

**DRAFT
LEGAL COMMITTEE
WORK PLAN
July 1, 2020 to June 30, 2021**

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

Background: 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.

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 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. On October 24, 2018, the workgroup held a workshop in Coeur d’Alene, Idaho, on State and Federal Agencies’ Approach to Grazing Water Rights. On October 15, 2019, the workgroup held a second Grazing Water Rights workshop in Breckenridge, Colorado, including state and federal agencies as well as national and local ranching and agricultural organizations. As of March 24, 2020, the WSWC-WestFAST Clearinghouse is available on the Council’s website under Member Resources, and additional documents may be added by contacting Council staff.

2019-2020: 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 continue to hold workshops. Additional topics to pursue include (1) water rights related to Wild and Scenic Rivers, and (2) identifying useful principles for state-federal memoranda of understanding to develop a useful framework and recommended approaches.

Time Frame: Ongoing

Federal Non-Tribal Water Claims Subcommittee: David Schade (AK), Jay Weiner (MT), Greg Ridgley (NM), Jennifer Verleger (ND), Micheline Fairbank (NV), Todd Chenoweth (TX), Norm Johnson (UT), Buck Smith (WA), and Chris Brown (WY). WestFAST members and agency staff participating in the Subcommittee in an *ex officio* capacity include: Paul “Doug” Curtis (Bureau of

Land Management), Michael Higgins (U.S. Fish and Wildlife Service), Donald Anderson (Bureau of Reclamation), (National Park Service), Stephen Bartell (Department of Justice), Lauren Dempsey (Air Force) and Chris Carlson (U.S. Forest Service). Other *ex officio* members of the Subcommittee include 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 Clean Water Rule (2015 WOTUS Rule), finalized on June 29, 2015 (80 FR 37054). Many of our member states filed lawsuits challenging the WOTUS Rule in federal court.

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. At the October 2018 meeting in Coeur d’Alene, Idaho, Position #410 was revised and readopted as #427, with the State of Washington abstaining from the vote.

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. 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 (82 FR 12532). 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. On February 14, 2019, the agencies published the proposed rule for a Revised Definition of Waters of the United States (84 FR 4154), and WSWC submitted comments. The final Navigable Waters Rule (2020 WOTUS Rule) was published ____ (___FR___). WSWC has continued to engage with the agencies at each outreach opportunity during the rulemaking process.

2019-2020: 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, as well as consider the impacts of the new rule of state policies, programs and regulations.

Time Frame: Ongoing

CWA Rulemaking Workgroup: 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 #412). 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 and legislation that facilitate settlements. A biennial symposium on settlements is held by the WSWC and NARF 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 and Department of Justice officials engaged in Indian water rights settlement 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.

The 116th Congress introduced bills to extend or make permanent the Reclamation Water Settlement Fund. WSWC testified before the House Natural Resources Committee and has been in ongoing communication with House and Senate staff in support of the legislation.

2020-2021: 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 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) prepare to hold the 2021 Symposium on the Settlement of Indian Reserved Water Rights Claims in partnership with the Native American Rights Fund.

Time Frame: Ongoing

Reserved Rights Subcommittee: Jay Weiner (MT), Greg Ridgley and Arianne Singer (NM), and Norman Johnson (UT). NARF members participating in the Subcommittee in an *ex officio* capacity include: John Echohawk, Joel Williams, Steve Moore, Dan Lewerenz, and David Gover. Other *ex officio* members include Susan Cottingham, Stanley Pollack, Ryan Smith, Vanessa Ray-Hodge, Jacob Schellinger, and Melanie Stansbury.

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 U.S. Army Corps of Engineers' approach to identifying and regulating the use of "surplus waters," and Corps drought authorities related to Corps projects. The Council also worked successfully to exclude irrigation water supply canals from federal levee safety program.

2020-2021: The Council will continue to work with the Congress and Corps on WRDA and Corps-related issues, 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 further to preserve and protect to the fullest extent established and potential uses of the rivers' natural flows, i.e., 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' rights to access natural flows, separate from the captured floodwaters stored within those reservoirs.

In October 2015, the Council adopted a resolution (readopted as #431) 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.

On March 23, 2020, the Corps withdrew the proposed rule, citing concerns raised by states, tribes, and other stakeholders including "inconsistent pricing methodologies, reallocation approval levels, agreement approval levels, and difficulty getting real estate instruments...." The Army plans to consider how to address water supply by "simplifying, clarifying and streamlining provisions and processes to achieve better consistency and address long-standing policy issues." WSWC has been working with WGA and CWAG in support of language consistent with Position #431 that may be included in the 116th Congress' WRDA bill.

2020-2021: The Committee will continue to work to address this issue and explore alternative solutions, including both administrative and congressional action.

Subcommittee: Jerry Rigby (ID), Earl Lewis (KS), Jesse Bradley (NE), Jen Verliger (ND), Julie Cunningham (OK), Tom Byler (OR), Jon Niermann (TX), and Mary Verner (WA).

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.

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 9th Circuit decision could be far reaching, not only for states and tribes outside the 9th 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. Western Governors strongly objected to the directive, as did the WSWC, which worked with the Forest Service to modify it. The Forest Service later withdrew this proposed directive.

WSWC position #422 notes that no federal statute has addressed any federal property or other rights 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.”

2020-2021: 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.

2020-2021: In coordination with the Water Resources Committee, the Legal Committee will work on updating the information in the old reports, and prepare a new summary 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 and Recovery (ASR) projects.

6. WATER RIGHTS

Some of our states have expressed interest in understanding how other states approach different aspects of the management and administration of water rights, including what qualifies as beneficial uses, extensions of time to prove beneficial use to perfect a water right application, and statutes or rules or court procedures governing curtailments in times of scarce water resources., and regulation of water wells.

A. State Water Well Construction Rules and Regulations

Background: The State Engineer, or other state official, is required to make rules regarding well construction and related regulated activities and the licensing of water well drillers and pump installers. Various states have varying requirements, which may change from time to time. The purpose of these rules is to: (1) assist in the orderly development of underground water; (2) insure that minimum construction standards are followed in the drilling, construction, deepening, repairing, renovating, cleaning, development, testing, disinfection, pump installation/repair, and abandonment of water wells and other regulated wells; (3) prevent pollution of aquifers within the state; (4) prevent wasting of water from flowing wells; (5) obtain accurate records of well construction operations; and (6) insure compliance with the state's authority for appropriating water. The rules establish administrative procedures for applications, approvals, hearings, notices, revocations, orders and their judicial review, as well as requirements related to well construction standards, such as casing, and procedures for monitoring, reporting and criteria for the waivers of certain requirements.

2020-2021: The Committee will prepare and distribute a series of survey questions to address member states' interests related to administering water and related well drilling programs and then compile and report on the results. This will include the types of wells covered or excluded from registration and regulation. The Committee and Council will also provide a forum for the discussion of best management practices.

Subcommittee:

Timeframe:

B. Proof of Beneficial Use of Water and Extension Criteria

Background: Beneficial use is the measure of any right to the use of water in the West. The State Engineer, or other state official, on behalf of the State, may grant a permit to put water to beneficial use but evidence or proof of completion of the work necessary to then actually put the water to use is also required. Only after development is done and the water is being fully put to beneficial use, will a water right be granted, which will be limited to the extent and nature of use in the accepted proof. This also applies to requests to change the use of a water rights, whether changing the point of diversion, use or purpose of use, or location water is returned to a natural source. Generally, some specific period of time will be allowed to complete the work, and if needed applicants may request an extension of time. The specific criteria for proof of beneficial use and extending timelines may vary by state.

2020-2021: The Committee will prepare and distribute a series of survey questions to address member states' interests related to administering proof of beneficial use requirements, and criteria for granting extensions to complete necessary work, then compile and report on the results. The Committee and Council will also provide a forum for the discussion of best management practices.

Subcommittee:

Timeframe:

C. Calls and Curtailments

Background. Droughts in many areas of the West have highlighted state procedures and methods of enforcing curtailment of water uses and administration of water rights in a priority system, particularly where junior groundwater pumping, insufficient carriage water, instream flow for fish and wildlife, junior municipal supply, and federal reserved rights are at issue.

2020-2021. The Committee will prepare and distribute a series of questions to address member states' interests related to state procedures and methods of enforcing water rights, including administrative and court processes related to calls and curtailments during times of scarcity, then compile a report on the results. The Committee and Council will also provide a forum for a discussion of water rights enforcement.

Subcommittee:

Timeframe: