

**MINUTES
of the
LEGAL COMMITTEE
Courtyard by Marriott
Lincoln, Nebraska**

April 24, 2025

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MEMBERS AND ALTERNATES PRESENT (*via zoom)

ALASKA	<i>Tom Barrett Christina Carpenter</i>
ARIZONA	<i>Trevor Baggione</i>
CALIFORNIA	Jeanine Jones
COLORADO	<i>Jojo La Jason Ullman</i>
IDAHO	Jery Rigby Mat Weaver
KANSAS	Earl Lewis Tom Stiles Matt Unruh
MONTANA	Trevor Watson <i>Jay Weiner</i>
NEBRASKA	Jesse Bradley Justin Lavene
NEVADA	<i>Jennifer Carr Cathy Erskine</i>
NEW MEXICO	<i>Tanya Trujillo</i>
NORTH DAKOTA	<i>Reice Haase</i>
OKLAHOMA	Julie Cunningham Sara Gibson
OREGON	<i>Doug Woodcock</i>
SOUTH DAKOTA	Nakaila Steen

TEXAS

UTAH

Candice Hasenyager
Teresa Wilhelmsen
Mark Stratford

WASHINGTON

Ria Bearns
Leslie Connelly

WYOMING

Chris Brown

GUESTS

Charlie McGuigan, AGA-CWAG
Tom Riley, Riley Consulting LLC
Brian Clark, U.S. Geological Survey
Victoria Asbury, Kansas Water Office
Jennifer Verleger, State of South Dakota
Christopher Estes, Instream Flow Council
Rick Allen, Evapotranspiration Plus, LLC
Conor Doherty, California State University
Ayse Kilic, University of Nebraska-Lincoln
Adel Abdallah, Utah Division of Water Rights
Forrest Melton, NASA Ames Research Center
Austin Davidson, Legislative Finance Committee
Matt Rakow, Washington Department of Ecology
Mark Svoboda, National Drought Mitigation Center
Hannah Singleton, Southern Nevada Water Authority
Dave Christensen, Washington Department of Ecology
Philip Blankenau, Idaho Department of Water Resources
Alexa Davis, Nebraska Department of Natural Resources
Sarita Nair, New Mexico Department of Workforce Solutions
Isabella Peterson, Nebraska Department of Natural Resources
Patrick Fridgen, North Dakota Department of Water Resources
Kathy Alexander, Texas Commission on Environmental Quality
Patrick Kormos, USDA Natural Resources and Conservation Service

WESTFAST

Lauren Dempsey, U.S. Air Force
Chris Carlson, U.S. Forest Service
Chad Abel, U.S. Fish and Wildlife Service

Paula Cutillo, Bureau of Land Management
Roger Gorke, Environmental Protection Agency
Elizabeth Ossowski, National Oceanic and Atmospheric Administration

STAFF

Tony Willardson
Michelle Bushman
Elysse Campbell

WELCOME

Sara Gibson, Committee Vice-Chair, called the meeting to order and let everyone know the agenda had been modified.

APPROVAL OF MINUTES

Sara entertained a motion to approve the minutes from the meeting held on October 23, 2024 in Lawrence, Kansas. There was a motion, a second and the minutes were unanimously approved.

HISTORICAL WATER RIGHTS

Cathy Erskine and James Bolotin shared Nevada's recent challenges with historical water rights, an issue that has come to the forefront with a legislative bill. As the bill has progressed, the discussions surrounding historical water rights have broadened considerably, extending beyond the original scope and intent of the legislation. Consequently, we've been navigating a range of complex and sometimes conflicting legal interpretations presented during testimony. We're sharing our current understanding and progress in this area and hope to learn from the experiences of other western states as we move forward.

In looking at Nevada's current pre-statutory water rights law, we often refer to historical rights as vested water rights. For surface water, Nevada's laws were enacted in 1905, and for groundwater in 1939. While the majority of our surface water resource rights have been adjudicated through decrees, a considerable number of vested rights are still unadjudicated. This includes groundwater rights and, particularly, those related to stock water use at springs. These claims are frequently associated with small, remote springs scattered across the state, which makes them challenging to track and verify.

In 2017, with the support of the State Engineer's Office, the legislature passed a bill that is the current law. This law mandates that anyone claiming a water right with a priority date before Nevada passed its water laws must submit proof to the State Engineer by December 31, 2027. It

also requires the State Engineer to provide notice of this requirement during the 10 years leading up to the deadline. Additionally, the statute states that failure to file a claim by the deadline will result in the right being considered abandoned. It's important to note that while this statute, enacted in 2017, exempts Federal Reserved Rights, it does not address federal vested rights.

The Division introduced Senate Bill 31, which we view as providing a focused yet crucial clarification: federal claims to vested water rights are not subject to the December 31, 2027, filing deadline. We believe this is a necessary adjustment to align with the federal government's limited waiver of sovereign immunity under the McCarran Amendment, and that it reflects a legal precedent from *United States v. Oregon*, where the court held that the McCarran waiver applies only after a state formally initiates an adjudication and reinforces a statewide filing deadline set outside of a judicial process that does not bind the federal government.

Much of the debate and opposition surrounding this bill centers on this legal interpretation of how the McCarran Amendment is applied and the *Oregon* case. Nevada has a unique situation as we have approximately 85% of land that is federally owned, which often contributes to an "us versus the feds" mentality. In my opinion, this sentiment has influenced the perception of the bill. Despite the strong legal basis for Senate Bill 31, we continue to encounter resistance from stakeholders and legislators who argue that federal government should not receive what they consider special treatment and should adhere to our deadline, or the deadline for filing proof should be removed entirely to create equal footing for all claimants. The bill passed through the Senate as introduced, with language specifically including vested rights. While we faced pressure regarding several amendments, we were successful in the first House. The bill now moves to the other House, where we anticipate continued challenges rooted in the "us v the feds" mentality, fairness concerns, and proposals to either remove or extend the proof filing deadline.

Given Nevada's experience, I thought it would be beneficial to gain insights from other western states on the broader issue of historical water rights in general. Hopefully learning from the experiences of other states, it may help Nevada determine the best path forward. To facilitate this discussion, I have some questions I'm hoping you might be able to share your perspectives on. However, before we delve into those, if it's alright, I'd like to introduce my colleague, James Bolotin, who is a lawyer with extensive expertise in this area, to add any additional comments he may have.

James Bolotin: We are currently facing a challenge where our existing statute appears to be non-compliant with the McCarran Amendment. This is due to the Ninth Circuit precedent, which Nevada is a part of, saying these general filing deadlines are too far removed from an active adjudication to get a waiver of the federal government's sovereign immunity. Our aim is to bring the statute into compliance with the McCarran Amendment while preserving our current filing deadline for all other parties. As many of you from other states are likely aware, we are dealing with water rights that were established over a century ago. The evidence supporting these rights naturally diminishes with time, making our current deadline what we believe to be a necessary measure. However, we understand that we cannot apply this deadline to the federal government outside the context of an active adjudication. At the same time, we are committed to including the federal government in these processes to ensure comprehensive adjudications through a proper

waiver of their sovereign immunity. We sincerely appreciate your time and would be very interested to learn how your respective states have addressed similar issues.

Questions/Comments:

Sara: Does anybody have any thoughts immediately? It's been a long time since Oklahoma's done an adjudication.

Michelle Bushman: Does anybody still have historic rights that haven't already been determined?

Jerry Rigby: Yes, that's our problem. We thought we were done! We even bragged that we were done - remember, many times. However, according to the government, they are saying that our stock watering and minimal claims, because we exempted them for the time being, they claim we haven't finalized our McCarran Amendment, and therefore we haven't finalized our adjudication. I'll let Mat address any further issues.

Mat Weaver: I don't know if I have much to add. I will say we're working through adjudications in northern Idaho, and the Bear River where I think one applies to that. Certainly, as Jerry alluded to, we're working through these issues now with deferred *de minimis* uses and how long those can remain deferred before you violate the McCarran Act assumptions.

Mark Stratford: At one point, Utah tried to put a deadline on filing of what we call diligence claims (same as pre-statutory claims), and as we got close to the deadline, people didn't want the deadline to come, and so we had to extend it. We did that a couple of times and eventually got rid of the deadline. Now, we only apply the deadline through the adjudication process. You've already identified the problem if you don't do an adjudication. I don't see any way to foreclose the federal government from filing those reserved claims.

Michelle: Has everybody else already finished their historic claims?

Nikaila: I don't believe South Dakota, that we've done a historical basin wide or statewide adjudication of pre claims, but we still allow folks to file vested water right claims. We haven't set a hard date, it's whenever they want at this point in time.

Trevor Watson: In Montana, we've been going through an adjudication since 1973. It was supposed to happen quickly, which obviously it has not. We are finalizing within the next 10 years. Similar to Utah, we set a date, then we extended that date, and now we are going through full adjudication so we are in compliance. We have never had push back on that. But, we had a very similar situation where we set the date and extended, and that was years ago.

Joaquin Esquivel: In California, we do have some adjudicated basins, but we also have a lot that aren't adjudicated. Our most significant and difficult ones aren't, and so we're a bit behind.

Tony Willardson: I have a question about Montana. At least with tribal rights, there was a commission that completed their work and I believe all those tribal rights are done. You've also settled the Forest Service rights. Are there any other federal rights that are still outstanding?

Trevor: Yes, we do have a commission that went forward and was doing federal compacting for those. The Forest Service has been done, and all the tribes except for one. We hope to get that one done soon. We understand that Montana is pretty unique in the way that we went about that, but I'd say in general, it's been helpful, but it took a while.

Jay Weiner: I would add that we certainly got BLM up through the compact process. We did do the Wild & Scenic River claims through the compact process. There were also sort of the fuzzy ones like the PWR 107 claims, which had to get results through the course of our adjudication. But we bit off the statewide adjudication all at once. The filing deadlines that were just referred to, it was 1982 and then a late claim in 1996. There's an open question about water rights for subsequently designated federal lands. There's a new Wild and Scenic designation under review that postdates any of the filing periods, or anything the Compact Commission touched. There may be some odd cat and dogs we have to deal with, but between the Compact Commission process and the fact that we bit off a statewide adjudication all in one go, we don't really face these issues in Montana in the same way.

Sara: Do we have any other questions or comments?

Michelle: Cathy, I hope that helped.

Cathy: I'm curious if folks think that a statewide adjudication strategy has been successful?

Michelle: I don't think anyone in this room has finished.

Jay: No. I mean, Montana is 10 years out from being done with the statewide adjudication. It's huge and long-time commitment. It may be a more reasonable thing to think about in a state like Nevada, similar to how it was in a state like Montana, as opposed to somewhere that is just a lot larger in terms of what you'd be biting off, but it's been quite a thing. The Commission process was very helpful for dealing with federal reserved water rights issues. That would have been harder to do if we didn't have a statewide process, but I'm certainly willing to recommend anyone trying to do a statewide adjudication all in one go.

Sara: Oklahoma did an adjudication for groundwater rights statewide when the groundwater law was changed in 1972, but we also mostly had applications and permits for the majority of those users. We were just confirming what we believed already existed, and that was a long time ago. Since then, the legislature has changed our adjudication process a couple of times, so I don't know exactly how it went, but Oklahoma had to do that to avoid some takings claims. I think it's kind of just balancing what the pros and cons are to having it done versus not.

Michelle: I don't know what Colorado has completed. You might want to reach out to them specifically.

Cathy: Thank you! I appreciate the feedback. I wish we were all in a better position on this. It sounds like it's kind of a struggle for everyone.

DOI SOLICITORS MEMO/MIGRATORY BIRD TREATY ACT

Related to WSWC Position No. 480, Chad Able, USFWS, provided a brief update. The previous Administration did not ultimately promulgate the proposed regulation under the Migratory Bird Treaty Act (MBTA) that would have resulted in a changed scope for the prohibition on incidental takes. I'm sure you all know this, but an incidental take results from the taking, or killing of a migratory bird, their nest or their eggs that was by accident.

The Department of Interior Solicitor just released a memo (M-37085), which repeals a Biden Administration memo (M-37065) and effectively reinstates a longer memo (M-37050) from the first Trump term, which concluded that prohibitions of the MBTA do not apply to the incidental taking or killing of migratory birds. The new DOI Solicitor's memo (M-37085) mentions Executive Order 14154, which is the Unleashing American Energy Executive Order. There's also a Secretarial Order 3418, that provides additional context and mentions incidental take under the MBTA specifically is one of those regulations that will be reviewed and likely reduced in order to comply with Executive Order 14154.

SUNSETTING POSITION

The Committee considered Position #480 - regarding Migratory Birds & the Management of State Water Rights & Resources. There was some discussion of whether to keep the position or to allow it to sunset. There was some concern about allowing it to sunset in case it is needed again, to respond to a new situation. There was a suggestion to strike the two Whereas Clauses that reference the Federal Register notice and the rulemaking that has since been withdrawn.

Sara: Any other thoughts, questions? Do I have a motion on the position as amended? There was a motion, a second and without any further discussion, the motion passed to move the position forward to the Full Council for their approval.

PRODUCED WATER AS A PIECE OF THE WESTERN WATER RESILIENCY PUZZLE

Matthias Sayer, WATR Alliance - In response to some water issues in the State of New Mexico and generally across the Southwest, my law partner and I started Water Access, Treatment and Reuse (WATR) Alliance last year. Our focus is on advocacy and education pertaining to water reuse. We've been working on this for the better part of the last decade. More often than not, many discussions on this topic have been with individuals in the oil and gas industry as they are the primary entities involved in bringing this water to the surface. However, their familiarity with broader water resource issues in New Mexico and the Southwest is often less extensive. Consequently, we've frequently found ourselves needing to provide foundational education on

these topics. With treatment and reuse, there is an opportunity to take some of the produced water that would otherwise be disposed and try to augment some of the traditional water supplies. At the WATR Alliance we have used some of the content from the National Water Reuse Action Plan to help guide some of our work. We have looked at different sources of waters that can be treated, from effluent to produced waters, and considered whether it can be treated to a standard that is protective of human health and the environment, or whether there is a purpose for which the water is fit. In the Permian Basin in New Mexico, we have about 4-5 barrels of water for every barrel of oil. We've been working to get the industry to convert their dialogue about units from barrels to acre-feet.

We would have separate legislative hearings in New Mexico, where legislators would talk about water stress in one room, and in another they would be talking about the management of produced water and rising volumes and where to dispose of all of it. Right now most of the water is disposed in Class II wells, but in the next few years we will run into the challenge of running out of space for the produced water. One outcome could be to curtail oil and gas production. New Mexico is facing a reduction of 25% of its water supply over the next 50 years, almost a million acre-feet of water. Governor Lujan Grisham released her 50-year Water Action Plan, which includes proposals to address that reduction in water, including a strategic water supply that targets brackish resources and treated produced water. The brackish water is proving to be an easier nut to crack, because the produced water is so controversial. There is a lot of angst in New Mexico about whether we should use this water, regardless of whether we can treat it from a technological standpoint. California has been using produced water in meaningful ways for the past decade, growing almonds among other things.

Governor Lujan Grisham's initial proposal for a \$500M appropriation to help fund brackish and treated produced water projects was not passed by the legislature. In the most recent legislative session the governor brought back a more modest proposal of \$75M, but ultimately the legislature pulled the produced water component and the brackish piece passed with about \$44M in funding. In each of the legislative hearings there were dozens of comments from the public about the toxicity of produced water to wildlife and human health, which of course it is when it is untreated, just like effluent. So I think the challenge we face now at the WATR Alliance is to help educate stakeholders in New Mexico about the state of the science in the context of treating produced water, and what can be achieved.

In 2018, New Mexico and EPA published a white paper on the state of the regulatory landscape as it pertains to produced water that Jim Kenney and I drafted. He went on to become the Secretary of Environment in New Mexico, and one of the first things he did was help champion the Produced Water Act which clarified some important matters, including the issue of ownership. The Act established that the entity bringing the produced water to the surface has a possessory interest in the water, which is not the same thing as a water right, but it is sufficient to enter into contracts or other transactions over the water, providing greater certainty.

We are taking a closer look at the treatment projects to provide better data to the legislature, and there are many projects that are piloting technology to treat produced water. Texas Pacific is one that is working with TCEQ, EPA, and universities in Texas and New Mexico, and theirs is

one of a few TCEQ applications pending for a discharge permit into the Pecos River. In New Mexico we have a patchwork of regulatory language relating loosely to water reuse. The WATR Alliance is working on some proposed language based on the treatment technology data we are gathering to help establish a permitting regime for the reuse of treated produced water. This isn't data that our Environment department has had easy access to, so when various parties have tried to discuss the use of treated reuse water, their response has been that they don't have the data to show that this can even be done. So we have been trying to help close that gap. If anyone wants to see the data we'd love to show you where we are at with that effort.

On the federal regulatory side, there are two categories in the regulations, one that limits produced water to no discharge, and one that allows some treated produced water discharge in the West for agriculture and wildlife. Only a few permits were ever issued. The regulation was drafted in 1976, and the technology and the data have advanced considerably since then, and we're able to achieve water quality levels now that I don't think most people appreciate. We aren't sure what EPA is going to do with this regulation under this Administration, but there is some potential to remove some of those old prohibitions.

Questions:

Tony: I believe in New Mexico, with regard to groundwater, that there is a certain TDS level at which it doesn't require a permit. It was some astronomical number, like 25,000 TDS. We might see that in the Great Salt Lake.

Matthias: Yes, this water TDS is astronomical. The produced water in the Permian Basin is 150,000 parts per million, so it's pretty salty. The State Engineer does have a process for brackish waters, and it's notice of intent process, as compared to a traditional filing of water right.

Candice: Our legislature took up this issue in this last session. Mark can correct me, but they determine they can use it as long as they're not using it consumptively, so non-consumptive use of that water. I'm curious, with the produced water in New Mexico, can they use it consumptively and/or to what amount?

Matthias: There's no restriction on consumption, and there's no numerical threshold either. It's as close as you can have to a water right, without calling it a water right.

Sara: In Oklahoma, we have a transportation problem. These are very high TDS contaminated waters that are not in the place we need them to be for reuse. From our produced water working group, that was the highest cost associated with produced water. It wasn't even treatment. It was getting the water where it needed to be. In Texas and New Mexico, Permian Basin produced water is already where you need it to be.

Matthias: It's kind of where it needs to be. Our population centers are a fair distance away and so that is an issue.

GREAT SALT LAKE

Candice Hasenyager and Mark Stratford provided an overview of the Great Salt Lake (GSL) and some recent litigation. Candice noted significant changes over time in terms of its elevation and extent. It has become a crucial element in our considerations for water use within the Great Salt Lake Basin. The lake reached a high point in the 1980s (4,200'), a midpoint around 2002, and it reached a record low in 2022 (4,188.5'), which brought national attention to Utah. Interestingly, after that record low in 2022, we experienced a winter with record-breaking snowfall. This substantial snowpack raised the lake's elevation by almost five feet. Following we had another pretty good year and then this year has been meh - it's been average in northern Utah and pretty dry in South Utah.

She noted the importance of GSL resources for migratory birds, sulfate of potash for crop fertilizers, brine shrimp, magnesium, and lithium. Additionally, 5 to 7% of our lake effect snow originates from the Great Salt Lake, which then contributes to our crucial water runoff. The continued decline in the GSL's elevation has serious potential economic ramifications. We could face losses in the mineral extraction industry, significant landscape mitigation expenses, a decline in recreation, damage to the brine shrimp industry, increased health costs, and reduced spending at ski resorts, among other issues. Additionally, a drying lake leads to increased dust, impacting public health.

In 1959, a railroad causeway was constructed across the Great Salt Lake. This causeway effectively divided the lake into what are now known as the North and South arms. Referring to slide 11, you'll notice Farmington Bay and Bear River Bay. To give you a sense of the scale, Farmington Bay is comparable in size to Owens Lake in Owens Valley for those of you who are familiar with it. This highlights the significant size of our terminal lake.

To illustrate the complexity of how water reaches the GSL, the Bear River, for example, flows through three states before reaching the GSL. The Bear River contributes approximately 50% of the inflows, the Weber River about 20%, and the Jordan River around 25%, which also includes imports from the Colorado River, although it's important to clarify that this water reaches the GSL through our diversions, usage, and subsequent return flows. A relatively small amount, about 5%, originates from the west desert. It's truly a complex basin. It encompasses a vast area of 36,000 square miles, spanning four states, 18 counties, 141 cities, 70 groundwater aquifers, 1,300 reservoirs, and 150,000 water rights. Not to mention we have 2.8 million people, 1.5 million acres of farmland, nearly 700,000 urban acres, and 184,000 acres of wetlands, making it one of the largest wetland areas in Utah. Then we have all the behaviors, attitudes, and values of these 2.8 million residents, and their various ways of using water within our basin adds another layer of complexity. Once again, this is not just Utah. This includes our friends in Idaho and Wyoming.

We've seen considerable variation in human water depletions from the GSL over time. While agricultural use is the largest driver of depletion in the basin and is closely tied to hydrology, municipal use appears to have stabilized with a slight downward trend. Other depletions include managed wetlands, mineral extraction (specifically sulfate of potash from the lake), agriculture, and reservoirs. An earlier study by the Great Salt Lake Advisory Council identified a desirable

range for the lake's water levels. Maintaining this "sweet spot" is important because both excessively high and low levels can lead to negative consequences. High levels can decrease salinity to problematic levels, while very low levels can cause other issues. There were, once upon a time, islands in the GSL, but as the lake dries up, the formation of land bridges has impacted waterfowl and increased predator access.

One significant challenge of the GLS lies in the coordination, collaboration, and management of the lake due to the sheer number of involved entities, including federal and state agencies, and users. This is one of the reasons why the legislature established the Great Salt Lake Commissioner's Office. Salinity is another major concern; maintaining the right balance is crucial for the health of brine shrimp. When the water becomes too salty, their reproduction rates decrease. Changes in salinity also impact the bird populations that rely on brine shrimp and brine flies as a food source. There are also concerns about potential endangered species listings, such as the ongoing review of a petition for the Wilson's Phalarope. Dust and dust hotspots also pose a significant threat directly to nearby communities like Bountiful, Centerville, and even parts of Salt Lake City. As a resident of the area, this is a concern I experience firsthand.

Drawing parallels with Owens Lake in California provides some perspective on the potential costs associated with these challenges. Owens Lake, roughly one-fifteenth the size of the GSL, has required an estimated \$3.6 billion in capital costs by 2025 and an ongoing annual maintenance budget of \$75 million, with about one-fifth of an LA resident's water bill contributing to this. While our legislature has estimated \$1.5 billion in capital costs and \$15 million in ongoing maintenance for the GSL, we suspect these figures may be underestimated given the experience at Owens Lake. We are actively addressing these issues. As I mentioned to Matthias regarding water use, we share the concern about Utah's water consumption and are dedicated to finding ways to get more water to the lake and reduce our overall water usage.

Mark Stratford provided an overview and update on a public trust case filed in state court. The only water rights associated directly with the GSL waters are from companies that do mineral extraction. If lithium extraction moves forward, it's anticipated to be a non-consumptive use, with plans focused on minimizing water loss through evaporation. Consequently, because the lake lacks a dedicated water right, this situation has led some individuals to believe that the state is not sufficiently safeguarding the GSL's elevation. They have advocated for court intervention to mandate specific lake elevation management practices. As a result, litigation has been filed, asking the court to define the public trust doctrine in this context and to order the State of Utah to alter its water management practices for the lake. Initially, I had planned to discuss the public trust doctrine, which I believe many of you are already familiar with. However, it's important to understand that the foundation for the public trust argument rests on the fact that the bed of the GSL is considered sovereign land. In the 1970's the U.S. Supreme Court clarified that it was really sovereign land, and that the water above was used for public purposes for navigation. By concept of our constitution, that land is managed for the benefit of the people.

The primary state agency managing the GSL is the Utah Division of Forestry, Fire and State Lands. Their main focus is on managing the land resources surrounding the lake, rather than the water itself. While they do handle approvals for leases related to water extraction for mineral

production, their role isn't centered on the quantity of water in the lake. Instead, they concentrate on activities occurring on or utilizing the land. Similarly, the State Engineer's office is not tasked with managing the lake's elevation. Their responsibility lies in overseeing water diversions and uses. They process applications for water appropriation but do not specifically monitor or aim to control the lake's water levels. Historically, this approach functioned without significant issues, as the lake levels naturally fluctuated.

In 2022, concerns arose that this existing framework might be insufficient to address the lake's challenges. This led to a lawsuit by a group requesting the court to mandate the state to actively manage the lake to reach an elevation of 4198 feet above sea level. This target is considerably higher than the lake's low point in 2022. It's important to remember the natural seasonal changes, where snowmelt increases lake levels in the spring, followed by a decline throughout the summer months. That is a significant volume of water necessary to reach the 4198-foot elevation of the GSL. In the lawsuit, the plaintiffs proposed that the most effective method to achieve this, given the large water quantity needed, would be for the State Engineer to adjust the regulations governing existing water right diversions upstream of the lake. The idea was to modify these diversions to ensure more water reaches the lake. The timeframe suggested for the State to implement these changes was quite short. In response to this lawsuit, initially filed against the Division of Water Rights and Forestry, Fire and State Lands, other state departments, including Water Resources (where Candice serves as director), also joined in. As Candice mentioned, the holders of those 105,000 water rights expressed concerns regarding the proposed modification of upstream water rights. Consequently, many of them organized into different groups and also joined the litigation, seeking the court's dismissal of the case. Their arguments for dismissal were varied, numbering around five or six. However, the central theme of most arguments revolved around the idea that the legislature had already made a determination regarding the public trust resource through the existing water law. This law allows for water appropriation, granting individuals the right to use that water. The argument was that by adopting this system, the legislature had essentially prioritized these uses over the need to deliver water to the GSL. Utah's Constitution from 1896 acknowledges and protects existing water rights, stating that these rights will not be disturbed. Since the majority of the water required for this type of effort is tied to these existing rights, this presented a significant obstacle. Therefore, several arguments along these lines were presented to the court, advocating for the dismissal of the case.

The court's opinion made a couple of key points: (1) the court stated that even though there isn't one specific state agency overseeing the lake's elevation, the state still has a responsibility under the public trust doctrine to consider the water in the lake. They emphasized that having water is essential for navigation, commerce, fishing, and recreation, which are part of that public trust; (2) while the court didn't find that the state had failed in its duty, they decided to allow the case to continue to trial to determine if the state had indeed breached its public trust duty, acknowledging that fluctuating water levels could potentially impact those public trust uses; and (3) the court stated it wouldn't be feasible to order changes to upstream diversions, which is likely a political matter rather than something the court can directly mandate. So, even if a breach of duty is found after the trial, the options for a remedy might be limited.

To illustrate the complexities we face, consider a scenario on the Platte River where maintaining a specific flow is mandated by state departments to ensure navigability. Imagine the challenges of achieving this consistent flow in a naturally fluctuating environment. This led me to research the Platte River's navigability. Interestingly, online sources offer conflicting information, highlighting the ambiguity surrounding its status. This scenario mirrors the difficulties we encounter in managing resources that are inherently variable and subject to both human and natural influences over time. Considering this, the lake we're discussing has generally remained navigable. While accessibility was difficult in 2023 due to high marina levels preventing boat launches, it technically remained open. Brine shrimp harvesting continued, albeit with reduced yields due to increased salinity that year. While we've seen improvements and a recovery of some benefits, the underlying challenges Candice described persist, and we remain committed to addressing them.

Questions:

Sara: Has there been a push for previous water rights to transfer to that in stream flow protection?

Mark: Yes, in addition to the funding Candice mentioned that was allocated to benefit the lake, there have also been important legal changes. The law now recognizes that water flowing to and being used in the lake for ecological purposes is a beneficial use. Several entities have implemented temporary adjustments to allow water to reach the lake. While permanent changes are less common, these fixed-time arrangements are a positive step. The area with the greatest potential for further impact is the agricultural community. Understandably, it's taking time for agricultural interests to become fully comfortable with this concept, but it is something we are actively working on.

STATE ENGINEERS SURVEY REPORT

Jen Verleger provided a quick update on some work she has been doing for the Council. You may recall this Committee had a discussion between 2019-2021, followed by a survey regarding the structures of state offices that deal with water rights. We received responses from some states at that time. However, since then, several states have changed.

I've been compiling a report on this information for Michelle, and a draft is nearly complete. We will be sending out the report and seeking your feedback on your state's information. Nebraska will have to revise their entire section due to the recent changes. Not everyone provided the same level of detail in response to the survey, but we tried to standardize the entries as much as possible. If you'd like a reference, the sections on North Dakota and South Dakota can serve as examples of the envisioned format – approximately one to one and a half pages.

The report focuses on whether a Professional Engineer (PE) is required for individuals granting water rights permits and where that position is in your organizational structure. Additionally, I've included information about related boards that handle broader water-related issues, even if they don't directly deal with water rights.

To provide a clear overview, each state's information includes a more detailed write-up alongside a concise summary for quick reference. A high-level spreadsheet summarizing this information will also be included.

Once we receive feedback and confirmation from each state, I will finalize the report and present the findings at the Utah meeting this summer. In essence, you will be receiving this report for review. Please take the time to examine your state's section and provide any necessary updates or corrections promptly so we can finalize the report for the presentation.

INDIAN WATER RIGHTS

a. 19th Biennial Indian Reserved Water Rights Settlement Symposium

Michelle: As you know, we typically hold our Indian water rights settlement symposium biennially, and this year is one of those years. It's been quite interesting navigating the planning process this time, particularly given the lack of new settlements since our last symposium. We usually schedule the event after a Congressional session ends, and despite numerous pending settlements, none were passed. This presented some challenges, including securing a tribal host. Additionally, the Secretary's Indian Water Rights Office hasn't been fully operational, which added another challenge. Given these circumstances, we are tentatively planning a one-day virtual workshop, potentially in August. We will be sure to send out more details as they become available. We hope to have a registration portal set up soon. We have a strong intention of returning to an in-person format next year. Meeting in person has been a priority for us since the pandemic.

We do not yet have a Deputy Assistant Secretary for Water and Science. A hearing for Andrea Travnicsek is scheduled for April 30th, so we're hoping that matter will finally be resolved. This will be helpful for several policy initiatives for the WSWC, including the upcoming symposium.

b. Ad Hoc Group DC visits

Regarding the Ad Hoc Group visits that were planned for March and April, those were unfortunately postponed for the same reasons. We are aiming to reschedule those visits later this year once we have the right people in place to engage with.

WESTERN WATER COOPERATIVE COMMITTEE

Progress on the federal efforts related to the Western Water Cooperative Committee have been delayed. I've been regularly following up with Lauren at the Corps of Engineers for an update, and while we haven't received a full one yet, I do have a minor development to share. To submit their package to the DOD, they realized they needed a chair and vice chair already appointed, even though they initially planned to elect them at the first meeting. To keep things moving, it was decided to designate an interim chair and vice chair for the paperwork, with the

understanding that a formal election will still take place at the committee's first meeting. Rather than trying to explain this to everyone beforehand, I made the decision to select individuals who I know would be effective in these interim roles. So, Jen Verleger will serve as our interim chair, and Chris Brown will be the interim vice chair. This decision was partly based on Jen's extensive involvement with this initiative from the beginning, giving her a strong understanding of its goals. Chris also brings relevant experience to the table. While this wasn't strictly my decision to make, I felt it was necessary to keep the ball rolling. At some point, they were planning on having a virtual call with everybody who has been appointed to the committee. I call them appointments from the Governors and Attorneys General. DOD calls them nominations because they're looking at it as a FACA committee. Initially they were planning a virtual meeting for all appointees, followed by a summer in-person meeting. However, the status of the summer meeting is now uncertain. We will continue to stay in contact and work towards getting this initiative underway. While the funding from Congress has been technically secured, there may be other factors at the federal level causing these delays. Thank you to those who have already sent in your appointment letters from your governors and AGs. We appreciate you taking care of that on your end. On our side of that equation, our states have proceeded forward.

STATE WATER PLANS AND STATE FUNDING

Michelle: I received a request from someone in New Mexico who works with one of our members. They are working on rulemaking to better align their state water plans with their state funding mechanisms. Specifically, they are trying to understand how different states accomplish this alignment, the challenges involved, and any successes you might have experienced. They are focused on developing regional water plans that support their broader state water security goals and are looking for ways to incentivize these regional efforts through state funding opportunities within New Mexico.

The concept is that Regional Water Plans would outline specific actions that advance the objectives of the state water plan, with incentives provided through access to state funding. The Colorado Water Plan update, which we recently featured in our newsletter, immediately came to mind as a potential example. Their update details case studies where various funding sources were strategically used to implement specific aspects of their State Water Plan. These case studies clearly demonstrate the awarded amount, the funding source, and the direct link to the Water Plan's goals.

I was hoping we could briefly go around the room, similar to how we did in the recent groundwater workshop, to share any insights you might have on this topic, to hear if your state has any processes for connecting water-related funding with the objectives of your state water plan. Do you have any mechanisms in place to achieve this?

Comments:

Sara: Texas might be good to talk to.

Nakaila: I don't know enough about the financing side of RDA and our department in South Dakota. I'd have to take that question home and ask some folks.

Jesse: If you're talking about the water quality side, Clean Water and Drinking Water State Revolving Funds (SRF) are different. However, concerning water quantity funding distributed through our Natural Resource Districts (NRD), the approach differs. Given that water management and planning are handled at the NRD and basin levels, rather than through a centralized state water plan, state-level funding prioritizes fully and over-appropriated areas. This funding typically requires a 60/40 cost share match, with the state covering 60% and the local entity using their taxing authority for the remaining 40%. Importantly, these local entities can also use this as matching funds for other opportunities, such as WaterSMART grants, as we encourage leveraging of funds.

To be eligible for any funding, each entity must have an active plan outlining their goals, objectives, and control measures, consistent with the steps discussed earlier today. Furthermore, a key requirement for receiving state funding is the active implementation of their established rules, particularly their groundwater management rules.

Trevor Watson: For Montana, we do have a state plan. The Department of Natural Resources and Conservation has two distinct divisions: the Water Resources Division and the Community and Resource Development Division (CARD). A lot of the funds distributed by our agency are managed through CARD, which offers opportunities for both community and resource development. These avenues could align with some of the larger funding opportunities at the state level. We also rely on programs like WaterSMART. While I believe our state plan mentions these opportunities, we don't currently have a direct formal tie between them.

Joaquin: At the California State Water Board, we oversee the Clean Water and Drinking Water SRFs. Additionally, we typically receive bond funding, particularly for water recycling projects. To maintain efficiency and avoid creating redundant processes, we also utilize our existing Intended Use Plans (IUPs) for the expenditure of these bond dollars. This yearly activity is crucial for effectively deploying federal program funds. Given our continuous pipeline of projects, leveraging the IUP process allows us to achieve significant efficiencies. We can seamlessly integrate additional funding from bonds or other sources as they become available.

Consequently, the requirements and scoring criteria we employ are largely aligned with both the state's water plan and the administration's broader water supply strategy. This includes a focus on key areas such as groundwater recharge, urban stormwater capture (which falls under our purview), and water recycling. It's important to note that our agency does not handle conveyance or storage projects, as those are managed by the Department of Water Resources. While our functions are distinct, we strive to maximize programmatic efficiencies within the State Water Board by aligning our funding criteria with the IUP.

Candice: The Utah legislature last year passed HB 280 mandates a new process for funding water infrastructure projects across the state. A key requirement of HB 280 is the development of a unified water infrastructure plan. This plan will be a comprehensive compilation of all necessary

water infrastructure needs looking out over the next 20 years. Importantly, this includes all types of water projects, not just drinking water, but water quality, agricultural, and stormwater. We are currently in the process of collecting that information, as it needs to be reported in the state water plan. Currently, there's not a decision process associated with the state water plan.

We currently have one-sixteenth of our sales tax revenue that is allocated to water infrastructure, typically in the form of loans. The Division of Drinking Water and Wastewater, or Water Quality also offers some grants based on hardship. Additionally, the legislature may choose to appropriate further funds if available. We are also in the initial stages of a fee study to explore the potential for collecting a fee. We are working to determine the specifics of such a program.

Julie Cunningham: This is a good question. The 2012 recommendations from the comprehensive water plan included funding requests for state legislation for each of those items, with the understanding that state appropriations would be matched with federal funds. To that end, we actively seek various funding sources, including programs like WaterSMART through the Bureau of Reclamation.

Beyond infrastructure financing matches, we've also proactively engaged with the legislature, including last year, to secure matching funds for the SRFs and ensure continued support for these programs. Since approximately 2008, we've successfully utilized the gross production tax. These funds were initially requested to develop the comprehensive statewide water plan, and following the recommendations, we've continued to use them for plan implementation. We are requesting additional funding to enhance our existing efforts and develop new programs aimed at addressing gaps in our small community grants. This includes exploring providing bridge funding for initial startup costs or engineering design, which would enable these communities to be more competitive when applying for larger construction grants. We are also seeking funding for technical assistance initiatives.

We recently implemented new priority ranking criteria for communities, particularly small systems, that have developed or are actively working on strategic plans for CIP, and overall system sustainability. This holistic approach is also reflected in our current 2025 plan, which is nearing completion. As part of this process, we conducted public meetings and engaged with various finance agencies and private sector entities to assess infrastructure financing programs across the U.S. and identify best practices.

Mat: For over ten years, we have received approximately \$11 million in ongoing general fund appropriations for our grant and revolving development loan programs. However, the recent legislative session resulted in a significant increase of an additional \$30 million in ongoing funding. This brings our total ongoing general fund appropriation to \$41 million moving forward, which will be directed to the Idaho Water Resource Board, which Jerry is a former chairman, so he can correct me if I get anything wrong. This funding supports three primary grant and loan programs: Aging Infrastructure; Water Sustainability Projects; and Flood Management Projects.

On the planning side, the state has a water plan that includes sub-components such as Comprehensive Aquifer Management Plans for select aquifer systems and basin plans for select

surface water basins. The IWRB has established criteria and selection processes for each of the three funding programs. Notably, there are both formal and informal connections between these plans and the project selection process. We maintain a regional sustainability project list, which identifies significant capital expenditure projects statewide, and there is a direct link between the state plans and the ranking criteria for these projects.

Patrick Fridgen: North Dakota has a well-established cost-share program that supports water development projects. Our state develops a water development plan on a biennial basis. We collaborate closely with local water project sponsors across North Dakota to identify viable projects. These projects are then presented to our legislature as part of the biennial water development plan. The types of projects we support are diverse, ranging from flood protection, water supplies, to addressing aging infrastructure and smaller general water management initiatives. In terms of program size and funding, our current biennial budget is just over \$600 million, with funding derived from 20.5% of the oil extraction tax.

Jojo La: Colorado is fortunate to have gambling tax, which largely funds our state water plan. Through selection process, how we're able to leverage other funds is we actually asked for grant matches, and so that's what makes a project strong and most projects have those match dollars. That's how we're able to leverage some of those other funding revenues.

Matt Unruh: From Kansas's perspective, this actually is an area where there's a great deal of evolution that's ongoing at the present time. Historically, our state water plan has been supported by the state water plan fund. This fund serves as the primary mechanism for advancing implementation efforts. Currently, through fees, general fund transfers, and other legislative approvals over the past few years, we have approximately \$60 million annually to support various water-related projects, programs, infrastructure, and technical assistance.

I believe this has been touched on, maybe at last meeting in Lawrence, but in 2024, we were going through a strategic implementation planning process. This process aims to better identify and develop a pipeline of projects for water plan implementation within the state. It also serves as a basis to advocate for renewed and increased funding that the legislature initially approved for fiscal year 23 (which has a five-year sunset). This implementation framework has identified roughly \$140 million in annual needs, contrasting with our current \$60 million in funding.

During our state report tomorrow, we may discuss a newly forming legislative task force. A key part of their activities will be to explore long-term funding solutions, using this implementation framework as a basis for those discussions.

Regarding current prioritization, our process involves local stakeholder advisory groups or regional advisory committees that help inform priorities that are identified and supported by our Kansas Water Authority and ultimately included in agency budget requests from the entities receiving state water plan funding. The ongoing project pipeline development process may also lead to the development of a new project prioritization effort for overall water plan initiatives.

Overall, we anticipate significant developments in Kansas on this specific topic in the coming years.

Sara: Thank you everyone. I hope New Mexico finds that helpful.

DRAFT FY2025-2026 COMMITTEE WORK PLAN

Sara noted that the committee work plan will be put on hold until after the strategic plan process is finished

STAFF UPDATES

Michelle's legislative and litigation updates can be found at Tab S.

SUNSETTING POSITIONS FOR SUMMER 2025 MEETINGS

There are no sun setting positions for the summer 2025 meeting.

OTHER MATTERS

There being no other matters, the meeting was adjourned.