

MINUTES
of the
LEGAL COMMITTEE
Virtual Summer Meeting
(due to COVID-19)
July 22, 2020

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MEMBERS AND ALTERNATES PRESENT

ALASKA	--
ARIZONA	Kyle Miller Ayesha Vohra Kelly Brown
CALIFORNIA	Jeanine Jones
COLORADO	Becky Mitchell Patrick Pfaltzgraff
IDAHO	Jerry Rigby Mary Anne Nelson
KANSAS	Earl Lewis Kenneth Titus
MONTANA	Tim Davis Jay Weiner
NEBRASKA	Jim Macy Jesse Bradley
NEVADA	Jennifer Carr Micheline Fairbank James Bolotin Adam Sullivan
NEW MEXICO	Greg Ridgley Arianne Singer John D'Antonio
NORTH DAKOTA	Jennifer Verleger

OKLAHOMA

Sara Gibson
Julie Cunningham

OREGON

Tom Byler
Doug Woodcock

SOUTH DAKOTA

Kent Woodmansey

TEXAS

Jon Niermann
Jim Rizk
Kathy Alexander
Kathleen Ligon

UTAH

Todd Adams
Norm Johnson
Erica Gaddis
Todd Stonely

WASHINGTON

Mary Verner
Buck Smith

WYOMING

Steve Wolff
Chris Brown
Kevin Frederick
Sam Swartz

GUESTS

Christopher Estes, Chalkboard LLC
Ward Scott, Western Governors' Association
Clive Strong, Conference of Western Attorneys General (CWAG)

WESTFAST

Chris Carlson, USDA Forest Service
Pat Lambert, U.S. Geological Survey
Deborah Lawler, U.S. Bureau of Reclamation
Roger Gorke, Environmental Protection Agency

STAFF

Tony Willardson
Michelle Bushman
Jessica Reimer
Adel Abdallah
Ryan James
Cheryl Redding
Joseph Brewer, Intern

WELCOME AND INTRODUCTIONS

Chris Brown, 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 Breckenridge, Colorado October 17, 2019, were unanimously approved. Note: Due to COVID-19, the WSWC Spring 2020 (192nd) Meetings and Washington, D.C. Roundtable were cancelled, delaying approval of the Breckenridge, Colorado meeting minutes until this summer meeting.

SUNSETTING POSTION

Position No. 406 opposes any federal legislation intended to preempt state water law. The Council has kept this position for about 20 years now. The Executive Committee did not have any proposed amendments, or changes to this position, but Greg Ridgley from New Mexico had a couple of suggestions. The existing position uses the phrase “sound federalist principles.” Greg Ridgley is suggesting to instead use the term “sound principles of cooperative federalism.” Then change the third “whereas” clause to simply include the word “water” between state and law. Then in the fourth “whereas” clause delete “and related laws.”

Chris asked for a motion to advance this amended position to the Full Council, with a recommendation that it be readopted with the proposed changes. The motion was made, seconded and unanimously approved.

U.S. ARMY CORPS OF ENGINEERS

Clive Strong, Legal Director for Natural Resources and Environment, Conference of Western Attorneys General (CWAG) provided an update on the Water Supply Rule (81 FR 91556).

After petitioning the President, we were finally successful in having the U.S. Army Corps of Engineers (Corps) withdraw the proposed rule.

Since then, I have been working with CWAG, WSWC members and staff, and Ward Scott, Western Governors' Association (WGA) on efforts to persuade Congress to amend Section 6 of the 1994 Flood Control Act, and Section 301(b) of the 1958 Water Supply Act, to incorporate principles that would reflect the primacy of state water law for the allocation of water out of the Corps reservoirs. We were successful in getting some draft legislation put together with the support of Senator Kevin Cramer (R-ND), who made a proposal that would have incorporated language requiring deference to state water law in the WRDA bill. Unfortunately, we ran into opposition from Georgia and Alabama. Senator Shelby of Alabama is adamantly opposed to any amendments to either Section 6, or Section 301(b) of the Water Supply Act because of the ongoing litigation with Georgia over the Apalachicola, Chattahoochee, and Flint River. Each state feels the other will take advantage if there are any changes made to the statute. We have attempted to tailor the language specifically to apply solely to the western states, but unsuccessfully.

Regarding easements and water supply contracts, we are having an ongoing dialogue with large contract power holders that work with the Corps on these projects. We hope to try to pull back at least the Corps' Real Estate Letter 26, which currently requires that in order to get an easement across Corp property to access a reservoir, an applicant is required to obtain a water supply contract under Section 6 of 1994 Flood Control Act. This has been particularly problematic for both South Dakota and North Dakota, in the sense that there is plenty of unappropriated natural flow in those reservoirs, that is appropriable under state law. The Corps' demand that they sign these water supply contracts has made their ability to access water difficult. I think we are making some progress as the dialogue so far has been fairly positive.

What we are really trying to do, with regard to Section 6, is make an exemption for the western states. There are currently only 11 water supply contracts under Section 6 of the 1994 Flood Control Act. It is a provision that the Corp itself does not intend to use in the future. The proposed legislation we had with Senator Cramer would have exempted western states from that particular policy. With regard to Section 301(b), we would incorporated language comparable to Section 8 of the 1902 Reclamation Act. We are still going to continue to pursue that. We have really appreciated our working relationship with the Western Governors Association and the Western States Water Council. Your participation in the conversations has been very helpful

Ward Scott: Clive did a great job summarizing where we are. This presents an opportunity to build bridges, trust and working relationships. It does not seem that the various interests are entirely adverse on this issue. We really are just in the process of understanding where folks are coming from and the concerns and potential unintended consequences of any changes. I want to echo Clive's appreciation for all the Council has done on this issue and we look forward to moving ahead. Hopefully, we can find a resolution to preserve state authority while effectively operating Corps' reservoirs. WGA is supportive of the Water Resources Development Act (WRDA). The proposed language in Senator Cramer's amendment did not get through the Senate Environment and Public Works Committee, so we are looking for another vehicle if it does not work with WRDA.

WSWC/WestFAST FEDERAL NON-TRIBAL WATER RIGHTS WORKGROUP

Michelle noted that Tab S has a summary of the last workgroup call and provided a brief report of the call highlights. While hosting workshops in conjunction with our regular Council meetings is considered the ideal approach to discuss and learn from each other on each of the topics of interest, pandemic uncertainties may necessitate that we proceed with virtual workshops until we can gather in person again.

Chris Brown noted that the workgroup saw value in continuing to address all three of the topics in the FY2021 workplan: (1) federal grazing rights; (2) wild and scenic river designations; and (3) MOUs between states and federal agencies. Chris stated if anybody had any thoughts or ideas on how to move this work forward to please share them with the folks on the workgroup.

WSWC/NARF TRIBAL WATER RIGHTS AD HOC GROUP UPDATE

Several Indian water rights settlements are going through Congress right now. Committee members offered updates.

A. Navajo

Norm Johnson: The Senate passed Senator Mitt Romney's (R-UT) bill (S. 1207) to ratify the Utah Navajo Settlement Act of 2019. We started working on this in 2003, so we are getting to be very experienced at it. It was a little bit of a surprise when the Senate passed the bill. The House version, H.R. 644, has not yet been approved. The bill provides 81,500 acre feet of water to the Navajo Nation from Utah's Colorado River allocation. It authorizes about \$210 million to build drinking water projects. It waives all of the Navajo Nation's water related claims against the United States. It requires a state contribution of \$8 million. It protects existing water rights in the area. It allows off-reservation leasing to the same extent as other state water rights and it satisfies allottee water rights within the portion of the Navajo Nation located in Utah. The water to do that comes from the Nation's allocation.

We hope for approval in the House too. The Nation and State of Utah are working on that. There are some politics involved as there always are. It was a little bit unusual to have it approved in the Senate before we had it approved in the House.

I should mention that the Nation has agreed to take an amount of water that is less than the "practicably irrigable acreage" amount that the Nation could claim based on lands located in Utah, in exchange for the funding for the drinking water. This is a very big deal to the State of Utah, because we can fit this in within our Colorado River allocation, whereas a larger amount, we could not. Another interesting aspect of this legislation is we do not have an underlying lawsuit, which is not typical.

B. Kickapoo

Kenneth Titus: The Kickapoo piece included in S. 886 that passed the Senate is unique, because it is not for full congressional approval of a water right. All sides feel pretty good about the actual water right, but this piece involves the Kickapoo Tribe's intent to use a USDA NRCS watershed program to fund a study and create a dam and reservoir on the upper Delaware. The Senate language directs NRCS – in cooperation with the Department of the Interior – to complete a two year study of the upper Delaware River watershed plan. It would essentially review the project and allow the tribe to come up with a cost estimate for what it would take to put their water right into use. The study would be the first phase. They would have to come back to Congress in a couple of years to work on the subsequent phases for construction.

Kansas is not actively pushing or lobbying for this. Our federal delegation is working on it, but the tribe is the one doing most of the work. There is some hope that by the end of September this will move through the House. I know our Senate contact was thinking that it may be time to find a different vehicle to get the Kickapoo piece through.

C. Aamodt

Arianne Singer: We ended up in a project cost overrun situation after Congress authorized the Aamodt settlement and made appropriations. The regional water system that is the linchpin of the settlement provides a drinking water supply to the Pueblos of Nambee, Tesuque, and Pojoaque, and San Ildefonso. The United States acquired water rights for the project and transferred them to the regional water system off the Rio Grande. The costs greatly exceeded the amount initially appraised, to the point of nearly doubling the amount of what Congress appropriated. The parties needed to agree on how those additional costs would be allocated between the state, local parties, and the federal government. There was a series of intense negotiations for about 18 months to come up with the 611(g) agreement, an amendment to the settlement. Under the agreement, the state provide an additional amount of funding, even though we have no obligation to do so. The county is putting in some additional funding and deferring some portions of the project. The last piece required the federal government to put in an additional \$137 million in funding, and to amend the legislation to allow the existing cost ceilings and timelines under original Settlement Act to be exceeded.

We do not have that additional funding from the federal government yet. Reclamation was not going to even commence construction unless they knew they could meet the conditions in the Settlement Act and complete construction by a certain time. They were not going to start it unless they knew they had the funding to complete it, as they could be held accountable, or in some way liable. Aamodt has been viewed by some as a failure of the settlement process, but we are working against that perception. We are hopeful that will lead to additional support from Congress.

S. 886 passed the Senate, but has been held up in the House because Chairman Raul Grijalva wants the bill to contain the original language to extend the Reclamation Water Settlement Fund. We heard from the Senate, if the bill gets sent back with that language, it will stay there. It will not go forward at all and so we are in a bit of a quandary between competing interests there.

We did reach that agreement to provide additional funding. We have amended our cost share system integration agreement and construction has started on the ground. There has not been much progress because of COVID, but we are we are proceeding.

D. Confederated Salish and Kootenai Tribes/Fort Belknap

Jay Weiner: In Montana, we have two settlements currently moving, Fort Belknap and the Confederated Salish and Kootenai Tribes (CSKT). We have been surprised to see the CSKT settlement – with a \$1.9 billion price tag that is probably the largest Indian water rights settlement in history – moving much more efficiently through Congress this session. We had a hearing in front of Senate Indian Affairs Committee in June, with the Administration testifying in support, assuming that certain amendments were made to the bill that everyone largely agreed to. The bill is due to be marked up in Indian Affairs by the end of July. We will see if there is Senate floor time or not. It has not yet begun to move in the House. I do not know exactly what the plan is there. The State has largely been taking a back seat to the Tribes on navigating the bill through the congressional process. The fact that they got the Administration to testify in favor of a \$1.9 billion settlement was pretty stunning. I think the CSKT is very focused on trying to get that bill moved through this Congress.

The Fort Belknap settlement is not as ripe as CSKT. A draft bill has been introduced, but negotiations continue between the Tribe and the United States, as well as the Tribe and the State over aspects of that legislation. I think the prospects of that being ready to move this Congress are much more remote.

Watching the dynamics play out between the House and Senate with the settlements and the Reclamation Water Settlement Fund will be interesting. We have a high-profile Senate race going on. Democratic Governor Steve Bullock is running against Republican Senator Daines, the incumbent who has been the primary sponsor, and chief mover of this iteration of the CSKT legislation. Senator Tester was the primary sponsor of the 2016 version. Those political dynamics may affect the willingness of one party or the other to ultimately move the CSKT legislation through this Congress. This session is something we are certainly attuned to, but as I mentioned, the State is largely deferring to the Tribes on driving legislative strategy at this point.

E. Hualapai

Jay Weiner: The Hualapai Tribe has been trying to move legislation for the better part of a year now. There were some concerns with provisions of the settlement by other Arizona tribes that seemed to slow things down. There has been a lot of back and forth with the state, with the congressional delegation, with Hualapai and with some of those tribes that had raised objections. There was a significant roadblock standing in the way of that bill for a while, but lately there has been a renewed effort to try to move it through.

Chris Brown asked if there were any thoughts or opinions swirling around out there with the recent *McGirt v. Oklahoma* decision regarding tribal lands and judicial jurisdiction and what

impact it might have with regard to water administration under existing settlements or future settlements?

Jay Weiner: In Montana, one of the things that we have always explicitly negotiated in our Indian water rights settlements is the administration provisions, so there is a very clear articulation of where tribal jurisdiction extends, and where state jurisdiction extends, either adjacent to the reservation, or sometimes on the reservation for people with state-based water rights. Each of our Indian water rights settlements contain specific dispute resolution mechanisms that identify what to do if there appears to be a conflict between users of tribal water rights and state-based water rights, or if there are disputes over the administrative interpretation of the compact itself. We have done that deliberately because we did not want to find ourselves at the mercy of changes in the law, or questions being raised about jurisdiction. So for Montana, I do not expect there will be much of an impact.

Sara Gibson mentioned that in the Chickasaw Choctaw settlement legislation, they included several provisions that they think will limit the impact of *McGirt v. Oklahoma*. The eastern half of the state may be taken care of. It remains to be seen what will happen with the remaining tribes.

Chris Brown stated he appreciate the thoughts and comments.

F. Reclamation Water Settlements Fund

Michelle mentioned that Jay and other members of the WSWC-NARF Ad Hoc Group were involved in drafting the initial legislative language for extending the Reclamation Water Settlement Fund (RWSF) beyond 2030. She summarized the explanation from Senate staff on why the RWSF language was removed from S. 886. We have been trying to get an extension of the RWSF to pass now so that it would be outside the 10-year budget scoring window. When the Blackfeet water settlement passed, the Congressional Budget Office (CBO) took a different perspective as to whether or not Blackfeet would have access to the Reclamation Water Settlement Fund and whether that needed to be scored. CBO has asked Reclamation if there would be any money left over in the current RWSF for settlements other than the priority settlements listed in PL 111-11. The answer is complicated.

We are still working toward the goal of extending the RWSF. I think our primary reason for this has been that the settlements take a long time to fund through the annual congressional appropriation process, and if funding is not consistent because Congress is focused on other things, then that derails this entire decades-long settlement process. These water rights settlements contain provisions for undoing them if they do not get funded within a certain timeframe. Our push for getting a permanent settlement fund in place is intended to ensure that the funding is always going to be there once these negotiated settlements are approved, even if it stretches out over decades.

Jay Weiner: It seems like we keep getting a different story every time it goes to CBO on whether and how these settlements and the RWSF extension will score. We were trying to push

it outside the 10-year scoring window for purposes of getting the RWSF extension passed. The CBO roadblocks on scoring may ultimately diminish the utility of the extension of the RWSF anyway. It seems like every time you ask CBO, at least in a different Congress, you get a different answer.

LEGISLATION AND LITIGATION UPDATE

Michelle provided a brief overview of relevant court cases and Congressional bills, with the full update located under Tab T. There are about a dozen cases litigating the validity of the new 2020 Rule defining “Waters of the U.S.” Of particular note are two U.S. District Court cases, *Colorado v. EPA et al.* (preliminary injunction) and *California et al. v. Wheeler et al.* (Plaintiffs: CA, NM, OR and WA, with 13 other states; Intervenor Defendants: AK, ID, KS, MT, NE, ND, OK, SD, TX, UT, WY and 12 other states).

The U.S. Supreme Court recently held in *Maui* that discharges to groundwater are under Clean Water Act (CWA) jurisdiction when they are a “functional equivalent of a direct discharge.” The Supreme Court denied certiorari in *Baley v. US*, a case with complex implications for the application of western water law, particularly in Oregon. In April, the Colorado River Basin states (AZ, CA, CO, NV, UT, WY) moved to intervene in *Save the Colorado, et al. v. DOI*, arguing that the Department of the Interior (DOI) does not have the authority to consider NEPA alternatives under the Law of the River. A case challenging the Bureau of Land Management’s rescission of its 2015 Fracking Rule, *California v. BLM*, is now on appeal to the 9th Circuit.

Notable Indian water rights legislation in the 116th Congress includes:

- S. 2019 (CSKT-Montana; SIA hearing June 24);
- S. 3113/H.R. 5673 (Fort Belknap-Montana; introduced December – language makes priority funding available from PL 111-11);
- S. 886 (Navajo-Utah, Aamodt-New Mexico, Kickapoo-Kansas);
- H.R. 644 (Navajo-Utah);
- H.R. 2459/S.1277 (Hualapai-Arizona);
- H.R. 1904 (RWSF)

Notable legislation on infrastructure and drought includes:

- S. 3591 (AWIA);
- H.R. 2 (WRDA);
- S. 3590 (DWIA);
- H.R. 5513/S.3160 (extended State Revolving Fund [SRF] loan terms);
- H.R. 6617 (Bureau of Reclamation surface/groundwater);
- H.R. 3723 (BOR recycling/reuse/desal);
- H.R. 5217 (BOR aquifer recharge);
- S. 2044 (dam safety);
- H.R. 1162, H.R. 5302, H.R. 2871, H.R. 5504, H.R. 6985, and S.1570.

Other water resources legislation includes: S. 3403, H.R. 6964, S. 1565, S. 1571, H.R. 2174 (Missouri River); S. 990/H.R. 3237 (Platte River); S. 2718/H.R. 4891 (Rio Grande); and H.R. 7116/ S. 3758 (Klamath)

Other recent legislation covered in Tab T includes topics such as: PFAS, fracking bans, Buy American provisions for SRFs, invasive species, federal grazing permits, conservation practices, Corps partnerships with non-federal sponsors, and energy-water nexus programs.

LEGAL COMMITTEE DRAFT WORKPLAN FOR FY2020-2021

Chris Brown: The first item on the workplan is the state and federal collaboration regarding the adjudication of federal non-tribal water rights, which we have already talked about, but just in general. We had three separate topics that the workgroup had discussed: (1) federal grazing rights; (2) the wild and scenic designations and quantifications; and (3) the MOUs between the states and the federal government. If you would like to participate in that particular work group, please let Michelle know.

Item No. 2: Clean Water Act jurisdiction. Given the fact the WOTUS rule is final, and we currently have litigation going on, we will just keep track of this litigation for now.

Item No. 3: Ad Hoc Group on Reserved Indian Water Rights. This was updated to acknowledge that our next biannual WSWC/NARF Symposium will be held next summer depending on the COVID pandemic. Usually it is hosted in one of the states that has a settlement. Everything else is pretty much the same.

Item No. 4: WRDA/Corps Policies. Jennifer Verleger stated that at a minimum, we still need to track this issue as she does not think it has gone away and will just morph into a different form. She agreed that Subsection A on the Corps Surplus Water Supply Rulemaking can be deleted for now, and we can always add it back in if the Corps takes up another rulemaking. Chris suggested working with Jennifer to make sure that anything that the Missouri River states want to keep tracking is still contained in what is left so we are not missing something.

Item No. 5: Groundwater. Chris recommended retaining part A as it is. Under subsection B, the WSWC staff is in the process of putting together an update of the 1998 report on groundwater recharge projects. Jeanine Jones stated the intent of this workplan item is not to focus on the High Plain states, but to address some of the practical issues that come up with constructed groundwater recharge projects, like migration of arsenic, which then raises permitting issues. Chris recommended that members let Michelle know if there is anything they would like to see from their state included in the report.

Item No. 6: Water Rights. Once the list of survey questions is finalized, Michelle will share it with the committee for approval, and then shoot those out to the states. There are no subcommittees, but if you specifically wish to participate, please let Michelle know. Jennifer Carr may be interested in participating.

Chris Brown moved to approve the work plan as amended. Jennifer Verleger seconded. The work plan was unanimously approved.

SUNSETTING POSTIONS FOR SUMMER 2020 MEETING

There are three sunseting positions: Position No. 412, which supports Indian water rights settlements; Position No. 415, supporting the Dividing the Waters program; and Position No. 416 with regard to federal government's role in expediting general stream adjudications. Chris Brown encourage members to take a look at those.

OTHER MATTERS

There being no further matters, the Legal Committee was adjourned.