

**MINUTES  
of the  
LEGAL COMMITTEE  
Beaver Run Resort & Conference Center  
Breckenridge, Colorado  
October 17, 2019**

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**MEMBERS AND ALTERNATES PRESENT**

<b>ALASKA</b>	David Schade
<b>ARIZONA</b>	
<b>CALIFORNIA</b>	Jeanine Jones
<b>COLORADO</b>	Pat Pfaltzgraff
<b>IDAHO</b>	John Simpson Jerry Rigby
<b>KANSAS</b>	
<b>MONTANA</b>	
<b>NEBRASKA</b>	
<b>NEVADA</b>	
<b>NEW MEXICO</b>	John D'Antonio Greg Ridgley
<b>NORTH DAKOTA</b>	Garland Erbele Jennifer Verleger
<b>OKLAHOMA</b>	Sara Gibson
<b>OREGON</b>	
<b>SOUTH DAKOTA</b>	Kent Woodmansey
<b>TEXAS</b>	Jon Niermann
<b>UTAH</b>	

**WASHINGTON**

Buck Smith  
Mary Verner

**WYOMING**

Chris Brown  
Steve Wolff

**GUESTS**

Ward Scott, Western Governors' Association, Denver, CO  
Jordan Bunker, Southern Nevada Water Authority, Las Vegas, NV  
Kyle Miller, Arizona Department of Water Resources, Phoenix, AZ  
Scott Steinbrecher, Colorado Attorney General's Office, Denver, CO  
Micheline Fairbank, Nevada Division of Water Resources, Carson City, NV  
Kathy Alexander, Texas Commission on Environmental Quality, Austin, TX

**WESTFAST**

Chris Carlson, USDA Forest Service, Washington, DC  
Pat Lambert, U.S. Geological Survey, Salt Lake City, UT  
Lauren Leuck, U.S. Army Corps of Engineers, Lakewood, CO  
Amy Frantz, U.S. Army Corps of Engineers, Washington, DC  
Stephen Bartell, U.S. Department of Justice, Washington, DC  
Cherilyn Plaxco, U.S. Army Corps of Engineers, Little Rock, AR  
Doug Curtis, U.S. Bureau of Land Management, Washington, DC  
Deborah Lawler, U.S. Bureau of Reclamation, Salt Lake City, UT

**STAFF**

Tony Willardson  
Michelle Bushman  
Adel Abdallah  
Cheryl Redding

**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 Leavenworth, Washington on July 17, 2019, were unanimously approved.

### **SUNSETTING POSTIONS**

Position No. 398 – Federal Payment of State Filing Fees in General Stream Adjudications. This has been a longstanding position of the WSWC. Micheline Fairbank offered a Nevada perspective of the continuing importance of this position (see presentation below.) Chris Brown suggested the second to last Whereas clause should be changed to add the word “often” before the word “claims,” since not all states experience the same thing from all agencies.

A motion was made to present the committee’s recommendation to the Full Council. Dave Schade - motion. John D’Antonio – seconded. Approved.

### **FEDERAL PAYMENT OF STATE FILING FEES**

Micheline Fairbank, Deputy Engineer, Nevada Division of Water Resources, presented information on Nevada’s experience of federal agencies failing to pay filing fees. They have 6 major river systems and 256 groundwater basins. Some of these have been adjudicated but there are many still left to complete. Nevada’s fee statutes are contained in NRS 533.135, 533.190, and 533.435

We always ask for the federal agencies to pay the fees, but usually get a letter back saying they respectfully decline. There are many inconsistencies between federal agencies, and even within the same federal agency from state to state. The non-payment of fees creates some challenges for Nevada. The fee structure is tied to budget forecasting. When federal agencies don’t pay, this creates a gap in the budget, and it can cause a delay in proceedings until the administrative costs can be covered. The states, of course, are not supposed to operate in the red. This may also result in budget shortfalls before the end of the year. There may be impacts to non-federal participants. In turn, there is an impact on the equity to non-federal users who are paying the fees.

With respect to the sunseting Position No. 398, we wanted to share why we believe the WSWC position is important.

Jerry Rigby offered a few comments about Idaho’s experience with the filing fees, which have been similar in nature. Greg Ridgley said New Mexico has never had an issue with this, but appreciates that it does happen in other states, and concurs with Nevada about the importance of federal agencies paying for those fees. Micheline said Nevada believes there should at least be consistency.

## **COLORADO LEGAL ISSUES**

Scott Steinbrecher, Senior Assistant Attorney General, Colorado Attorney General's Office, provided a powerpoint presentation on legal issues and case law trends in Colorado. He focused on the developments in *Hill v. Warsewa*, No. 19-1025 (10th Cir.), a case involving fishing access on a river in Colorado, near the Arkansas Headwaters Recreation Area. The river itself has sections along the 150-mile stretch of the river designated for public fishing (under 30 state-negotiated easements), but angler Roger Hill chose to wade into water surrounded by Warsewa's private property. The conflict between the two escalated from warnings to threats to throwing rocks.

Dealing with two doctrines. (1) Equal Footing Doctrine: States admitted to the Union after its formation are coequal sovereigns under the Constitution, and therefore, like the 13 original States they "hold the absolute right to all their navigable waters and the soils under them." See, e.g. *Lessee of Pollard v. Hagan*, 11 L.Ed. 565 (1845); and (2) Navigability for Title: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 19 L.Ed. 999 (1871)

The State moved to dismiss at the District Court level on several grounds. (1) Third-party standing: "It is undisputed that Plaintiff does not own the land in question and does not contend he should own the land in question. Therefore, Plaintiff fails on the element that he must assert his own rights." (2) Generalized grievance: "Additionally, Plaintiff does not show his claim is more than a generalized grievance based on a desire for the general public, including himself, to be able to fish in certain spots while standing on the bed of the Arkansas River and avoid the unpleasantness which could go along with trespassing on private property." Avoided determinations that claims are barred by sovereign immunity and that Hill lacks standing under Article III.

On appeal to the 10<sup>th</sup> Circuit, the fisherman is asserting that federal common-law creates a public easement in lands underlying navigable water ways: "That the state holds the title to the lands under the navigable waters ... we have already shown .... But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). Hill claims personal injury because his right to use that easement is impaired. State's assertion of sovereign immunity automatically deprived district court of jurisdiction and, thus, it was required to remand under 28 U.S.C. §1447(c). District Court abused its discretion by dismissing on non-jurisdictional issue before determining whether it had jurisdiction

Colorado's response: Hill improperly assert the rights of third party (Colorado). There is no federal common-law under the equal footing doctrine. *Oregon ex rel. State Land Bd. v.*

*Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977). The scope of public trust in navigable waters is defined by state law. *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012). Colorado law does not create public trust or public rights of access. COLO. CONST. art. XVI, §5 “preserve[s] the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded”; it does not “assure public access to waters for purposes other than appropriation.” *People v. Emmert*, 597 P.2d 1025, 1028 (Colo. 1979). COLO. CONST. art. XVI, §7 also protects access for the purpose of applying water to beneficial use, but not for recreation or other purposes. Members of the public do not have title in public lands. *Wilderness Soc. v. Kane County*, 632 F.3d 1162 (10<sup>th</sup> Cir. 2011). Hill improperly asserts a generalized grievance. Hill’s claims are no different than those that might be suffered by any other trespassing angler. Asserting title in riverbed has far reaching consequences. Whether to do is best left to elected officials after considering all of those consequences; it should not be left to individuals to assert title on behalf of the state. Oral Arguments to be held November 19, 2019.

### **Questions:**

Buck Smith: If the property owner put up a barbed wire fence across the creek to prevent the fisherman from going up, how would the state feel about that?

Scott: That gets into some different issues because it’s then interfering with flow. If you have fencing just on the property and not across the river, then that is a little easier to deal with, but it gets tricky. Under Governor Ritter, I believe, they established a task force that was designed to deal with issues like that.

David Schade: The State of Colorado does not claim submerged lands that are under navigable waters?

Scott: It has not up to this point. We do not want to take a position on that. We do not want to be forced into court on the issue.

Dave Schade: I understand that, so the answer is you do not assert a claim?

Scott: We have not.

### **REVOLUTIONIZE USACE**

Lauren Leuck, U.S. Army Department of Civil Works, provided an update on the Revolutionize Civil Works program. John D’Antonio talked about this program before. The goal is to: (1) accelerate project delivery - start and finish projects faster; (2) transform project financing and budgeting – more efficient project delivering using alternative financing tools and new budgeting processes; and (3) improve permitting and regulation reform – streamlined permit processes and elimination of duplicative reviews to expedite delivery of projects.

We're really working to get feedback and have been taking actions to address the feedback we've been given. Our website has a feedback button to make it a simpler process. One issue raised has been inconsistencies in the way that Districts have implemented decisions, and we're working on the best ways to address those inconsistencies. Please let us know where you see issues. We have a team that can reach out to the district to see what the problems are. If there are resource struggles, or a lack of understanding of the Corps guidance. We've also been dealing with inconsistencies in delegations of authority, and working to get decisions down to the local level as much as possible, so the folks making the decisions really know what is going on. We currently have 22 delegations of authority in place, and we are working on 18 more.

Key Actions in Progress: (1) Delegate Decision Making - continuing to delegate decision making authority to the lowest possible level; (2) Streamlining Acquisition - continuing to implement additional acquisition changes to accelerate project delivery; (3) Innovation/Streamlining Project Execution - continuing to revise our business process to accelerate project execution and pursue innovative methods to design/construct projects; (4) Update Policy & Guidance - continuing to update policy & guidance; and (5) Non-Federal Implementation of Projects - working to address barriers to this implementation and pursue activities that support non-Federal entities. You heard more about this morning from General Spellmon. We have heard a lot on the Water Resources Development Act (WRDA). We're trying to change how we approach WRDA implementation, looking at the barriers we put in your way that hinder implementation of projects going forward. We would like to hear your thoughts.

Part of the internal budgeting process is looking at the Corps Water Infrastructure Financing and Innovation Act (WIFIA) shared program authority with EPA. EPA has done a lot to turn their small funds into a big program, but it has not been implemented yet on the Corps side. The program name has changed to the Corps Water Infrastructure Financing Program (CWIFP). The Corps programs would be non-federal projects (not authorized and not federal projects) but we hope to expand that into the future. The Corps program will be finalized in Spring 2020, although it can't move forward without Congressional funding. Notice of funding availability in FY2020, subject to appropriations.

The Public Private Partnership (P3) Program is not a traditional P3, but we are looking at alternative ways to deliver projects more quickly with non-federal partnerships and private capital. The Fargo-Moorhead Flood Risk Management P3 is a \$2.4 billion Federal project with split delivery responsibilities - the Corps and non-federal sponsors are responsible for distinct reaches. The Corps takes the lead on NEPA and stays in an advisory capacity for the P3. Non-federal DBFOM contract is anticipated close 2020. There are 3 short listed firms, resumed contract actions in 2019. We have some project proposals we are looking at now, and we expect to start a new round of proposals in the next few months.

This Administration has been doing a lot on improving permitting and regulation reform. Accomplishments to Date: streamlined Section 408 permission requests (modifications to CW projects); alignment of Section 404/10/103 and 408 Programs; lead district policy for projects that span multiple districts; improved public access to tracking systems; mitigation - regulatory guidance letters, on removal of obsolete structures, on credit release schedules for mitigation banks

and equivalency in service areas; one federal decision implementation guidance; guidance for State assumption under Section 404(g); and regulation reform – reviewed 53 regulations.

We are working on our communication and collaboration, including for our Clean Water Act responsibilities like WOTUS and 401 state certifications. We have talked about what is needed, sought to identify the sources of the problems, and what type of communication and collaboration is needed. We have been doing a lot at the HQ level, but not all of that is making its way down the way we think it is. It's requiring a culture change, and we continue to work on that.

Key Actions In Progress: WOTUS - step 1: re-codify pre 2015 definition and step 2: promulgate revised definition; mitigation - revise 2008 Mitigation Rule to streamline third party mitigation process and approvals; nationwide permits - streamline processes and pre-construction notification (PCN) requirements; improved transparency and consistency - review all existing guidance and modify, replace or rescind as necessary; tracking systems - established public website to view the status of some permit applications. Improve availability of information on status of 408 reviews; Civil Works projects - eliminate duplicative reviews for authorized Civil Works projects undertaken by non-Federal interests.

Strategic Communication: Some of the feedback has focused on a lack of responsiveness and accountability from the Corps. we are working to share information on our efforts and get feedback from our partners on a regular basis; in-person partner sessions, webinars, discussions at partner meetings; and website, social media posts, email updates. The ideal doesn't always help on the ground. We are learning to communicate better, to work hand in hand to deliver these projects, to learn best practices, talk with district leaders about how they should be communicating with states, stakeholders, engage with sponsors as partners, early and often. We are holding webinars Dec 5th and 19th to talk about the Revolutionize program, and will take feedback and comments.

### **Questions:**

Pat: How is the effort from HQ, getting the regions to align? We find that we get three different answers in CO from three different regions.

Lauren: HQ is pushing out that decisionmaking to regions – but we do need feedback from you to know how that is going

Adel: Have you considered streamlining data access from the Corps reservoir levels and releases?

Lauren: In the past week or two there was an EO on agency guidance – it turns out our guidance is difficult to find. We're working to make that guidance at least more accessible.



### **WSWC/WESTFAST FEDERAL NON-TRIBAL WATER RIGHTS WORKGROUP**

Deborah Lawler, WestFAST Liaison, provided a summary of the workshop on water rights associated with grazing on federal lands, held earlier in the week. Participation from state agencies, federal agencies, and stockowner associations from a variety of states offered several different perspectives on challenges, conflicts, and the potential for working together.

### **WSWC/NARF TRIBAL WATER RIGHTS AD HOC GROUP AND SYMPOSIUM**

Michelle Bushman briefly reported on the symposium. It was very educational. There were many new participants who offered positive feedback, saying they appreciated how much they learned. The Ad Hoc Group continues to educate Congress about the importance of authorizing and funding the settlement of the tribal water rights. Michelle testified in April before the House Natural Resources Committee regarding the use of the Reclamation Fund for its intended purpose to fund western water development, and supported the extension of the Reclamation Water Settlement Fund. This bill has undergone revisions in the Senate, and may potentially become part of a package of bills the Senate is trying to pass in the coming weeks.

### **FEDERAL WESTERN WATER LITIGATION UPDATE**

Stephen Bartell, Assistant Chief, Natural Resources Section, Environment & Natural Resources Division, United States Department of Justice. I've worked on western non-tribal water cases over my entire career. I've worked with the same team of 13 people for a long time. We handle all of the defensive litigation on behalf of the Bureau of Reclamation (BOR), Department of Energy, National Park Service, and others. Water Rights work is for all federal agencies (mainly BOR, NPS, BLM). The Department of Justice is huge, with a lot of litigating divisions, about 800 people. My section handles all water adjudications in the U.S.

Given the discussion earlier, I thought I would offer a DOJ perspective on federal payment of filing fees. The U.S. can't do things unless sovereign immunity is waived. In the McCarran Act, which requires us to participate, it says the Federal government does not pay fees for adjudications. It's different when it comes to administration implementation fees. That said, I understand your concerns about how that impacts state resources.

We handle all original action litigation, where one state sues another, which right now includes *Texas v. New Mexico* and *Colorado* where Reclamation also intervened; *Texas v. New Mexico* – dealing with the Pecos River; *Florida v. Georgia*; and *Mississippi v. Tennessee*. We also deal with Administrative Procedures Act (APA) litigation, such as the NEPA challenge on the Glen Canyon Dam operations and Reclamation's EIS.

A quick run through the current litigation going on in the western states: In California we're dealing with a particular dam with water flowing to the delta. In Colorado there are issues with filling the Windy Gap reservoir. In Utah we are dealing with a Green River block exchange. We

also deal with some long-term cases. In Nevada with have the Truckee River Carson settlement and implementation of the 1944 Orr Ditch Decree.

The heart of our work is the adjudications. We have adjudications in nearly every western state, except Wyoming and California. The Department of Justice complies with state procedures, orders and deadlines to file claims, and has to understand each states laws, as well as the nuances of each of the federal reserved water rights. In Arizona we are participating in the Gila River Adjudication, asserting water rights claims for the San Pedro Riparian Conservation Area. In Oregon we've been participating in the Klamath adjudication for decades. Colorado has a rolling adjudication of all seven basins, which involves objecting to any new applications or changes in use that would interfere with water rights held by the federal government. In Idaho we have refill issues as part of the Snake River Basin Adjudication; stock watering claims are still being filed Coeur d'Alene River Adjudication. In Nevada the Walker River Federal Water Rights Adjudication, which is actually in federal court, started in 1936 and is currently active. As part of the Owahee Adjudication, the Elko County District Court said the federal government did not have stock watering rights. Most states recognize that stock water rights can be held by federal agencies, but not all. In New Mexico, both the Pecos and Lower Rio Grande River Adjudications are ongoing. In Utah we recently entered into settlement agreements for the big National Parks, and we're also involved in several other smaller adjudications with federal claims. In Montana there was a real push to adjudicate the entire state. They have the compacts, but there is also regular adjudication work happening basin by basin, filing claims and objections. Even something as small as an individual claiming water that turns out to be on federal land requires some good work to sit down and communicate. It takes effort to overcome the perception that the U.S. is just coming in to assert some kind of a water grab, but we do end up working out a lot of those concerns. Washington just completed the Yakima River Adjudication after decades of work. There will probably be appeals, but the biggest part of that process is done.

In Wyoming, we will be working with the state and quantifying 13 Wild & Scenic Act claims.

### **SUNSETTING POSTIONS FOR SPRING 2020 MEETINGS**

The Legal Committee has no sunseting positions for the Spring 2020 meeting.

### **OTHER MATTERS**

Jerry Rigby briefly mentioned a case in the 9<sup>th</sup> circuit, included in the Litigation Update under Tab U, Pacific Coast Federation of Fishermen's Associations, et al., v. Glaser, et al. It deals with the agricultural exemption to pollutant discharges for a drainage system of perforated drain laterals underlying farmlands to catch irrigated water. The plaintiffs allege that the project water isn't entirely agricultural, that some of the seepage comes from non-agricultural sources, and therefore the exemption doesn't apply. The District Court held that since a majority of the water was agricultural, the exemption still applied, but the 9<sup>th</sup> Circuit remanded the case, said the

discharges had to be entirely agricultural, and that the burden of proof was on the defendants to demonstrate that their discharges fit the agricultural exemption. Idaho is watching this case.

Chris Brown discussed the NEPA case that Mr. Bartell mentioned, *Save the Colorado, et al. v. DOI*. The case is very concerning. They are saying that climate change was not adequately taken into consideration, including alternatives like decommissioning the Glen Canyon Dam, filling Lake Mead, and returning the river to its natural flow. I suspect the 7 Colorado River Basin states will be taking this up. We don't think that Reclamation has the authority to consider those kinds of environmental alternatives under the law of the river.

There being no other matters, the meeting was adjourned.