifying and regulating the use of "surplus waters" and Corps drought authorities related to Corps projects. The Council also worked to exclude irrigation water supply canals from any new safety levee safety program.

**20187-20198:** The Council will continue to work with the Congress and Corps on WRDA and Corps-related issues, including the treatment of irrigation canals under the proposed new levee safety program. Further, the Council will continue to work to ensure that state water rights and prerogatives are protected, specifically as it relates to natural flows, Corps storage and other issues.

**Subcommittee:** Jennifer Verleger (ND); Tracy Streeter (KS); and Tim Davis (MT)

### **A. Corps Surplus Water Supply Rulemaking**

**Work to date:** On December 16, 2016, the Corps published its proposed surplus water rule, *Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply*. The Flood Control Act of 1944 specifically declared the policy of Congress to recognize the interests and rights of the Missouri River Basin States in determining the development of the watersheds within their borders and likewise their interests and rights in water use and control, and to preserve and protect to the fullest extent established and potential uses of the rivers' natural flows, those flows that would pass through the states in the absence of the Corps of Engineers dams. The federal government has long recognized the right to use water as determined under the laws of the various states. However, the Corps has indicated that all waters entering its Missouri River mainstem reservoirs are stored waters to be allocated and controlled by the federal agency and does not recognize the States' right to access natural flows, separate from the captured floodwaters stored within those reservoirs.

In October 2015, the Council adopted a resolution (#388) urging the Corps to recognize the legal rights of the States' to allocate water, wrote the Assistant Secretary of the Army for Civil Works regarding its concerns, and has met with Corps officials on different occasions, as well as discussed legislative clarifications with congressional staff. The Council has also surveyed its member states regarding their definition of stored waters and related storage rights. On May 12, 2017, the Council sent a letter to the Corps expressing the states' concerns with the proposed rule.

**2017-2018:** The Committee will continue to work to address this issue and explore alternative solutions, including both administrative and congressional action.

## **5. Groundwater**

There are a number of ongoing groundwater issues that pertain to WSWC policies or are otherwise of interest that the Committee will monitor and address on an as-needed basis.

### **A. Reserved Water Rights**

**Background:** On March 7, the 9th Circuit upheld the California District Court’s summary judgment from Phase I of the trifurcated case, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* (No. 15-55896). The 9th Circuit decision holds that the United States implicitly reserved a right to water when it created the Agua Caliente Reservation, and that the Tribe’s reserved water right extends to the groundwater underlying the Reservation. The court acknowledged that it was unable to find any controlling federal appellate authority explicitly holding that the federal reserved water rights doctrine in *Winters v. United States*, 207 U.S. 564 (1908), extends to groundwater. Instead, it pointed to *United States v. Cappaert*, 426 U.S. 128 (1976) and *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) as persuasive and implied authority for its decision, emphasizing that *Winters* does not distinguish between surface and groundwater or prohibit the inclusion of groundwater among the reserved rights. “Apart from the requirement that the primary purpose of the reservation must intend water use, the other main limitation of the reserved rights doctrine is that the unappropriated water must be ‘appurtenant’ to the reservation.” The court determined that as long as the waters are attached to the reservation, it does not matter whether that water is above or below the ground. The court also held that federal reserved water rights preempt conflicting state law. The water district argued that the Tribe does not need a federal reserved right to prevent the purpose of the reservation from being defeated, because (1) the Tribe has a correlative right to groundwater under California law; (2) the Tribe has not historically used groundwater; and (3) the Tribe is entitled to surface water under the Whitewater River Decree. The court rejected these arguments, noting that state water entitlements do not affect the analysis of the Tribe’s federally reserved water right, and that states do not have power to dispose of reserved rights. The water district [is appealing the decision to the U.S. Supreme Court, and the petition for certiorari was denied.](#)

Given that the federal agencies have relied on tribal water rights cases in the past to press for reserved water rights to groundwater, the implications of the 9<sup>th</sup> Circuit decision could be far reaching, not only for states and tribes outside the 9<sup>th</sup> Circuit’s jurisdiction, but also for federal agencies seeking to control groundwater appurtenant to federal lands.

As one example, the Forest Service issued a proposed groundwater directive May 6, 2014. Although the Forest Service asserted that the directive would not infringe on state-issued water rights or change how state groundwater and surface water quality regulations affect federal lands, the proposed directive would have: (1) required 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) required the Forest Service to evaluate all applications to states for water rights on lands adjacent to NFS lands; and (3) would have presumed that groundwater and surface water are connected unless proven otherwise. The Forest Service later withdrew this proposed directive.

WSWC position #380 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.”

**20187-20198:** The Committee will continue to work to ensure that state water rights and prerogatives are protected, specifically as they relate to tribal and non-tribal federal water rights and state authority over groundwater.

## **B. Groundwater Storage Projects**

**Background:** In 1983, Congress passed the High Plains States Ground Water Demonstration Project Act, authorizing the Bureau of Reclamation to undertake a westwide groundwater recharge program. In 1989, WSWC and Reclamation entered a cooperative agreement to prepare a number of case studies to evaluate project effectiveness, identify economic and institutional problems such as the allocation of project costs and requisite legal authorities, and recommend alternative solutions to improve public policymaking with respect to future groundwater programs and projects. As a result of this agreement, WSWC prepared two reports in 1991 and 1998, titled Ground Water Recharge Projects in the Western United States. Among other recommendations to encourage recharge opportunities, the 1998 report suggested that each state examine its own legal and institutional systems to assure that they adequately address groundwater recharge, amending statutes as necessary to recognize it as a beneficial use, and reasonably protect the right to recover recharged waters.

| **20187-20198:** In coordination with the Water Resources Committee, the Legal Committee will work on updating the 20-year-old report. The Committee will query the states to review and update their relevant laws on groundwater storage, particularly as they relate to groundwater banking or Aquifer Storage Recovery projects.