

MINUTES
of the
LEGAL COMMITTEE
Wild Horse Pass – Gila River Hotel & Casino
Chandler, Arizona
March 21, 2019

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MEMBERS AND ALTERNATES PRESENT

ALASKA

ARIZONA

Trevor Baggiore
Einav Henenson

CALIFORNIA

Jeanine Jones

COLORADO

Patrick Pfaltzgraff
Amy Moyer

IDAHO

KANSAS

Cara Hendricks

MONTANA

Tim Davis

NEBRASKA

NEVADA

NEW MEXICO

Greg Ridgley

NORTH DAKOTA

Jennifer Verleger

OKLAHOMA

Doug Woodcock
Julie Cunningham

OREGON

SOUTH DAKOTA

Kent Woodmansey

TEXAS

Jon Niermann

UTAH

WASHINGTON

Buck Smith

WYOMING

Kevin Frederick

Chris Brown

GUESTS

Ward Scott, Western Governors' Association, Denver, CO
Sallie Diebolt, U.S. Army Corps of Engineers, Phoenix, AZ
Dave Castanon, , U.S. Army Corps of Engineers, Los Angeles, CA
Kyle Miller, Arizona Department of Water Resources, Phoenix, AZ
Jeri Sullivan Graham, University of New Mexico, Albuquerque, NM
Virginia O'Connell, Arizona Water Banking Authority, Phoenix, AZ
Caitlin Parker, Arizona Department of Water Resources, Phoenix, AZ
Ken Slowinski, Arizona Department of Water Resources, Phoenix, AZ
Dave Lelsz, Arizona Department of Environmental Quality, Phoenix, AZ
Brian Manwaring, U.S. Institute for Environmental Conflict Resolution, Tucson, AZ
Pam Williams, Secretary's Indian Water Rights Office, U.S. Department of the Interior

WESTFAST

Bob Joseph, U.S. Geological Survey, Austin, TX
Tim Stryker, U.S. Geological Survey, Reston, VA
Mindi Dalton, U.S. Geological Survey, Atlanta, GA
Chris Carlson, U.S. Forest Service, Washington, DC
Patrick Lambert, U.S. Geological Survey, Salt Lake City, UT
Doug Curtis, U.S. Bureau of Land Management, Washington, DC
Cherilyn Plaxco, U.S. Army Corps of Engineers, Little Rock, AR
Deborah Lawler, U.S. Bureau of Reclamation, Salt Lake City, UT
Andrew Hautzinger, U.S. Fish and Wildlife Service, Albuquerque, NM
Kevin Werner, National Oceanic and Atmospheric Administration, Seattle, WA

STAFF

Tony Willardson
Michelle Bushman
Sara Larsen
Adel Abdallah
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 Coeur d'Alene, Idaho on October 25, 2018, were unanimously approved.

INDIAN WATER RIGHTS

Pam Williams, Director, Secretary's Indian Water Rights Office, U.S. Department of the Interior (DOI), talked about Indian water right settlements. For almost 4 decades, tribes, states, local parties, and the Federal Government have embraced negotiated settlements, rather than protracted litigation, as the preferred approach to resolving Indian water rights conflicts.

Settlements provide multiple benefits. Infrastructure projects (often in exchange for a portion of foregone reserved water right claims) provide "wet water" to tribes; litigation only provides a "paper" water right. Win-win solutions for tribes and the surrounding communities provide water to tribes while protecting existing non-Indian water users. Local solutions allow parties to develop and implement creative solutions to water use problems based on local knowledge and values. Certainty and economic development provide certainty to tribes and neighboring communities, support economic development for tribes, and replace historic tension with cooperation. Trust responsibility consistent with the Federal trust responsibility and Federal policy of promoting Indian self-determination and economic self-sufficiency.

Settlement negotiations frequently evolve from litigation, but can also occur without litigation. DOI provides technical and other assistance to the tribes. Settlement agreements vary from multi-party agreements to compacts among the state, tribe, and Federal government. When agreement is reached, parties typically seek federal approval in the form of federal legislation. The DOI has completed 36 Indian water rights settlements since 1978; 32 were Congressionally approved; 4 were administratively approved by DOI & Department of Justice (DOJ).

Looking at Indian Water Rights Settlements with federal legislation by State, Arizona is far out in front with 10, in part due to Central Arizona Project (CAP) water for additional supply.

The DOI's Working Group on Indian Water Settlements is chaired by Alan Mikkelsen, Senior Advisor to the Secretary, and is composed of all Assistant Secretaries and the Solicitor who provide policy guidance for the Indian Water Rights Settlement Program. The Secretary's Indian Water Rights Office (SIWRO) manages the Indian Water Rights Settlement Program. SIWRO's Local Federal Negotiation Teams – the primary manner in which the federal government

participates in settlement activity – has 21 negotiation teams; 23 implementation teams; and 2 assessment teams.

Agencies most often represented on the Teams are: BIA, BOR, FWS, SOL, DOJ, DOI, other federal agencies with interest (can be FS, DOD, BLM). Teams are typically staffed at the local level. Team duties and processes include first line negotiators, who explain the federal policy on settlement issues, and help to mold the parameters of the settlement. The team makes recommendations to the Working Group on a negotiation position, including the amount of the Federal contribution and how it can be justified. The Working Group considers the team's recommendations and makes settlement decisions for the Secretary's consideration. Thereafter, the Department works with the Office of Management and Budget (OMB) and DOJ in finalizing a federal position. Who is at the negotiation table for tribes and local parties will depend on the needs of the communities and the nature of the water rights at issue. Indian water rights vary in character based on historic circumstances and by region (irrigation focus in the Southwest: flows for fisheries focus the Pacific Northwest). Some states have developed their own negotiation style or process. Others are still struggling with process.

Typical settlement time has averaged 10.9 years to negotiate, but some have taken as few as 5 years, or as long as 25 years. Reasons for lack of closure vary: local politics, insufficient litigation pressure, rulings anticipated, or rulings favor one party. These long timeframes mean that turnover in personnel is inevitable - federal, tribal and state. Another challenge is the unwillingness of parties to meaningfully engage, or often unrealistic expectations for federal or other funding to resolve water conflicts.

Federal costs of Indian water rights settlements has significantly increased over time. Roughly a billion dollars expended between mid-1980s and 2002, but more than \$2 billion authorized between 2009-2016. Funding of Indian water rights settlements comes out of the budgets of both the Bureau of Indian Affairs and the Bureau of Reclamation.

WSWC/NARF TRIBAL WATER RIGHTS AD HOC GROUP AND SYMPOSIUM

Michelle Bushman referred members to the notice in Tab S. The Native American Rights Fund and Western States Water Council will be co-hosting the 16th biennial Symposium on the Settlement of Indian Reserved Water Rights claims. The symposium will be held at Harrah's Resort Southern California in Funnar, California, on August 13-15, 2019.

Tony Willardson added that Michelle will be testifying before the House Natural Resources Committee on the extension of the Reclamation Water Settlements Fund (RWSF). The RWSF is scheduled to begin receiving transfers from the Reclamation Fund in FY2020 through FY2029, to be used on priority settlements indicated in the 2009 Omnibus Public Land Management Act through FY2032, without further appropriation. The proposed legislation (H.R. 1904) would remove the end date and make the RWSF permanent.

ARIZONA LEGAL ISSUES

Ken Slowinski, Chief Counsel, Arizona Department of Water Resources, reviewed a powerpoint presentation on the status of Arizona tribal water rights settlements and the outcome of the recent Arizona Supreme Court decision in *Silver v. Pueblo Del Sol Water Company*.

There are 22 federally recognized Indian tribes in Arizona. Arizona ranks first among all states in the percentage of tribal land in the state –27.7% (Alaska is the second highest at 10.7%). This underscores the importance of settling the remaining claims, to avoid litigation and provide certainty of all water in the state. The Gila River settlement was approved by Congress in 2004.

An Arizona Supreme Court decision in 1999 held that the federal reserved water rights doctrine applies not only to surface water but to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. Once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion by holders of junior state law water rights.

Several Arizona tribes have quantified their water rights through litigation. In *Arizona v. California* (1963), the U.S. Supreme Court adjudicated the federal reserved water rights of four Indian tribes near the Colorado River in the Lower Basin: Cocopah Tribe –7,681 AF (1917 priority date); Colorado River Indian Tribes –662,402 AF (1865-1874); Fort Mojave Indian Tribe – 103,535 AF (1890-1911); and Fort Yuma (Quechan) Indian Tribe –6,350 AF (1884). The total amount of Colorado River water awarded –779,968 AF (27% of Arizona’s 2.8 million AF share of the Lower Colorado River). Ten Arizona tribes have water rights through a Congressionally approved settlement (three are partial settlements). Eleven Arizona tribes have outstanding water rights claims that have not been quantified.

There are several current tribal settlement negotiations in Arizona. The Hualapai Tribe has a comprehensive settlement agreement signed by the Tribe and the state parties and is awaiting legislation to be introduced in Congress. Settlement discussions ongoing for several years include the Tonto Apache Tribe, and the Yavapai-Apache Tribe. Settlement discussions in early stage are the Havasupai Tribe and Tohono O’odham Nation. Settlements previously under negotiations, but not currently being negotiated include the Navajo Nation and Hopi Tribe.

Silver v. Pueblo Del Sol Water Company, 244 Ariz 553 (2018) - The San Pedro River in southeast Arizona is free flowing and has 130 miles of undammed habitat. 36 miles are a natural conservation area (SPRNCA), with a federal reserved water right (1988). Areas outside AMAs are required to show a 100-year adequate supply before offering lots for sale. Amended laws for new developments allow ordinances to be adopted by cities/counties.

The Pueblo Del Sol water company applied to ADWR for designation of adequate supply to serve groundwater to a proposed new master planned development. This would result in a large increase in groundwater pumping. Objections were filed by BLM and locals. BLM argued that the flow of river would be affected by the pumping. ADWR made a determination that groundwater

would be available, and granted the application under relevant criteria: water was physically and legally available.

In response to objections, they couldn't determine whether proposed pumping would need to be curtailed until the reserved right claims were adjudicated. On appeal to the Superior Court, vacated the ADWR determination in part. The Court of Appeals vacated the Superior Court decision, but inserted a decision on an issue not raised on appeal, that for water to be physically available for 100 years it had to take into account reserved water right.

The Arizona Supreme Court (4-3 decision) said this would be speculation, and ADWR was only bound by statute. BLM could get an injunction later if their water right is impaired, but may only restrict the rights of others to the minimum amount, appropriately tailored. The court will not apply a zero impact standard. Legally available is ambiguous with respect to reserved water rights – under the canons of construction of the statute, same meaning as in ADWR rules (which were already in place when legislature codified those words with their existing meaning).

FEDERAL COLLABORATIVE ACTION AND DISPUTE RESOLUTION

Brian Manwaring, U.S. Institute for Environmental Conflict Resolution gave a powerpoint presentation on Federal Environmental Conflict Resolution Centers. He was joined later in the presentation by Cathy Humphry, Bureau of Land Management Collaborative Action and Dispute Resolution (CADR) Collaboration Specialist; and Sarah Palmer, Department of the Interior CADR.

Brian started with an overview of how the three federal Environmental Collaboration and Conflict Resolution (ECCR) Centers can help: 1) assess the challenge; 2) create a collaborative environment; and 3) facilitate a solution. The person in the facilitator role works for all parties, including conveners, in a process to ensure all stakeholders are heard and considered. The focus and emphasis is on the process – the facilitator has no stake in the substantive aspects of the outcome. The facilitator is a process expert – his or her role is to help develop an appropriate decisionmaking process, guide the process, and help participants reach outcomes. When reaching a consensus is the goal, the facilitator ensures the outcomes are supported by those engaged in the process.

The application of these tools is broad. Usually the parties are at an impasse, and they cannot make progress without some conflict resolution. The ECCR Centers' mission is straightforward. They were created by Congress, and the staff is comprised of 13 people. It is a unique program dedicated entirely to ECCR. They are a federal agency. They focus on improving government processes and decision-making. The program includes training for facilitators. They support work between fed, state and local agencies, tribes, stakeholders, and the public. They are impartial and neutral.

They have a Native American and Alaska Native Program that provides collaboration and conflict resolution services across a range of environmental, natural resources, public lands and

trust land issues involving Native American and Alaska Native communities and agencies or interests.

The Department of the Interior's CADR Program employees work collaboratively to prevent, manage and resolve conflict at the earliest opportunity to achieve organizational health, gain trust, maximize productivity, and improve efficiency in accomplishing their mission. Key goal is to promote collaborative approaches to manage conflict and resolve disputes within DOI and with external stakeholders including federal, state, local and tribal governments, non-governmental organizations, industry, and the public.

To access the Bureau of Land Management's CADR Program, the matter must involve the BLM and must involve the BLM's mission to manage public lands. WO-funded projects must be consistent with this administration's priorities. More complex, broader-scope issues are typically contracted out.

When deciding whether to utilize a neutral 3rd party or not, consider the following: Are you re-visiting the same topics again and again? Has communication slowed or ceased? Are tensions escalating? If you are the designated lead, do you find yourself torn between conveying substantive or policy information and with managing communications among the group? If yes, then an impartial facilitator may be helpful by managing process communications in group setting; serving as a confidential sounding board for parties; and designing a process that is acceptable to all.

LEGISLATION AND LITIGATION UPDATE

Michelle Bushman showed the new searchable databases for legislation and litigation updates on the WSWC website. She covered several legislative updates, including passage of the John D. Dingell, Jr. Conservation, Management, and Recreation Act (S. 47), introduction of the Navajo Utah Water Rights Settlement, and bills on hydraulic fracturing, water reuse grants, non-point source management program authorization, limiting EPA veto authority over Corps 404 decisions, and state-NGO partnerships to reclaim water and land for pre-1977 coal mines.

Litigation updates included *Kisor v. Wilkie* (Seminole/Auer deference), *Hawaii Wildlife Fund v. County of Maui* (CWA application to groundwater pollutants that reach navigable waters), *California v. BLM* (to reinstate the 2015 Fracking Rule), WOTUS cases, *Texas v. New Mexico* (Rio Grande Compact), Gold King Mine cases, *Mississippi v. Tennessee* (cross boundary groundwater pumping), *Florida v. Georgia* (equitable apportionment), and *Sturgeon v. Frost* (Alaska River and federal authority to regulate beds and banks)

DRAFT FY2019-2020 COMMITTEE WORK PLAN

Jen Verleger gave a brief overview of topics and activities in the current workplan: (1) Non-Tribal Federal Water Rights Workgroup; (2) Clean Water Act Jurisdiction; (3) Ad Hoc Group

on Reserved Indian Water Rights; (4) WRDA/Corps Policies; and (5) Groundwater issues. She encouraged committee members to take a look at the proposed changes and updates to the work plan, and prepare to approve the workplan at the summer meeting.

SUNSETTING POSITIONS FOR SPRING 2019 MEETINGS

There are no sunseting positions that will be brought up at the 2019 Spring meetings.

OTHER MATTERS

There being no other matters, the meeting was adjourned.