

MINUTES
of the
175th COUNCIL MEETING
Holiday Inn Conference Center
Helena, MT
July 18, 2014

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MEMBERS AND ALTERNATES PRESENT

ALASKA	David Schade
ARIZONA	Bill Staudenmaier
CALIFORNIA	Jeanine Jones Tom Howard Betty Olson
COLORADO	Trisha Oeth
IDAHO	John Simpson Jerry Rigby
KANSAS	--
MONTANA	John Tubbs Tim Davis George Mathieus
NEBRASKA	Jim Schneider
NEVADA	--
NEW MEXICO	Scott Verhines
NORTH DAKOTA	Jennifer Verleger
OKLAHOMA	J.D. Strong
OREGON	Raquel Rancier
SOUTH DAKOTA	Kent Woodmansey
TEXAS	Toby Baker Carlos Rubinstein Curtis Seaton

UTAH

Walt Baker
Eric Millis
Norm Johnson

WASHINGTON

Stephen Bernath
Buck Smith

WYOMING

Chris Brown
Pat Tyrrell
Kevin Frederick
Philip Stuckert

GUESTS

Jim Peña, USDA Forest Service, Washington, DC
Rod Harper, USDA Forest Service, Washington, DC
Darcy Bushnell, UNM-Upton Center, Albuquerque, NM
Carlee Brown, Western Governors' Association, Denver, CO
Bruno Bowles, Southern Nevada Water Authority, Las Vegas, NV
Tucker Royall, Texas Commission on Environmental Quality, Austin, TX
Doug Kluck, National Oceanic and Atmospheric Administration, Kansas City, MO

WESTFAST

Eric Stevens, Federal Liaison, Salt Lake City, UT
Jean Thomas, USDA Forest Service, Washington, DC
Lee Koss, Bureau of Land Management, Washington, DC
Becky Fulkerson, Bureau of Reclamation, Washington, DC
Patrick Lambert, U.S. Geological Survey/Incoming Federal Liaison, Salt Lake City, UT

STAFF

Tony Willardson
Nathan Bracken
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

Pat Tyrrell, Vice-Chair, welcomed those in attendance. He also thanked the WSWC's Montana delegation for hosting a "very nice" meeting with a "great" social hour.

APPROVAL OF MINUTES

The minutes of the meeting held in Arlington, Virginia on April 2014 were moved for approval by J.D. Strong. The motion was seconded by Eric Millis. The minutes were unanimously approved as presented.

WATER RESOURCES AND WATER QUALITY ISSUES IN MONTANA

A. Water Resource Issues in Montana

John Tubbs discussed a report the Montana Department of Natural Resources and Conservation (DNRC) published that describes the agency's impact to the state's economy. DNRC employs a 565 full time staff as well as up to 800 seasonal firefighters each summer. The state has 22 counties in 27 communities. It pays about \$40-\$50 million in payroll.

John also discussed grant assistance DNRC provided to SmartLam Technologies Group, a Montana company that is the only manufacturer of cross-laminated timber products in the United States. The company's long-term goal is to produce architectural-grade panels for high-rise construction. DNRC also provided a \$863,000 grant to help fund a 5-year feasibility of enhanced oil recovery methods by Montana Tech.

With respect to water projects, John said there are 20 DNRC-owned water storage projects that focus primarily on water supply. He also noted that, "When you build a dam they turn into liabilities as much as assets," pointing out that contracts for repairs and upgrades to DNRC water projects have totaled more than \$70 million since 1995.

Tim Davis gave an overview of activities within DNRC's Water Resources Division. He began by discussing a statewide water plan his division is developing. The plan will be the first in 20 years and will determine how much water is currently used in the state, what future demand will be, how the state will meet that demand, and how the state will address drought. The plan will represent the recommendation of the state's executive branch to the Montana Legislature.

B. Water Quality Issues in Montana

George Mathieus gave an overview of the Montana Department of Environmental Quality's (DEQ) efforts to develop nutrient criteria to control excessive nutrient (nitrogen and phosphorus) pollution. The intent is to assure a level of water quality that will protect beneficial uses. DEQ has strived to base the numeric nutrient criteria on the best available science and data in developing the criteria. For instance, it began collecting data in 2000 and put together a

stakeholder group in 2007 to help develop the criteria. The ultimate goal is to create a Montana-specific process and to “get out ahead” of the national push for nutrient criteria. Notably, the stakeholder group led to legislation in 2009 that gave the state authority to grant a variance against a water quality standard. Legislation in 2011 broadened the options for variances. George also said the Montana Board of Environmental Review will likely adopt the standards shortly, after which time the state will do a series of “roadshows” to discuss the rule with the public. The state has employed a flexible, staged approach and has conducted an extensive amount of public outreach, including the development of a website and phone line.

While the Environmental Protection Agency (EPA) had some initial concerns, George said “it worked out in the end” and that local EPA staff were helpful.

COMMITTEE REPORTS

A. Water Resources Committee:

Scott Verhines reported on the Committee’s recommendations that the WSWC re-adopt three sunseting positons: (1) Position #332 supporting federal research and development of updated hydroclimate guidance for extreme meteorological events; (2) Position #333 urging Congress to use the Reclamation Fund for authorized water projects and programs in the West; and (3) Position No. 334 supporting the Water Resources Research Institutes. Motions to re-adopt the positions were made, seconds were offered, and the motions passed unanimously.

Jeanine Jones also read a proposed resolution of appreciation for Kelly Redmond with the Desert Research Institute, who has inoperable cancer. The resolution was adopted.

B. Executive Committee

Pat Tyrrell reported that the WSWC’s finances are strong and that membership dues are being paid. As a result, the Council is about \$56,000 “in the black.”

Pat also read a resolution of appreciation for former WSWC Chair Phil Ward of Oregon, who recently left state employment in Oregon to work for the U.S. Department of Agriculture’s Farm Service Agency. The resolution thanked Phil for his service to the WSWC. Jerry Rigby moved to approve the resolution, Norm Johnson seconded, and the motion passed unanimously.

C. Water Quality Committee

J.D. Strong reported on his Committee’s recommendation that the WSWC approve a new resolution regarding Clean Water Act (CWA) jurisdiction that the Committee’s CWA Workgroup has developed. The resolution would replace #330.5, which the Committee believes should be allowed to sunset.

Carlos Rubinstein moved to approve the new resolution and to allow Position #330.5 to sunset. Jennifer Verleger seconded and the motion passed unanimously.

Next, J.D. discussed a draft letter that Stephen Bernath and Greg Foley developed that asks EPA and the U.S. Army Corps of Engineers to withdraw an interpretive rule the agencies finalized in March regarding agricultural exemptions under Section 404 of the CWA. The letter notes that, notwithstanding the agencies' intentions, the rule has created an unnecessary amount of confusion regarding the exemptions, which are operating as they should. The letter also invites the agencies to work with the WSWC and its states to determine how best to clarify Section 404 exemptions.

Because the letter was developed at the meetings, J.D. noted that it had not been included in the 30-day notice and therefore required unanimous consent to consider. Stephen moved to consider the letter, Carlos seconded, and the motion passed unanimously.

Carlos and Walt Baker then requested removal of the last sentence of the third paragraph of the letter, which stated:

Withdrawing the rule will also remove uncertainty about the states' authority to address water quality issues associated with agricultural practices, as Congress intended, including but not limited to the states' use of voluntary incentive-based programs to help implement the CWA

Stephen moved to approve the letter with the requested deletion, Carlos seconded, and the motion passed unanimously.

Trisha Oeth also introduced a resolution of appreciation for Steve Gunderson, a former WSWC member and former director of the Colorado Water Quality Control Division. A motion to approve the resolution was made, a second was offered, and the motion passed unanimously.

D. Legal Committee

Norm Johnson reported that his Committee recommended that the WSWC re-adopt sunseting Position #331, which opposes preemption of state water law in federal legislation. A motion to re-adopt was made, a second was offered, and the motion passed unanimously.

Next, Norm said the Committee recommends that the WSWC adopt a related position urging federal agencies to consult with the states and comply with Executive Order 13132 regarding federalism consultation in the development of policies and regulations that impact water resources. The position also urges federal agencies to consult with states prior to publishing proposed rules and policies for public comment.

Because the position was developed after the WSWC issued its 30-day notice for the meetings, Norm said unanimous consent was needed to consider the proposed position. A motion to consider the position was made, a second was offered, and the motion passed unanimously.

Stephen moved to consider the letter, Carlos seconded, and the motion passed unanimously.

John Tubbs requested that the term “vested” be removed from the last “WHEREAS” clause.

A motion to approve the position with John’s requested change was made, a second was offered, and the motion passed unanimously.

Lastly, Norm noted that Jim Peña, the Associate Deputy Chief of the National Forest System, spoke to the Committee about the Forest Service’s proposed groundwater management directive. The WSWC had prepared possible comments to submit on the directive to comply with a coming comment deadline. However, Jim said the Forest Service will extend the public comment deadline. Norm further reported that the Committee recommends that the WSWC wait to submit any comments until after the Forest Service responds to a series of questions that the Western Governors’ Association (WGA) sent to the agency in June about the directive.

Scott Verhines introduced a resolution of appreciation for his former Chief Counsel, DL Sanders, who has retired. A motion to approve the resolution was made, a second was offered, and the motion passed unanimously.

WESTFAST REPORT

WestFAST Chair Becky Fulkerson of the U.S. Bureau of Reclamation announced that Pat Lambert from the U.S. Geological Survey (USGS) will succeed Eric Stevens as the next WestFAST Liaison. Pat currently serves the Director of the Utah Science Center and is already based in Salt Lake City.

Pat introduced himself, noting that he is a hydrologist and has worked for USGS for 29 years. His expertise is in groundwater and surface water relationships, including modeling. For last 18 years he has worked as program manager. In addition to his work at the Utah Science Center, he has also served as the acting director of the Idaho and Nevada Science Centers.

Becky thanked Eric for his service as Liaison. Eric expressed his appreciation for the opportunity to serve as Liaison.

Next, Becky reviewed WestFAST’s efforts to establish various subcommittees focused on specific issues. To date, subcommittees on drought and data have been established and Roger Gorke of EPA is the lead for the drought committee. Becky invited the WSWC to use WestFAST to coordinate state-federal cooperation, including at the local level.

Lastly, Becky noted that Nathan Bracken worked with Jean Thomas and Eric to put together a workshop on Federal Non-Tribal Water Rights Claims that preceded the WSWC’s meetings. She said WestFAST looks forward to future efforts on this topic and appreciated the opportunity to provide speakers for the workshop.

Pat expressed his interest to work with the states' federal partners to improve state-federal collaboration.

NOMINATING SUBCOMMITTEE REPORT

J.D. Strong substituted on behalf of Roland Westergard, Chair of the Nominating Subcommittee.

Officers for next two years will be: Pat Tyrrell of Wyoming as Chair, Jerry Rigby of Idaho as Vice-Chair, and Scott Verhines of New Mexico as Secretary-Treasurer. John Tubbs of Montana will serve as Water Resources Committee Chair, succeeding Brian Dunnigan of Nebraska. Jennifer Verleger of North Dakota will succeed Maria O'Brien of New Mexico as Chair of the Legal Committee. Roland will continue as Chair of the Nominating Subcommittee and J.D. will continue as Water Quality Committee Chair. A motion was made to approve the new officers, a seconded was offered, and the motion passed unanimously.

STATE REPORTS

Texas: Carlos introduced Toby Baker with the Texas Commission on Environmental Quality (TCEQ), who has been named to the WSWC. Carlos then discussed the implementation of financing for water projects in Texas. The state recently approved the use of \$2 billion from its rainy day fund with the goal of turning this money into \$27 billion in financing. The state has done some capacity modeling and has found that in each of the first 10 years it will be able to provide up to \$800 million in financing for water projects.

Next, Carlos reviewed the results of the 5th Circuit Court of Appeals' in *The Aransas Project v. Shaw*. The case involved a lower court decision that found TCEQ's operation of the state's water rights program had caused a take of the endangered whooping crane in violation of the Endangered Species Act. The 5th Circuit reversed on due process grounds, finding that the "string of linkages" that led to the alleged take was unforeseeable. The 5th Circuit also reversed an injunction the lower court imposed on TCEQ regarding the operation of its water rights program, find that the lower court's decision was an abuse of discretion.

Texas is still having problems with Mexico regarding its compliance with treaty obligations on the Rio Grande, which is jeopardizing over 400,000 jobs and creating \$395 million in impacts to the state's economy.

Montana: John Tubbs deferred to the state's report earlier during the meeting. John did note that Merriweather Lewis arrived at the Gates of the Mountains, where the WSWC's field trip took place, on July 19 – the day after the full WSWC meeting.

Oklahoma: J.D. reported that Oklahoma continues to experience drought, although the state did have the wettest June on record. Oklahoma is working to implement its Water for 2060 Act,

which the legislature passed in 2012 to set a goal that the state will use no more water in 2060 than it does today. Oklahoma will host the first of the WGA's drought forum meetings in September. The meeting will focus on drought and its relationship with energy.

Utah: Walt Baker discussed his state's effort to complete the first phase of its nutrients strategy. Nutrients are the largest cause of impairment in the state and the strategy will likely be expensive and affect most communities. The first phase is focused on phosphorus and the next phase will address nitrogen. Walt also noted that the state has experienced some recent pipeline oil spills, including one in which Chevron agreed to pay the full cost of the impacts associated with the spill, or about \$45 million.

Eric Millis gave an update on water resources issues in Utah. Specifically, he said Utah expects two big projects – the Lake Powell Pipeline and the Bear River Pipeline – to be coming on line in the future, but that both projects are a “few years out.” There are a number of other proposed projects that are not necessarily state projects, but the state is looking for ways to provide funding because the local entities are unable to pay for them upfront. Quagga mussels are presenting challenges to the state and Lake Powell is “infested” with them. The state's focus is on containing the mussels. Utah has had a “decent” precipitation year.

New Mexico: Scott Verhines said drought “is the story” in New Mexico. The state is in its fifth year of drought and experienced a “weak” monsoon season and El Niño. Scott also discussed a number of the state's water priorities, including updates to New Mexico's 16 water plans and efforts to defend the state's jurisdiction over water, among other priorities. New Mexico is also moving forward with its adjudications. Additionally, Scott noted that the Arizona Water Settlement Act provides New Mexico with the opportunity to develop 14,000 acre-feet out of the Gila River as part of an exchange with the Central Arizona Project. The state needs to determine whether it will exercise this option by a certain date and the issue is very controversial. Lastly, Scott reported that Greg Ridgley will succeed DL Sanders as his General Counsel.

Alaska: Dave Schade, who replaced Gary Prokosh, stated that this was his first WSWC meeting and thanked everyone for the warm welcome. He said Alaska has a large water rights backlog that it is working to address. Alaska is not in a drought and has too much water in many areas, but there are some areas where the state is limiting permits. Alaska is a land of extremes with five temperate zones. Dave's office is also starting to work closely with Alaska's Division of Environmental Quality.

Arizona: Bill Staudenmaier reported that Mike Lacey has succeeded Sandy Fabritz-Whitney as the Director of the Arizona Department of Water Resources. Sandy is now working for Freeport McMoRan Copper & Gold Inc., a mining company that Bill happens to represent. Arizona will host the WSWC's fall meetings in October.

Nebraska: Jim Schneider reported that Nebraska has been fortunate with the drought, although 2012 was the hottest year on record and 2013 “wasn't too much better.” The state received 10-12 inches of rain in June, which improved drought conditions. Nebraska has created a water sustainability fund that received an initial infusion of \$20 million and will receive \$11 million per year after that. The fund will provide a “real boost” for water planning in Nebraska. Jim also discussed the status of litigation with Kansas regarding the Republican River Compact, noting

that the case is nearing completion and that oral arguments are scheduled for October 14. In related news, Nebraska is completing the second of two large streamflow augmentation projects to help meet compact obligations in dry years. Lastly, Jim said Nebraska has rolled out an initiative named INSIGHT, which stands for “Integrated Network of Scientific Information and Geohydrologic Tools.” The web-based portal includes data on water supplies and uses in Nebraska and shows how these supplies and uses are being balanced or may be balanced in the future. INSIGHT is available at: <http://www.dnr.ne.gov/insight/>.

California: Jeanine Jones said the state’s current drought may be the second driest in 113 years. In major watersheds, precipitation is the third or fourth driest year. The governor has issued emergency proclamations on drought that have included directions for state agencies and called for the public to conserve water by 20%. The state is also conducting conservation-related outreach, including public service announcements from Lady Gaga and Conan O’Brien as well as the purchase of time on a baseball stadium jumbotron. The goal of the outreach is to find affordable ways to market the need for conservation relative to the size of California’s media market. At the same time, California’s State Water Project is providing a 5% project allocation, while the federal Central Valley Project has allocations as low as 0%. This has prompted people who rely on water from these projects to turn to groundwater and water transfers. The legislature is also considering a new water bond that will likely appear on the November ballot. The state is also looking at ways to strengthen groundwater regulation statutes to empower local agencies. Lastly, Jeanine invited everyone to attend the Remote Sensing Applications Workshop that the WSWC and NASA will hold on August 25-27 in Pasadena, California at the National Jet Propulsion Laboratory.

Tom Howard said that most of California is un-adjudicated, which means the State Water Resources Control Board (SWRCB) is the only entity that can determine whether water is available “when it gets dry.” This week, the SWRCB adopted emergency regulations mandating urban conservation and requiring cities to develop contingency plans. The SWRCB is also the state’s drinking water agency, which means it needs to address arsenic. The state is developing water flow standards and EPA has informed the state that it requires Section 303(c) approval. EPA has also indicated that they are taking a similar approach around the country, or at least in Region 9.

Betty Olson said many of the groups that represent the water agencies in California are focused on the drought and the proposed CWA jurisdiction rule. These agencies have a number of valid questions and Betty expects that there will be a fairly “big response” from California. The rule’s treatment of ditches is one specific question.

Idaho: Jerry Rigby reported that Idaho will hold a celebration on August 25-26 to commemorate the signing of the Snake River Adjudication, although there are a few remaining issues to resolve. Justice Scalia from the U.S. Supreme Court will attend and a number of law firms are paying for the event. In other news, the governor is very interested in water storage and extra storage. Idaho only has one year of storage, which creates problems for multi-year droughts. The state is providing some money to study this issue.

John Simpson reported that Idaho is also looking at how to store water underground in addition to surface water storage. Originally, the state's reservoirs were meant to provide a two-three year buffer, but now only provide a one-year buffer.

Oregon: Racquel Rancier said Phil Ward asked her to thank the WSWC for the opportunity to serve. Oregon has about \$10.2 million for water supply projects and is beginning to look at water supply development, which is raising a lot of interest. The state is also developing guidelines for place-based integrated resources planning with the hope that communities will assess water quality and quantity needs. Another agreement was signed in April regarding the Klamath for the off-project area. There are multiple agreements operating in the basin, which will help reduce "the pain" of regulation. Irrigators have also been monitoring flow levels to prevent regulation in some areas. However, Oregon has begun regulating groundwater for the first time in the basin. This is a new experience for the basin. Oregon is also in drought and the Klamath Basin has been in drought for years. In related news, there are fourteen wildfires this week and a large fire season is possible.

North Dakota: Jennifer Verleger said her state has a significant amount of oil and money, recently surpassing California in oil production. The city of Willis is the fastest growing area in the U.S. and has some of the highest rents, some of which are higher than Manhattan. Thirty percent of the State Engineer's appropriations staff is retiring and the office has been able to secure temporary approval to hire five new staff with the hope that permanent approval can be secured. The State Engineer's Office is also receiving pressure to centralize its IT staff with the state's IT department, which other states have advised against. The state is also spending millions on roads and infrastructure. Lastly, Jennifer noted that North Dakota continues to experience problems with the Corps' interpretation of legal requirements regarding the state's access to surplus water at its reservoirs.

Wyoming: Philip Stuckert said Wyoming is in the final phases of finalizing a groundwater control area in Laramie. The legislature also approved biennial budget. This year has been economically better the last few years, so the State Engineer's Office is faring a "bit better." The current water year has also been very good for Wyoming and has filled Reclamation's reservoirs. The State Engineer's Office is also working with the governor's office to develop a drought strategy. In September, the state will finish the Big Horn adjudication and will have a celebration.

Chris Brown reported that Wyoming's litigation with Montana over the Yellowstone Compact is nearing completion and that a decision is expected soon.

Kevin Frederick said Wyoming is in the process of "closing out" small reservoirs related to coal-bed methane development. His agency began requiring small reclamation bonds and has about \$20 million in bond funds. The bonds are intended to address situations in which operators go bankrupt. Kevin then discussed a trespass issue in which a third-party environmental group collected data regarding impaired water listings that it sent to EPA. The question centers on whether the group has legal access to federal and state lands.

Washington: Buck Smith said October, November, and December were dry, as well as the month of January. This resulted in the activation of the state's drought contingency plans.

However, subsequent months helped bring snowpack levels back up to normal, with March and June being particularly wet. This resulted in a mudslide that destroyed the community of Oso. The mud was 70 feet deep in some places and there were about 400 pieces of hazardous waste, namely propane tanks that were removed. Buck then discussed recent developments regarding an in-stream flow rule Washington adopted for the Skagit River Basin, which subjected rights issued after 2001 to minimum in-stream flows. In 2006, the state amended the rule to establish reservations of water for future uses to allow for uninterrupted out-of-stream water uses, including permit-exempt groundwater wells. In October 2013, the Washington Supreme Court overturned the 2006 amendment, ruling that the state cannot establish water reservations through rulemaking where water was previously set aside to support stream flows for fish. Without water reservations, water uses established after the adoption of the 2001 rule, including future uses, can be interrupted when dry spells impact protected stream flows. To address current and future water resource needs, the state is working with local governments, tribes, water utilities, and land owners to develop sustainable water supply solutions in the Skagit basin. With respect to Indian water rights, Buck said the Nooksack and Lummi tribes are continuing their efforts to quantify their rights and are moving to federal court. Lastly, Buck reported that the Yakima adjudication is winding down and may finish this year.

Stephen Bernath said Washington is developing human health criteria for water quality standards. Basically, they are following Oregon and are proposing to adopt 175 grams per day as a fish consumption rate. The compromise is that they are looking at a cancer risk rate of 10 to -5 instead of 10 to -6. Stephen also said Washington is “just starting” to come out of recession. However, the Washington Supreme Court’s recent McCleary decision found that the state legislature is not providing adequate funding for the state’s schools. Consequently, the court ordered the state government to increase funding for public schools, thereby requiring all state agencies to cut funding by up to 15%. In addition, a few conservative Democrats in the Senate created a new majority coalition with Republicans, which is not interested in discussing funding. The House remains under Democratic control.

Colorado: Trisha Oeth said Colorado Water Conservation Board Director James Eklund and State Engineer Dick Wolfe were unable to attend the meeting because they are working on Colorado’s state water plan. Colorado continues to work with Texas and New Mexico to address issues on Rio Grande. Colorado is also working with Kansas and Nebraska to address issues related to the Republican River Compact. Additionally, Colorado’s recently adopted nutrient criteria are “going well.” Finally, Trisha said the state is working on grants to help repair water and wastewater infrastructure damaged as a result of significant flooding last fall.

South Dakota: Kent Woodmansey said South Dakota had a very wet June, especially in the southeast portion of the state. South Dakota also passed a new law outlining how the state will deal with fully appropriated aquifers. With respect to significant water projects, the state has pre-paid its share of the Lewis and Clark Regional Water System, which will also provide water to communities in Minnesota and Iowa. However, the project is dependent on federal appropriations for Reclamation, which have been slow in coming. This has prompted the project to seek state funding. Kent said this is “another case where we have done what we need to do and the federal government isn’t doing what it needs to do.”

FUTURE COUNCIL MEETINGS

The next Council meeting will take place on October 7-10 in Scottsdale, Arizona at the Talking Stick Resort.

OTHER MATTERS

Scott Verhines updated the WSWC on the status of Estevan López's nomination to be the next Commissioner of the Bureau of Reclamation. Estevan served previously as the Director of the New Mexico Interstate Stream Commission. Scott said the Senate Environment and Public Works Committee cleared Estevan's nomination in June. His nomination now awaits action by the full Senate.

There being no further matters, the meeting was adjourned.