

MINUTES
of the
LEGAL COMMITTEE
Holiday Inn - Riverwalk
San Antonio, Texas
October 11, 2012

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MEMBERS AND ALTERNATES PRESENT

| | |
|---------------------|--|
| ALASKA | -- |
| ARIZONA | -- |
| CALIFORNIA | Jeanine Jones Betty Olson |
| COLORADO | Jennifer Gimbel Dick Wolfe |
| IDAHO | John Simpson Jerry Rigby |
| KANSAS | Tracy Streeter Chris Beightel |
| MONTANA | -- |
| NEBRASKA | Brian Dunnigan |
| NEVADA | -- |
| NEW MEXICO | DL Sanders Scott Verhines |
| NORTH DAKOTA | Todd Sando |
| OKLAHOMA | J.D. Strong |
| OREGON | Phil Ward |
| SOUTH DAKOTA | Garland Erbele |
| TEXAS | Carlos Rubinstein Rick Rylander John Elliott |

UTAH

Norm Johnson

WASHINGTON

Maia Bellon (via phone)

WYOMING

Pat Tyrrell
Sue Lowry
Chris Brown (via phone)

GUESTS

Perry Fowler, AGC of Texas, Austin, TX
Veva Deheza, NOAA/NIDIS, Boulder, CO
Jon Schnautz, Office of the Speaker (House), Austin, TX
Tom Iseman, Western Governors' Association (via phone)
Carlee Brown, Western Governors' Association (via phone)
Paul Blanchard, Northwest Pipe Company, Vancouver, WA
Robert Mace, Texas Water Development Board, Austin, TX
Dave Mitamura, Texas Water Development Board, Austin, TX
Melanie Callahan, Texas Water Development Board, Austin, TX
Ed McCarthy, Jackson, Sjoberg, McCarthy & Townsend, Austin, TX
Curtis Seaton, Texas Commission on Environmental Quality, Austin, TX
Herman Settemeyer, Texas Commission on Environmental Quality, Austin, TX

WESTFAST

Jean Thomas, Forest Service
Dwane Young, Former Federal Liaison
Eric Stevens, Incoming Federal Liaison
Becky Fulkerson, Bureau of Reclamation
John D'Antonio, U.S. Corps of Engineers
Lee Koss, Bureau of Land Management (via phone)

STAFF

Tony Willardson
Nathan Bracken
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

Jerry Rigby, WSWC Secretary-Treasurer, called the meeting to order.

APPROVAL OF MINUTES

The minutes for the meeting held in Seattle, Washington in June 2012 were presented for the Committee's approval. The minutes were moved for approval and a second was offered. The minutes were approved unanimously.

INNOVATIVE WATER TRANSFERS PROJECT UPDATE

WSWC Legal Counsel Nathan Bracken updated the Committee on the status of the WGA/WSWC water transfers report, which is focused on intra-state (not interstate) transfers and is being funded in part by a grant from the Walton Family Foundation. The project is intended to carry out a recommendation in the Western Governors' Association's (WGA) "Water Resource Management in the West Resolution" (#11-7), which calls on states to minimize the impacts of water transfers on agricultural economies and communities.

WSWC and WGA staff prepared the report based on independent research, a survey of state transfer mechanisms, and three stakeholder workshops held in Oregon, Colorado, and Nevada that over 100 state administrators and other stakeholders attended. The report includes a "toolbox" of options for states to consider when addressing the adverse impacts associated with transfers, as well as policy options for the governors and state regulators to consider. The purpose of the report is not to tell any states or policy makers what to do, but rather to show them what other states are doing and present them with a range of options to consider when addressing transfers. As such, the report does not take a position on whether transfers are "good" or "bad."

Nathan explained that the report is intended to appeal to high-level staff within the governors' offices, as well as programmatic staff "on the ground." To reach both audiences, the body of the report is written to be as short and accessible as possible. At the same time, a detailed appendix that provides specific information on state transfer laws and programs, examples of transfer mechanisms, and other detailed information accompanies the report.

Staff circulated a first draft of the report to participants from the three workshops in April for review and comment. Staff revised the report based on those comments and circulated the revised version to the WSWC in August for comment. Staff have now consolidated the comments received from the WSWC into a final report for the WSWC to forward to the WGA for its consideration at the Governors' 2012 winter meeting in Phoenix, Arizona.

Tom Iseman with the WGA then asked the Committee for its thoughts on transmitting the report to the WGA. After some discussion, the Committee agreed to transmit the report to the WGA as work product of the WSWC.

WSWC/NREL CONCENTRATED SOLAR POWER REPORT

Nathan reported on the results of a report that discusses the various water issues associated with concentrated solar power (CSP) development in Arizona, California, and Nevada – the three states where most CSP development is occurring. Nathan prepared the report with the National Renewable Energy Laboratory (NREL) at the request of, and pursuant to a grant from, the WGA. WSWC members from the states involved also reviewed and commented on the report. The report is intended to inform the WGA and WSWC’s larger efforts regarding water supply and demand associated with energy transmission in the West.

The report finds that wet-cooled CSP plants have the potential to use significant amounts of water and that many CSP plants have been proposed in some of the driest areas of the country. However, it also found that that state polices and other factors, particularly in California and Nevada, prohibit or severely limit the use of wet-cooling. As a result, most CSP plants that are under construction or have been proposed will rely on dry-cooling or other water-efficient cooling technologies.

The falling costs of natural gas and photovoltaic (PV) solar plants, which use significantly less water, have also lessened the demand for CSP. In fact, the higher cost of CSP has prompted developers to convert a number of proposed CSP plants to PV. Consequently, the report concludes that the future of CSP is “cloudy,” at least for the short-term.

EDWARDS AQUIFER AUTHORITY V. DAY

Ed McCarthy, a partner with the law firm of Jackson, Sjoberg, McCarthy and Townsend, updated the Committee on the Texas Supreme Court’s decision in *Edwards Aquifer Authority v. Day*. He explained that Texas has long operated under the Rule of Capture, which allows the production of as much groundwater as can be used for a beneficial purpose without waste, negligently causing subsidence, or intentionally causing harm to one’s neighbor. However, the *Day* decision found that groundwater is owned in place by landowners. The court also found that landowners have a constitutionally protected and vested property right in the groundwater beneath the surface of his or her property.

This court’s ruling has raised a number of questions, including: (1) when, whether, and/or how may a right to groundwater be taken, damaged, or destroyed within the meaning of the Takings Clause in the Texas Constitution as the result of government regulation; (2) if taken, how will the damages for such a taking be calculated and valued; and (3) in considering takings issues, should courts consider groundwater separate and apart from the land, or must the existence of the land be considered.

FEDERAL NON-TRIBAL WATER RIGHTS SURVEY

Nathan gave an update on the Federal Non-Tribal Water Rights Subcommittee, which had issued a survey to gather more information on what steps, if any, the WSWC can take to

further the effective resolution of federal non-tribal water rights claims. The Subcommittee issued the survey to WSWC members as well as WestFAST representatives for the Forest Service, Bureau of Land Management, Fish and Wildlife Service, Bureau of Reclamation, U.S. Army of Corps of Engineers, and the Department of Defense.

Nathan reported that most states and federal agencies had responded. The consensus from most responses was that the WSWC should address this issue by holding a focused workshop and developing a clearinghouse of information.

The Committee instructed WSWC staff to work with the Subcommittee to develop a proposal on how to develop the workshop and symposium for the Committee to consider at its spring 2013 meeting.

INDIAN WATER RIGHTS UPDATE

Nathan reported that the WSWC sent a joint letter in August with the Native American Rights Fund (NARF) and the National Congress of American Indians, requesting a high-level meeting with the appropriate White House, Executive agency, and Office of Management and Budget personnel to discuss ways to strengthen the federal budget with respect to Indian water rights claims. The letter also asked that this year's White House Tribal Nation's Conference include a listening session on tribal water issues. So far, the Administration has not responded.

The outlook for settlement legislation in the remaining months of the 112th Congress does not look good. The general consensus had been that Senator Jon Kyl (R-AZ) would move a package of settlement bills during the lame duck session after the November election. The package was to be centered around the Navajo-Hopi settlement in Arizona (H.R. 4067/S. 2109), and would possibly include the Fort Belknap (S. 3209) and Blackfeet (H.R. 3301/S. 399) settlements in Montana, and possibly even the Klamath Basin settlement (H.R. 3398/S. 1851) in California and Oregon. However, both the Navajo Nation and the Hopi Tribe rejected the settlement bill, with the Navajo Nation also rejecting the underlying settlement, therefore scuttling the possibility of package of settlement bills.

In addition, Kyl has long supported Indian water rights settlements and has been instrumental in securing passage for previous settlement and related bills. His pending retirement at the end of the 112th Congress raised questions about who within the Senate will "champion" these and other settlements in the 113th Congress and beyond.

Lastly, Nathan mentioned that the WSWC and NARF will hold their biennial Indian water rights symposium in the summer of 2013. The decision about where to hold the symposium will be made after the lame duck session.

OTHER MATTERS

There being no other matters, the meeting was adjourned.