MINUTES
of the
LEGAL COMMITTEE
Holiday Inn at Buffalo Bill Village
Cody, Wyoming
June 24, 2021

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MEMBERS AND ALTERNATES PRESENT *(*via zoom)*

ALASKA	
ARIZONA	Tom Buschatzke Amanda Long-Rodriquez *Trevor Baggiore* *Ayesha Vohra*
CALIFORNIA	*Jeanine Jones*
COLORADO	*Jeremy Neustifter*
IDAHO	John Simpson Jerry Rigby
KANSAS	Connie Owen Cara Hendricks *Earl Lewis* *Kenneth Titus*
MONTANA	*Anna Pakenham Stevenson* *Jay Weiner*
NEBRASKA	Tom Riley Jim Macy
NEVADA	Adam Sullivan *Micheline Fairbank*
NEW MEXICO	*John D'Antonio* *Greg Ridgley*
NORTH DAKOTA	Jen Verleger
OKLAHOMA	Sara Gibson
OREGON	*Tom Byler*

SOUTH DAKOTA	Nakaila Steen
TEXAS	Jon Niermann
UTAH	*Norm Johnson*
WASHINGTON	*Buck Smith* *Mary Verner*
WYOMING	Chris Brown

GUESTS

Gary Boring, Keo Civil, LLC
Terry Fisk, National Park Service
Brent Duncan, USDA NRCS-SSRA
Aislinn McLaughlin, American Rivers
Pat Tyrrell, Tyrrell Resources, LLC
Norm Semanko, Parsons Behle & Latimer
Sheila Murphy, Water Resources Mission Area
Greg Johnson, Colorado Water Conservation Board
Bill McCormick, Retired Reclamation Civil Engineer
Michael Elliott, Citizens Infrastructure Advisory Board
Arianne Singer, New Mexico Interstate Stream Commission
Kathy Alexander, Texas Commission on Environmental Quality
John-Cody Stalsby, Texas Commission on Environmental Quality
Laura Rennick, Montana Department of Natural Resources and Conservation

WESTFAST

Heather Hofman, USDA/NRCS
Mike Eberle, USDA Forest Service
Travis Yonts, Bureau of Reclamation
Pat Lambert, U.S. Geological Survey
Chris Carlson, USDA Forest Service
Paula Cutillo, Bureau of Land Management
Stephen Bartell, U.S. Department of Justice
Roger Gorke, Environmental Protection Agency

STAFF

Tony Willardson
Michelle Bushman
Cheryl Redding
Jessica Reimer
Adel Abdallah
James Ryan

WELCOME AND INTRODUCTIONS

Committee Chair Chris Brown called the meeting to order and asked anyone not already introduced in the previous committee meetings to introduce themselves.

APPROVAL OF MINUTES

The minutes of the meeting held virtually on March 24, 2021, were moved for approval by Jerry Rigby, seconded by Jen Verleger, and were unanimously approved.

SUNSETTING POSTION

Position No. 425 regarding Endangered Species and State Water Rights

Typographical edits were made to the previous iteration of this resolution. Micheline inserted the words "collaboration and" in the last Whereas clause. She raised questions about the term "takings" – it was intended to describe regulatory and endangered species takings.

Greg Ridgley made a motion to pass along to the Full Council. Micheline seconded and it was unanimously approved.

GLEN CANYON DAM SPILLWAY (1983-84)

Bill McCormick, retired Reclamation Civil Engineer, and Gary Boring, President of Keo Civil, LLC, presented an historical perspective of flooding damage to the Glen Canyon Dam at Lake Powell in 1983-1984. McCormick worked construction for the Bureau of Reclamation for 34 years. When the flooding occurred, he was the last construction worker around who was there when the dam was built, so they called him in to deal with a cavitation problem on the spillway that was being used for the first time. When water is going downhill that fast, it starts to form microscopic bubbles, and as they expand and contract, and eventually implode, they start to eat away at the concrete. Initially the concrete looks like a washboard on a gravel road, but they increase in size the further down the slope.

Boring showed images of the dam, the large gates and sloping tunnel to explain where the problem occurred. The El Nino of 1983-1984 brought late season snows and then big rains in June, and Lake Powell was full, Lake Mead was full, and the water was still coming in at 120,000 cfs. The hydropower plant was operating at 100% of capacity, and they were vacating as much water as they could. They opened the four spillway gates for the first time since they'd been initially tested. After passing water for about four days, the dam started to shake violently, and downstream they found house-sized pieces of concrete, and the water was muddy. Meanwhile, the water level continued to rise. They added plywood to the top of the multi-million dollar engineered dam to raise it another four feet.

Getting to the damaged areas for repairs was complicated, because a neither a crane from the bridge above nor a barge from below would work. All the materials and equipment had to come through a 22' wide tunnel. They looked at the adits, and decided to drill two new tunnels from the transformer deck. To solve the cavitation problem they added an air slot that draws in air and cushions the water as it goes down the slope of the spillway tunnel.

The repairs took only nine months and cost $32M, and they got $35M from power due to the high volume of water, so the power paid for the repair project. The repair work was successful, and Reclamation learned a tremendous amount from the experience that they took to other projects. One of the key lessons was that problems present opportunities to improve an entire standard of practice. Another is that in an emergency, if you bring good people in and let them do what they are trained to do—and open the checkbook far enough—its amazing what they can accomplish in a short period of time.

In 1999-2000 Lake Powell was filled. It is not unheard of that it could fill again at some point in time.

There was a question about what happened recently with the Oroville dam spillway and whether it was a similar problem. The answer was that it wasn't a cavitation problem but a foundation problem and a lack of maintenance over the years. Cavitation could have contributed, but the slope was not as steep.

Another question was whether there are other dams this could happen to, or if Reclamation had done a review of their other dams to see if this could happen elsewhere. The answer was yes, and Reclamation moved up its funding program and made changes to similar spillway tunnels of about seven dams within about five or six years.

AUDUBON OF KANSAS V. DEPARTMENT OF THE INTERIOR

Kenneth Titus, Chief Counsel, Kansas Department of Agriculture, talked about the *Audubon of Kansas, Inc. v. United States Department of the Interior*, et al. lawsuit.

Kenneth mentioned a joint presentation he did with Brian Caruso, U.S. Fish and Wildlife Service (FWS) a few years ago on the ongoing negotiations between local groundwater users and

the State of Kansas on the impairment of the Quivira National Wildlife Refuge (Refuge). Since then, things have progressed and some agreements were made regarding the Refuge's water rights. Subsequently, the Audubon of Kansas (AOK) filed a lawsuit in the Federal District Court in Kansas. Kenneth showed a map of Kansas with the Refuge and the surrounding area. The Refuge is fed by the Rattlesnake Creek, which is the main creek on the map. The other major player is the Big Bend Groundwater Management District No. 5 (GMD No. 5), which includes various counties in the area surrounding the refuge. The refuge is fed entirely by surface water. There are various points of diversion and holding ponds along the way throughout the refuge. This is an important refuge, primarily because it provides a saltwater habitat. The Refuge was established under authority of the Migratory Bird Treaty Act and consists of approximately 7,000 acres of wetlands within a total Refuge area of 22,135 acres.

The FWS has the senior water right on Rattlesnake Creek, with a priority date before all of the groundwater pumping was established and senior to about 95% of water rights in the basin. It was certified and perfected in 1987 for 14,632 acre-feet of surface water (including Little Salt Marsh storage and evaporation). The water flow had changed significantly (slide 6).

There were reports in the file from 1986 that the FWS had concerns early on about reduced flow. Following administration via intensive groundwater use control area on nearby Walnut Creek, the voluntary Rattlesnake Creek Partnership was formed in 1993 with FWS, KDA-DWR, and GMD No. 5. The partnership failed to meet its goals and ended in 2012, followed by a formal impairment complaint by the FWS. The final impairment report was issued in July 2016, which found reductions in Rattlesnake Creek streamflow due to groundwater pumping of 30,000 to 60,000 acre-feet per year over 1995-2007. Further, over a 34 year review period, impairment of the Refuge's water right was greater than 3,000 acre-feet in 18 of those years, and depletions to streamflow continue to increase each year. GMD No. 5 began negotiations with the FWS to provide additional water via an augmentation system from August 2016 to March 2017. KDA-DWR developed a minimum acceptable solution of 15% reduction in use in addition to augmentation (allowed by statute), which is expected to halve future increases in depletions. GMD No. 5 attempted to develop a Local Enhanced Management Area (LEMA) to implement the reductions, but failed to meet the statutory criteria in an initial review.

By the Fall of 2019, KDA-DWR was prepared to administer the basin for 2020, but FWS withdrew their request to secure water and in July 2020, they entered a Memorandum of Agreement (MOA) with GMD No. 5. FWS and GMD No. 5 negotiated from Fall 2019 to July 2020 before reaching an agreement. KDA-DWR did not participate in any of the negotiations.

Elements of the MOA: GMD No. 5 shall design and construct an augmentation wellfield with a capacity of 15 cfs; submit a workplan for with an implementation schedule, including at least dates for project design, engineering plans, and construction dates within 12 months; GMD No. 5 will use "reasonable" efforts to develop a water rights purchase program to retire 2,500 acre-feet from sensitive areas or upon failure to reach this goal, attempt to incentivize removal of endguns; FWS shall attempt to maximize on refuge storage; and not submit a request to secure water in 2020 and 2021.

FWS has not submitted a request to secure water; and GMD No. 5 has been approved for a grant from USDA-NRCS for development of a watershed plan to include an EA and design engineering of augmentation.

Five days before the new administration took over, AOK filed a complaint on January 15, 2021, against the Department of the Interior (DOI), FWS, Kansas Secretary of Agriculture, and the Chief Engineer. GMD No. 5 filed a motion to intervene on March 9, 2021 (granted unopposed). AOK alleged violations by both the state and federal defendants of: the National Wildlife Refuge Service Improvement Act (NWRSIA); NEPA; APA; Endangered Species Act (ESA); and common law prohibition on disposition of federal property. Additionally, AOK asserted a right to a larger federal reserved water right or a request for the FWS to acquire additional state water rights.

They asked for a whole list of declaratory judgments: that the NWRSIA was violated by refusing to protect a water right; which in turn resulted in a taking of wildlife and violation of the ESA; affirmative duty to protect the historic hydrological conditions of refuge in place prior to human settlement; Refuge has a valid claim to a reserved water right equal to the water available prior to human settlement; the 2020 MOA is void and was entered into without authority as a delegation of federal authority; the 2020 MOA was a major federal action that required an EA; the decision not protect the water right constitutes disposal of federal property; NWRSIA requires the Chief Engineer to issue orders to administer junior water rights; and any order of the Chief Engineer that condones any depletions beneath the supply prior to human settlement violates the NWRSIA.

Similarly, injunctions to: prevent government defendants from taking any action that impairs the "restoration, protection, and maintenance of the hydrologic conditions" necessary to protect the NWRSIA required historic conditions; require federal defendants to immediately restore (by all affirmative actions necessary) the historic hydrological conditions at the Refuge prior to human settlement; to require FWS to immediately obtain additional water rights; and all impaired water rights protected by immediately prohibiting junior water rights from diverting any water until the court approves an administration plan.

Mandamus orders were filed. We are waiting to see how the federal court rules on the motion(s) to dismiss.

Questions:

Tom Riley: The watershed planning being done, are they using the watershed and flood protection operations funding for that?

Kenny: Yes, I believe it is the same program.

Tom: That's one that we're looking at in Nebraska right now. It's fully funded as I think you noted, it's 100% funded on the ground.

Kenny: Yes, it's a very good deal for the front end of this stuff. NRCS likes these projects.

Tom: Who is the Counsel representing AOK?

Kenny: They have a mix. The lead Counsel is Randy Rathbun, with Depew Gillen in Wichita. He's typically been involved in more of clean water quality type cases and then Burke Griggs who is a professor at Washburn and was previously with the Kansas Attorney General's Office who's been assisting them as well.

Tom Buschatzke: Are they restricted where the wells can be drilled?

Kenny: Yes. The groundwater is relatively salty from the eastern part of that district and so it's not highly developed. They plan to go outside of the Rattlesnake Basin into the next basin to the south. They want to put in somewhere between 40 and 50 shallow wells so they could pull out what freshwater is in the undeveloped area without upwelling the saltwater and then they'll pipe that up to the Refuge. They would have to get new applications in order to do that.

DEPARTMENT OF JUSTICE WESTERN WATER UPDATE

Stephen Bartell, Assistant Chief in the Natural Resources Section, Department of Justice (DOJ) has been with DOJ for 30 years. He provided a brief update on what's going on in litigation on behalf of the federal government in our western states.

In Arizona, we have the Gila River adjudication that has been going on for decades, as well as the Little Colorado River adjudication in the northern part of the state, which includes Navajo Indian claims and issues. It has been pretty quiet over the last few years. But we expect that to get back into that in the near future.

California has a lot of issues going on due to the droughts, particularly on behalf of the Bureau of Reclamation. As far as water rights cases, we've just been served with a new adjudication that involves the Naval Air Station, China Lake and the Indian Wells Valley Groundwater Basin. We also learned about another adjudication getting started, which involves the Naval Base Ventura County, and that's the Oxnard and Pleasant Valley Groundwater basins. I mentioned these two Navy facilities, but it's very likely we will have other federal agencies involved and making claims in those adjudications. We are also dealing with a number of water rights issues pertaining to the Central Valley project.

Colorado has a rolling adjudication and it's unlike any other Western State. Every year it adjudicates water claims and objections that are filed throughout the year. We have any number of cases going on throughout the year. Clients include: the Army; FWS; Reclamation; USFS; and BLM who are regularly filing objections or making claims to water rights in participating adjudications.

In Idaho we've seen quite a bit of litigation and adjudication work in the last few years. We have the Clark Fork-Pend Oreille Adjudication and the Bear River Adjudication. These are relatively new adjudications. We just had a ruling from the water court pertaining to the deferral of de minimis water rights claims and whether that satisfies the McCarran Amendment when such deferral occurs. We dealt with those issues in the Snake River Basin Adjudication. That adjudication has been going on for decades and is still not complete due to the deferral of *de minimis* claims. Also in Idaho, we have the Coeur d'Alene River Basin Adjudication and the Palouse River Basin Adjudication. These adjudications involve various federal agencies, tribal claims and interests and other water users. We are also watching recent legislation that was passed by Idaho pertaining to the stock water rights and how stock water rights may be affected and possibly lost. That legislation has not been implemented, but we're curious what will happen.

In Kansas, we just heard about *Audubon of Kansas, Inc. v. United States Department of the Interior*. We'll see what happens there.

Montana is one state that is keeping us probably the busiest over the last few years on a consistent basis. Montana is adjudicating all of its water rights in the entire state. We have a couple hundred active cases in Montana going at any given time.

Nebraska doesn't have a whole lot of litigation occurring. We do have the Niobrara National Scenic River issue and questions about the quantification of water rights for that Scenic River.

Nevada has a number of ongoing adjudications. We have the McConnell Creek adjudication up in the Winnemucca area, for which we just had a hearing before the district court. The Diamond Valley Adjudication is coming up for active litigation in the near future. We have the Owyhee River Adjudication I personally handled, which was pretty much brought to a final decree. One matter pertaining to stock watering rights was remanded back to the state engineer. We have a number of other open adjudications across the state that we expect to get moving at any time. One other point with regards to Nevada, we're very interested in the fact that the Nevada Supreme Court has recently put together a commission to study the water courts in the States, which is something the federal family is quite interested in.

New Mexico has the biggest case that we're dealing with in the Supreme Court - *Texas vs. New Mexico and Colorado*. This is an original action case brought before the Supreme Court that is being brought to trial by the special master this fall. This pertains to water rights in the Rio Grande River and flows from Colorado through New Mexico to Texas and eventually to Mexico. This case has been ongoing for many years and is finally set to go to trial this fall. We also have a couple state adjudications - the lower Rio Grande Adjudication and the Pecos River Adjudication that are at different phases before the courts.

Oregon is keeping us extremely busy right now due to the extreme drought conditions in the southern part of the state. The Klamath Basin Adjudication is up on an appeal. We have about four other water rights cases pending right now due to the extreme droughts and the low

flows in the Klamath River. This is one of the river basins that is suffering the most from drought as far as allocation of water from the federal government. Reclamation is in a very difficult position of trying to meet the needs and is unable to.

Utah has the Virgin River, the Utah and the Jordan River Adjudications and a number of others that are in different phases before the State agencies. We also have negotiated settlements on behalf of National Parks.

In Washington, we just had a hearing before the Washington Supreme Court in the Yakima River Basin Adjudication. New adjudications are heading our way, the upper Columbia River and Nooksack Rivers Adjudication, which I think will be initiated in the next year or two.

Wyoming has been relatively quiet with regards to federal government and the State water rights issues. We do have some wild and scenic river quantification issues that we'll probably be engaging in at some point. But other than that Wyoming is the one state that really brings us the least amount of work on behalf of our water rights team.

That is just a brief summary of where we are with our litigation. There are many other smaller cases that I don't have the time to get into. I will say having been here 30 years, that with the change in administrations, the political changes, it's always interesting to see how things change within the federal government. But the water rights docket, it really doesn't change that much. We are consistently representing the federal agencies and their claims for water rights, or objections to new water rights claims that could impact federal resources.

NEW MEXICO COURTS AND WATER RIGHTS SETTLEMENTS

Due to time constraints, Arianne Singer will hold her presentation until the Fall meeting.

ROUNDTABLE: WATER ADMINISTRATION IN DROUGHT

Nevada: Micheline Fairbank - Nevada is in different stages of drought across the state. In 2019, the state legislature approved a new section on water planning and drought preparedness. We tried in 2017, but we were experiencing flooding problems at the time and so that made it hard to get people's attention. The new section is headed by Bunny Bishop. We're working on updating our water plan, but also looking at other jurisdictions and states on how you guys are managing drought response. We've put together a groundwater conflict model to evaluate complex analysis for the Humboldt River. It's not really aimed at addressing drought response, or drought preparedness. It's more of a conflict analysis in terms of water resource management appropriations for us as a state. We're just trying to figure out how to deal with drought as we go, because this drought is looking to be probably something much more historic than we've experienced in the past several years, at least for us in Nevada. Our reservoir levels are not like they are in Wyoming. We don't really see much drought relief over this next winter. The heat that we're experiencing certainly isn't healthy. We're just trying to understand, prepare and

recognizing what we can do besides just the federal programs that are available with regards to financial assistance for irrigation and agricultural communities? How else do we go ahead and manage drought on the local level?

Chris Brown: With regard to the groundwater model, you said it's purpose is to evaluate conflicts. Is that with other groundwater rights, with surface water rights, or something else?

Adam Sullivan: Nevada's groundwater model is similar to what was just described in Kansas, where upstream groundwater pumping is asserted that is conflicting with senior decreed surface water rights at the downstream terminus in a closed system. The objective of the model is to try to quantify that and to be able to use that as a tool to deny change applications or potential protected scenarios.

Chris: So the evaluation would be to potentially reduce the groundwater pumping to some degree in order to fully satisfy the surface water rights, something like that?

Adam: Yes, that's right. And to do it in a way that's equitable and quantifiable, so that any action we take has a clear basis and can show positive results and not create a new harm.

Chris: Have you had the opportunity yet to employ that new tool yet in regulating groundwater rights?

Adam: The model isn't fully published. We have a parallel process of two interlinked efforts. One is on the technical end of developing the model and calibrating it, bringing in all the data we have available. At the same time, we had an administrative process of determining exactly how we're going to implement that, trying to have as much community outreach and discussions about the pros and cons of different alternatives. But until the model is published we can't actually use it.

Idaho: Jerry Rigby – as you know, we're involved with significant calls on the Eastern Snake Plain Aquifer (ESPA), that we've resolved at least temporarily with settlement agreements between the groundwater and surface water users. Then this year in the Sun Valley area, which is the Big and Little Wood Rivers, the Director did something different in the sense that ordinarily when you're in Idaho, if you are a surface water senior water user, you would make a call under the conjunctive management rules. However, there's a statute in Idaho, §42-237-18, that says in part, "water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom would affect the present or future use of any prior surface or groundwater right." So pursuant to that statute, without a call knowing that, by everyone's account, there is an impact from the groundwater users up above in the beautiful Sun Valley area, we got involved with representing the 1880s through 1890s surface water rights against the groundwater pumpers up in the Bellevue triangle. It's a very unique area, it's not the only area that impacts it, but the Director has basically carved it out as that's the most significant impact. We had a hearing, and it's been three weeks of hell in my life. I just got done with the briefing this Monday. So we're waiting for a decision on that. It's going to be interesting because this is plowing new ground with §42-237-18. I'm just glad this part of it's over.

Chris: My understanding with the ESPA is that you had to draw the line somewhere, considering what was enough impact to care. What you just read, it sounded as if any groundwater well has any impact on the senior right, you just shut it off. Is that how that's implemented?

Jerry: I guess that's yet to be seen. But arguably, yes, if you read that, you could say that. I still believe there's the groundwater act itself that allows for full beneficial use, or rather "optimal use." So there's a conflict there as to what that means relative to the other statute.

Chris: Yeah, that's a fun word. What's that mean?

Jerry: We love to litigate in Idaho. But by everyone's account, about 80% of the water in the aquifer is out that same year, so the surface water and groundwater are really interconnected here.

John Simpson: In Idaho, we've missed the drought situation that many states have had previous years and now it's here in Idaho. Jerry articulated one example of how it's affecting some groundwater basins. We tried to get ahead of the curve with organizing groundwater districts so that they can be organized with surface water users to provide opportunities to conjunctively manage within tributary basins to the Eastern Snake Plain and the mainstem Snake River because these tributary basins in many cases haven't been administered with the mainstem Snake. The adjudications are great to a point, but then bringing the smaller basins into the administration arena is difficult, because you have folks that have just done it their way for a hundred years and they're used to having the senior rights, they don't understand that as part of the larger system they are subject to curtailment. And when you layer the drought on top of that, it raises questions about what level of certainty you need to have before you administer those rights pursuant to a model you created. In Idaho we've had court decisions that say it's the best science available. But in a drought, that +/- 5% represents real water to a lot of people.

Kenny: Hearing everyone talk about the conjunctive management and these interactions, does anyone have a clear legal guidance about where you draw that line? On the Rattlesnake Creek map, we happened to draw the line at a 10% or greater impact, but you could argue for anything more than 10%. Are there any states with specific legal guidance--Idaho sounds like they have some court guidance--or is it just a reasonableness determination of impact by the state engineer?

Arizona: Tom Butchatzke – In Arizona we have something weird called subflow. Percolating groundwater is not part of the river legally, even though it is in reality. This goes back to a 1930s Arizona Supreme Court case when they created a thing called subflow - for water that is near the river, any pumping that directly and appreciably affects the flow of the river, is part of the river. In one part of the adjudication that Stephen Bartell talked about, our Superior Court in the State of Arizona has been trying to define subflow technically since 1987, and has not come up with a final decision. My department is the technical advisor to the court in both the Little Colorado and the Gila River Adjudication. So we have a lot of uncertainty. I think the folks that don't want that outcome, have been successful at delaying through the court process a final decision because they get to keep using the water.

Wyoming: Chris Brown – For Wyoming we do not have a bright line rule. We have a very simple statute, which basically says whatever the State Engineer decides is connected, is connected enough to care. I know Pat Tyrrell drew the line a few times in Wyoming, where we conjunctively regulate surface water and groundwater rights. But it's not been used much. We have a fairly specific circumstance in the 2001 modified decree with Nebraska in the triangle area where there's test set out, but that's only for the purpose of interstate administration of that decree. So it's not applicable to any other groundwater rights in Wyoming. But our rule in Wyoming is about as fuzzy as you can get; it's in the eye of the State Engineer for whatever is connected enough.

I believe the rule in Colorado is if the pumping from the well affects the stream flow 1/10th of 1% in 100 years, it's connected. So there's a test, a bright line rule. My understanding is that it's a court-made rule. It requires mitigation for groundwater pumping that affects or might affect surface water rights.

I think Montana, in the past decade, came up with a fairly tight rule, considering just about everything connected from a water rights permitting perspective for new groundwater rights. I do not know if that applies in a regulatory sense.

I dug into this once years ago when one of our creeks had some groundwater pumping. Pat drew that line, and the groundwater users appealed to the state district court, and we had to go argue about it. So I did quite a bit of research at the time, and there were not a lot of bright line tests with regard to how much is connected enough to care.

New Mexico: Greg Ridgley - New Mexico is very similar to Wyoming. We've had the authority of the State Engineer, recognized by the courts, to conjunctively manage surface and groundwater since way back in the early 1960s. It's never been reduced to any statutory formulation and there's never been any court ruling on what the line is. It is then almost entirely left to the administrative discretion of the state engineer. In practice, that has meant that anything that's connected is administered through our permitting system, to require offsets where necessary to surface flows caused by groundwater pumping.

Pat Tyrrell: Chris is exactly right; we don't have a bright line in Wyoming with the exception of operation under the North Platte decree. In comparison to Colorado, that's 28% in 40 years, not a 10th of a percent in 100 years. So it's a more liberal test. But the one good thing that we do have, and I have to applaud our old legislators for this, is our statutes do recognize that we can regulate groundwater to benefit surface water. And while they didn't give me a bright line, they gave me authority. I say me in the past tense. So you don't have to worry about the authority to do it. And we have over the years regularly regulated nearby shallow alluvial wells, if the stream on whose banks they exist was in regulation, and rarely have been challenged on that. I mean, these are wells that might be 50 feet from the creek, and you know they're connected. So we've been able to do that. Even though we don't have a bright line. Where it gets tougher is when you have large aquifers of great areal extent, they may be connected at points, but how far away from the creek do you get before the difference matters? Now just to verify that we don't have that

bright line, but on the other hand, we do have the authority. And as long as you can defend your decisions, I think we in Wyoming have so far been pretty successful.

Chris Brown: I think it's really difficult when you get into litigation with regard to those and you start arguing about typical surface water prior appropriation doctrines like futile call. You start talking about timing and extent of impact, and how exactly does that work with the groundwater well. If that impact isn't felt by the surface water right until December, for example, does that matter, or the next year does that matter? Because you don't know what the surface flow is going to be like. So we've got to litigate those issues, and managed at least in the instance we did litigate, to prevail on those issues. In that particular instance, they had had years of study both by Pat's groundwater hydrologists, and by the USGS, which clearly showed that basin was connected - groundwater and surface water.

Jerry: We still appreciate Wyoming sending all that water down the South Fork of the Snake.

Chris: Absolutely. And this year we were very happy to sell you guys 10,000 acre-feet.

John Simpson: In Idaho, we use the groundwater model to administer best to delivery calls or that straight administration between groundwater and surface water. The next phase that you'll go through is, then you'll have water right transfers. Now the question becomes, do you use that groundwater model to determine the impacts of moving groundwater from one location to another location? And what are those impacts on existing water rights? In Idaho, the law for transfers is no injuries. It's very clear. Then you get the same question again, about how much do you care and at what level do you care? Particularly when you have a drought, then you have a situation where sometimes those temporary transfers or permanent transfers are the mechanism where you have a fully appropriated or nearly fully appropriated system, to move water, or to develop new land. That's a tough standard to determine what level you're adjudicating to and next, allowing movement of water and not impacting the available water supply for existing rights. That's the area that we're struggling with now, because we have what we call a transfer memo(?), which allows some impact, some depletion to existing rights before there's mitigation, which arguably is in direct conflict with the law. But if you cut off all transfers, or require all transfers to mitigate, you make it too expensive, or too difficult to move water rights.

Oklahoma: Sara Gibson - I just got a Tweet from our Mesonet system about an end-of-June monsoon. They're predicting the state to get two to seven inches of rain. In Oklahoma, we have neither conjunctive management nor the ability to make administrative calls. If we get into a drought situation where we need to cut off a junior user, we have to go to each individual District Court and get an injunction for each user. That is not going to work if you're at the point where you need to make that call. So regional planning and drought preparedness scenarios are very important for us surviving any kind of drought situation. The 2012 conference water plan which was released in the middle of one of our largest droughts, called for regional planning. For the most part, regions across the state selected what their region was, and they have engaged in these planning processes to decide how they will handle both drought and flood mitigation issues. We've been fairly successful. One of the larger projects the State has been involved in is the Southwest Drought Action Plan with the Bureau of Reclamation and the operators of those rural

lakes. Because we don't have conjunctive management, we have to figure out triggers, or agree upon a way to manage these Bureau facilities that provide both irrigation water and public water supply in times of drought. Oklahoma also only protects the firm yield. So when we get into drought situations, we're talking about evaporative loss when there's not enough inflow, and whether there are ways we can protect those inflows before we start impacting yield or even getting to the bottom of that conservation pool. There's been 450 pages of legal review on the history of each reservoir and it's permitting. USGS is also doing technical work on both groundwater and surface water modeling to see where the actual impacts are to these reservoirs. I think we haven't gotten to the point where we're actually deciding what the results will be, but so far, the collaboration with all the partners has been great. I hope we can come up with something beneficial before the next drought. For the irrigators, the legislature has authorized a master irrigation program at Oklahoma State University that provides training for irrigators, best practices, as well as provides some equipment like soil moisture probes. Like many of your states, Oklahoma isn't big on regulation and being told what to do, but I think we are developing some good practices. They also have small dams for water supply, and a weather modification program.

Chris: It sounds like you guys are trying to put together rules, plans, agreements or collaborations with regard to regulation of water rights. In some ways, many streams in Wyoming are in perpetual drought, which is to say, there's not enough water to satisfy the water rights that are there. So we've got a fairly robust system of turning off the water every single year, in every corner of the State. How we handle drought isn't unlike how we handle a typical year, anywhere, we simply regulate under the doctrine of appropriation according to priority. There are some river systems for example, the Shoshone River being one of them that very rarely goes into regulation. But there are some that even the wettest years, even in 2011, we still had four streams in the Colorado River Basin that were in regulation going back to the 1870s. So if your water right was junior to 1870, you didn't get water in the best water year we've had in that basin for 20 years. That's kind of how we handle drought, we turn it off. If there's not enough water to satisfy your priority, you don't get it. There are tools under Wyoming law to help some of those junior users. A municipality can, through a temporary water use agreement, find an agricultural right that would be in priority and temporarily transfer half of the consumptive use, which has the default presumption of no injury, for up to two years to get through that drought period or through an allocation under the North Platte Decree. We also have tools under Wyoming law for rotation, where water users can voluntarily rotate their use of water, as long as it doesn't injure anyone. We allow for exchanges of different water rights, between an out-of-priority diversion and in-priority diversion, for stored water, direct flow, or groundwater, to allow that flexibility if the source of supply for those water rights is not sufficient. We have specific opportunities and specific basins to try to mitigate regulation or drought. For our water users in our Colorado River Basin, Wyoming owns 120,000 acre-feet in Fontanelle Reservoir that we'll contract with folks who might get curtailed under the Colorado River Compact. So we have some tools in place where we can try to mitigate the drought, but we use them all the time because we're out regulating every single year.

Sara: Our panhandle and central irrigators are mostly groundwater users. It is difficult in Oklahoma to get traction on a lot of things. Water banking, nobody seems to be interested in that

ability to transfer water rights. So really, we only get a lot of push for new programs when drought starts affecting the eastern part of the state.

New Mexico: Gregg Ridgley - The Pecos River, which is one of our longest running controversies in New Mexico, is a very dry, flashy river system. The senior water right is at the end of the river near the Texas state line, the Carlsbad Irrigation District (CID). Back in 2003, after years of fighting this, the parties within New Mexico reached the Pecos River Settlement Agreement to address issues and ensuring that we continue to comply with the Pecos River Compact in our deliveries to Texas, but also to address in times of shortage of providing water supply of or firming up water supply for CID. This year, it's as dry as it's ever been. The settlement agreement prohibits CID from making a priority call unless their project supplies fall below 50,000 acre feet, I believe as of March 1 of the water year. And they were something like 20,000 acre feet below that this year, so they have brought a priority call. The state engineer is preparing to administer water rights and priority on the Pecos River, and at the same time meet with the different parties on the river to talk about options and alternatives to priority administration. My question for the group, and I think Chris, you touched on it in the earlier discussion is, it's never been addressed in New Mexico the question of futile call to curtail groundwater pumping. The hydrologic question of how long would it take if you curtail groundwater pumping to address shortages in surface water flows on the Pecos? It's estimated for some of these wells it might take five to seven years of curtailment before the surface flows of the Pecos are affected by reductions in the groundwater pumping. Do any of your states have experience with the futile call doctrine in the context of curtailing groundwater pumping to address shortages in surface water supplies?

Chris Brown: That's an issue that we had to litigate in the one example that I described earlier. Luckily, for me, because I had to argue it, that situation had a very well-connected system, and it was connected temporally very quickly. Under the facts of that particular regulation that was appealed, we were able to prove that by regulating the groundwater wells in that season, it would put water at the headgate of the senior water right calling surface water that year. So under the facts of that case, we were successful. Now, how that would have played out if by regulating the groundwater right, you don't put water at the surface headgate until the following year or the year after that, I don't know. But we didn't have to argue that. I think this has been a point of argument and litigation in Idaho in connection with all the rules associated with the ESPA. But I'm not sure.

John Simpson: It's a bit of a timing issue. When you get into conjunctive management and the delivery call situation, it's been interesting. Because it's been applied, not so much to a futile call, but tied to the certainty in the model. About five years ago we had a delivery call by spring water user. The spring water discharging into the river, and about 60-70 miles upstream - how far upstream do you go to curtail small amounts of water that the model describes as contributing to that spring. You have the volume issue, how much water would really show up under a curtailment. And then you have the model certainty or uncertainty. How much certainty do you have that the water will get there? When Jerry asked the question about "optimal use" of the water supply, that's really just a variation of the Director's discretion as a technical expert. So the Director of the Water Resources Department made that determination in that delivery call

proceeding that the amount of water to be gained from curtailment above a certain area upstream was so small, and the model didn't describe that amount with the degree of certainty necessary to carry administration that far. So it's a little bit of a timing issue, with a little bit of the volume and the uncertainty of the tool that you're using. The result isn't really called a futile call, but is essentially the same thing.

Michelle Bushman: If you have groundwater pumpers that are affecting surface water users, and you're making a futile call, how many of those futile calls can you do year after year before it becomes the junior users are flipping the priority system upside down *de facto*? Do you just keep doing that forever because it's a futile call? Or you just hope for a monsoon or a wet winter to fix the problem?

John Simpson: In Idaho, 30 years ago, it was what we call the Edelman decision, which the burden was on the senior spring water user to prove which well is causing your injury. We didn't have that tool. The development of conjunctive management and the development of the groundwater model helped bring that into the present. Now the model is sufficient--to an extent--to describe that connection between springs and the aquifer. The other factor in Idaho is that not every water right relies upon that sole spring discharge. There are reach gains to the river, which senior surface water rights rely upon a reach of the record, which that connection is well defined. We know groundwater rights impact the reach of the river. What part of that reach doesn't matter, it at all comes into that reach of the river. So if you're downstream of that reach and you're senior, you can look upstream into the aquifer, and most every one of those groundwater rights is affecting that reach.

SYMPOSIUM ON THE SETTLEMENT OF RESERVED INDIAN WATER RIGHTS

Michelle Bushman referenced the draft agenda in Tab S, noting that the 17th Biennial Symposium co-hosted by WSWC and the Native American Rights Fund would take place on August 24-25. This Symposium will be virtual. It will feature the recent settlements and related legislation authorized by the 116th Congress: Navajo-Utah, Confederated Salish and Kooenai Tribes in Montana, changes to Aamodt in New Mexico, and authorization for the dam study toward the settlement of Kickapoo.

STAFF UPDATES

Michelle Bushman provided an update on the four state surveys requested by the Legal Committee, and acknowledged that there were several states still planning to respond to older surveys.

- Survey I - State Engineers (due January 15) (Responses so far: AK, AZ, ID, NE, NV, NM, ND, OK, OR, SD, TX, UT, WY)
- Survey II - Water administration (due April 5) (Responses so far: AK, ID, KS, NE, ND, OR, SD, UT)

- Survey III - Well construction administration (due July 9) (responses so far: AK, CA, ID, MT, OR, UT)
- Survey IV - Public trust/Public interest (August 27)

Michelle noted that the report on past workshops for grazing water rights was posted on the WSWC website: https://westernstateswater.org/publications/2021/stock-water-rights-for-grazing-livestock-on-federal-lands/ She asked the Committee about potential next steps, including (1) webinars highlighting stock water rights in other states; and (2) opportunities for grazing organizations to present further perspectives.

She showed a map of grazing-related water rights as shown by the WaDE data hub, noting that a couple of states are still working on details needed to enable that data to flow to WaDE. She also demonstrated the differences in state terminology just for stock-related water rights, and the work that will go into ensuring that the different terms are grouped together appropriately for cross-region queries.

The fall meetings in Deadwood will include a workshop on Wild & Scenic Rivers, and Michelle provided some potential topics to be covered and questions to address, and asked for additional input.

She provided a quick rundown of the cases in Tab T, highlighting recent decisions and pending conferences in Florida v. Georgia, Mississippi v. Tennessee, Texas v. New Mexico and Colorado (Rio Grande), and Montana and Wyoming v. Washington. She also offered a list of water-relevant legislation that may be of interest to the Committee, noting that the Senate passed the Drinking Water and Wastewater Infrastructure Act (S. 914).

DRAFT FY2021-2022 LEGAL COMMITTEE WORK PLAN

Chris said that the changes to the draft Legal Committee Workplan were mostly updates and clarification. The Committee noted that some of the workplan items do not express what we are going to do, and Chris acknowledged that some things, such as WOTUS, are more placeholders to keep an eye on anticipated developments even when there is no WSWC action pending, but agreed that we may need to provide greater specificity. The workplan was approved.

SUNSETTING POSTIONS FOR FALL 2021 MEETING

The Legal Committee has one position scheduled to sunset, Position No. 431, regarding States' Water Rights and Natural Flows. Please review it and get any proposed changes or edits to your Executive Committee member prior to the Fall meeting.

OTHER MATTERS

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