

MINUTES
of the
LEGAL COMMITTEE
Crystal Gateway Marriott
Washington, DC
April 3, 2014

Table of Contents

Welcome and Introductions	3
Approval of Minutes	4
2013-2014 Draft Committee Workplan	4
Department of the Interior Update	4
Department of Defense Update.....	4
U.S. Army Corps of Engineers Surplus Water Rulemaking.....	5
Report on March DC Visits	5
Litigation and Legislation Update	6
Other Matters	7

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MEMBERS AND ALTERNATES PRESENT

ALASKA	--
ARIZONA	Cynthia Chandley
CALIFORNIA	--
COLORADO	Dick Wolfe James Eklund
IDAHO	John Simpson Jerry Rigby
KANSAS	--
MONTANA	John Tubbs
NEBRASKA	--
NEVADA	--
NEW MEXICO	Maria O'Brien (via phone) Scott Verhines DL Sanders
NORTH DAKOTA	Jennifer Verleger Michelle Klose
OKLAHOMA	J.D. Strong
OREGON	Phil Ward
SOUTH DAKOTA	Kent Woodmansey
TEXAS	Todd Chenoweth

UTAH

Eric Millis
Norm Johnson
Walt Baker

WASHINGTON

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WYOMING

Pat Tyrrell
Chris Brown (via phone)

GUESTS

Robert Mace, Texas Water Development Board, Austin, TX
Carlee Brown, Western Governors' Association, Denver, CO
Tom Iseman, U.S. Department of the Interior, Washington, DC
Bruno Bowles, Southern Nevada Water Authority, Las Vegas, NV
Laura Sturgeon, Oklahoma Water Resources Board, Oklahoma City, OK
Herman Settemeyer, Texas Commission on Environmental Quality, Austin, TX
Becky Patton, Office of the Deputy Under Secretary of Defense, Washington, DC

WESTFAST

Eric Stevens, Federal Liaison, Murray, UT
Jean Thomas, USDA Forest Service, Washington, DC
Lee Koss, Bureau of Land Management, Washington, DC
Becky Fulkerson, Bureau of Reclamation, Washington, DC

STAFF

Tony Willardson
Nathan Bracken
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

Norm Johnson chaired the meeting in place of Maria O'Brien, who was unable to attend in person but participated via phone.

APPROVAL OF MINUTES

The minutes of the meeting held in Deadwood, South Dakota in October 2013, were moved for approval by Phil Ward. The motion was seconded by James Eklund. The minutes were unanimously approved.

2013-2014 DRAFT COMMITTEE WORKPLAN

Nathan reviewed the Committee's proposed work plan for 2014-2015, which the Committee will need to adopt at its summer meetings on July 16-18 in Helena, Montana. He explained that the draft is intended to be a "strawman" to generate discussion in advance of the Committee's summer meeting on July 17 in Helena, Montana, at which point the Committee will need to adopt a workplan for 2014-2015. Nathan explained that proposed work items include: (1) the development of a clearinghouse of information to assist states and federal agencies in the resolution of federal non-tribal water rights claims following a workshop the WSWC and WestFAST will hold before the WSWC's summer meetings in Montana; (2) additional work with the other Committees to review and comment on the proposed Clean Water Act (CWA) jurisdictional rule that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers have proposed; (3) continued efforts with the Western Governors' Association and the Native American Rights Fund (NARF) to support the negotiated resolution of tribal water right claims; and (4) a possible report on agricultural and urban water conservation that analyses the issues associated with improving or implementing a conservation program at the state level.

DEPARTMENT OF THE INTERIOR UPDATE

Tom Iseman, Deputy Assistant Secretary, discussed the Bureau of Reclamation's drought authorities, which he said include the WaterSMART grants program, the basin studies program, project-specific authorities, and planning and emergency response efforts under the yet-to-be-reauthorized Reclamation States Emergency Drought Relief Act.

Reclamation and the Department of the Interior have been very involved with the National Drought Resiliency Partnership. They are focusing on water supply resilience.

The President's 2015 budget request also seeks \$1.5M for drought response and planning. The Administration wants to reshape and restructure its drought program in Reclamation and move towards collaboration with stakeholders. The program will be developed in the coming months and they will be soliciting input from the WSWC and others.

DEPARTMENT OF DEFENSE UPDATE

Becky Patton, Climate Change Adaptation Policy Program Manager Becky Patton, Climate Change Adaptation Policy Program Manager for the Office of the Deputy Under

Secretary of Defense (Installations and Environment), gave a presentation that described the Department of Defense's (DOD) water-related efforts, which include water reuse, conservation, and other efforts.

Becky reported that all federal agencies have been asked to achieve a 26% reduction in potable water use by 2020, and said DOD is "well ahead" of this goal.

Among other efforts, the Army has a "Net Zero" initiative that is working towards a 50% reduction in its "water use intensity" by 2020. The initiative is focused on limiting consumption of water resources to minimize ground and surface water depletions. There are 8 pilot Net Zero installations, including five in the West.

Becky further noted that the use and availability of water are huge concerns for DOD. The department has fairly good information on aquifer availability and other types of availability and developing a methodology of water needs. Most are currently based on water use. Nevertheless, DOD is working to better understand its needs and is looking to partner with the states to address this issue.

U.S. ARMY CORPS OF ENGINEERS SURPLUS WATER RULEMAKING

Michelle Klose updated the WSWC on the Corps' surplus water efforts. In the Missouri River, she explained that the Corps did not previously charge for water from its reservoirs unless a benefit was received. However, the Corps recently changed this policy and now asserts that it controls all of the water in the reservoirs it manages, including natural flows that would be there if the dams did not exist. As a result, the Corps is asserting that contracts and associated are required to take water from the reservoir.

Michelle further reported that Congress is working to reconcile two competing Water Resources Development Act (WRDA) bills (S. 601 and H.R. 3080). It is possible that Congress may include a rider prohibiting the Corps from charging for surplus water in Missouri River reservoirs.

WSWC staff has also distributed a survey seeking information on how states address storage water and storage water rights. The purpose of the survey is to gather information that the WSWC can use in working with the Corps in the agency's surplus water efforts. One key point that the survey results are intended to address is the differences in how western and eastern states address storage water under the prior appropriation and riparian rights doctrine.

REPORT ON MARCH DC VISITS

Nathan reported that WSWC staff accompanied members Cindy Chandley of and Jay Weiner and representatives from NARF in a series of visits with Congressional and Administration officials in March to support Indian water rights settlements. The visits included

a meeting with the Office of Management and Budget (OMB) and senior White House advisors, as well as a meeting with Deputy Secretary of the Interior Mike Connor and his counselor Letty Belin. OMB and Interior are in the process of looking at ways to develop a more programmatic approach to addressing settlements and are reviewing many of the WSWC's policies, including its positions regarding the use of the Reclamation Fund to support water projects that are part of authorized settlements.

Staff from House Native American Caucus Rep. Tom Cole's (R-OK) office also indicated that Cole is working with House leadership to pursue a rule change clarifying that settlements are not earmarks.

Nathan also discussed the status of S. 715. As originally introduced by former Senator Max Baucus (D-MT), the bill would have provided \$85M in funding from the Reclamation Fund for authorized rural water settlements. In reporting the bill, the Senate Energy and Natural Resources Committee made two amendments. The first, by Senator Ron Wyden (D-OR), would provide \$35M for water infrastructure projects that are part of authorized settlements. The second, from Senator John Barrasso (R-WY), would provide \$35M for the repair and rehabilitation of Indian irrigation projects. Senator Baucus' departure to become the U.S. Ambassador to China has raised some questions about the future of the bill. The Council and NARF met with Senator Jon Tester (D-MT) during their visits to DC, and he agreed during the meeting to take up the bill. Senator Wyden has also succeeded Baucus as the Chair of the Senate Finance Committee, which will be helpful in securing the offsets needed to pass S. 715.

In light of the above developments, Nathan indicated that there may be a significant amount of work for the Committee to do in the coming year on settlements.

LEGISLATION AND LITIGATION UPDATE

Nathan updated the Committee on notable legislation and litigation. He reported that Congress passed H.R. 2431 to reauthorize the National Integrated Drought Information System (NIDIS) was passed. It will reauthorize NIDIS through 2018 and authorize \$13.5M per year.

The two competing WRDA bill (S. 601 and H.R. 3080) contain two competing levee safety programs, with the Senate version containing the more "robust" proposal. The WSWC and WGA are on record as stating that any federal levee safety program should not include water supply canals.

There are also a number of droughts bill. In particular, S. 2019 from Senator Brian Schatz (D-HI), the Chair of the Energy and Natural Resources Committee's Subcommittee on Water and Power, would reauthorize the WaterSMART grant program, as well as a grant program under the National Water Availability and Use Assessment. The bill would also expand the program and make grants to Hawaii available. The WSWC wrote the Subcommittee in February to express support for the bill's reauthorization of the two grant programs.

With respect to notable litigation, Nathan reported that the federal Southern District Court for the District of New York (SDNY) recently vacated EPA's water transfers rule, which clarifies that certain transfers are not subject to National Pollutant Discharge Elimination System (NPDES) permits under the CWA. In reaching this decision, the court rejected EPA's reasoning for the rule, namely that moving unaltered water from one "navigable" water to another does not constitute an "addition" of pollutants requiring an NPDES permit, because the conveyance does not cause the transferred water to lose its status as a "navigable" water. The court reasoned that "...many of the types of conveyances contemplated by [the rule] would not be considered a 'navigable water' under any of the...standards used in *Rapanos*.... Therefore, because EPA may expand the scope of 'navigable waters' only within the limits defined in *Rapanos*, and because...[the rule] goes beyond those limits, the Court rejects EPA's interpretation."

SDNY also said some of the CWA's language regarding state rights and state primacy over water allocation "...support an interpretation allowing for meaningful federal regulation of water transfers. For example [Section] 101(b)'s statement of a policy 'to recognize, preserve, and protect the *primary* responsibilities and rights of States'...implicitly recognizes a *secondary* role for the federal government, which...could include regulation of water transfers." The court also said a 1972 House report discussing Section 208 of the CWA "...implies that states should have control over water-resource allocation *only* where they have an EPA approved 402 program and a water-resource allocation program.... Where a state has neither, the [report's] language implies that the federal government should exercise primary responsibility."

OTHER MATTERS:

There being no other matters, the meeting was adjourned.