

MINUTES
of the
LEGAL COMMITTEE
Red Lion Hotel on Fifth Avenue
Seattle, WA
June 7, 2012

Table of Contents

Welcome and Introductions	3
Approval of Minutes	3
2012-2013 Committee Workplan	4
Innovative Water Transfers Project Update.....	4
H.R. 1837, “Sacramento-San Joaquin Valley Water Reliability Act”	5
Clean Water Act Guidance/Litigation and Legislation Update	5
Federal Non-Tribal Water Rights Survey	6
Exempt Wells in Washington	6
The Tax Deductibility of Charitable Contributions of Appropriated Water Rights	7
Other Matters	7

**MINUTES
of the
LEGAL COMMITTEE
Red Lion Hotel on Fifth Avenue
Seattle, Washington
June 7, 2012**

MEMBERS AND ALTERNATES PRESENT

ALASKA	--
ARIZONA	--
CALIFORNIA	Jeanine Jones Betty Olson
COLORADO	Jennifer Gimbel Dick Wolfe
IDAHO	John Simpson Jerry Rigby
KANSAS	David Barfield
MONTANA	
NEBRASKA	--
NEVADA	Roland Westergard
NEW MEXICO	DL Sanders Scott Verhines
NORTH DAKOTA	--
OKLAHOMA	J.D. Strong
OREGON	Phil Ward
SOUTH DAKOTA	--
TEXAS	Weir Labatt Herman Settemyer Dave Mitamura Robert Mace

UTAH

Norm Johnson

WASHINGTON

Barbara Munson
Maia Bellon
Stephen Bernath

WYOMING

Pat Tyrrell

GUESTS

Jim Davenport, JHDavenport, LLC, Buena, WA
Carlee Brown, Western Governors' Association, Denver, CO (via phone)
Mary Sue Wilson, Attorney General's Office, Olympia, WA
Tom Hicks, Resource Renewal Institute, San Francisco, CA

WESTFAST

Dwane Young, Federal Liaison
Jean Thomas, Forest Service (WestFAST Chair)
Becky Fulkerson, Bureau of Reclamation
Rich Rankin, Idaho National Lab (DOE)

STAFF

Tony Willardson
Nathan Bracken
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

Maria O'Brien, Chair of the Legal Committee, called the meeting to order.

APPROVAL OF MINUTES

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

FY 2012-2013 WORKPLAN

The Committee's workplan for FY 2012-2013 was submitted for discussion and approval. Maria explained that previous workplans had been tied to the Western Governors' Association's (WGA) 2008 *Next Steps* report. However, since the *Next Steps* report has sunsetted, the workplan is now keyed to current WGA and WSWC policies, which are essentially the same as the *Next Steps* report.

Among other work items, the plan calls for the completion of a joint report by the WSWC and the Western Governors' Association (WGA) on water transfers. That report is scheduled for completion this fall and staff will be circulating a draft for comment among the WSWC later during the summer.

The WGA has also asked WSWC staff to work with staff from the National Renewable Energy Laboratory (NREL) to prepare a staff report on the water supply issues associated with concentrated solar power development in Arizona, California, and Nevada. The effort will be funded through a grant from the Department of Energy and will help inform the WGA's larger Regional Transmission Expansion Planning project. The report is due to the WGA on September 15.

The work plan was moved for approval and seconded. The motion passed unanimously.

INNOVATIVE WATER TRANSFERS PROJECT UPDATE

Nathan Bracken and Carlee Brown of the WGA (via phone) updated the Committee on the status of the WGA/WSWC water transfers report, which is focused on interstate (not intra-state) transfers and is being funded in part by a grant from the Walton Family Foundation. The project is intended to carry out recommendations in the WGA's 2008 *Next Steps* report calling on states to work with interested stakeholders to minimize the impacts of water transfers on agricultural economies and environmental values.

In 2011, the project held three stakeholder workshops in Oregon, Colorado, and Nevada to solicit input on ways to accomplish this goal. The WSWC also surveyed its member states for information on how they regulate transfers and their perspectives on ways to share water between multiple uses. WGA and WSWC staff have prepared a report that builds upon these efforts. Among other things, the report will include a "toolbox" of options for states to consider when addressing the adverse impacts associated with transfers, as well as policy recommendations for the governors. 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,

staff have written the body of the report to be as short and accessible as possible, while also preparing a detailed appendix that provides specific information on state transfer laws and programs, examples of transfer mechanisms, and other detailed information.

Staff circulated a first draft of the report to participants from the three workshops in April for review and comment. Staff is finalizing changes based on those comments and will circulate the revised report to the WSWC for review and comment shortly after the meetings. The final version incorporating the WSWC's comments will be presented to the WSWC for its approval at the fall meetings scheduled for October 10-12 in San Antonio, Texas. The report will then be presented to the WGA at its winter 2012 meetings on November 30 through December 2 in Phoenix, Arizona.

H.R. 1837 "SACRAMENTO-SAN JOAQUIN VALLEY WATER RELIABILITY ACT"

Jeanine Jones provided an update on the San Joaquin Valley Water Reliability Act (H.R. 1837). Rep. Devin Nunes (R), who represents part of California's San Joaquin Valley, introduced the bill last year to repeal various restoration efforts that have taken place in California's Bay Delta over the past 20 years. In particular, the bill would expressly preempt California state water law as applied to water allocation or species protections in the Delta, despite Section 8 of the Reclamation Act, which states that the Act will not interfere with state laws regarding the control, appropriation, use, or distribution of irrigation water. Given concerns of the bill's preemption of state water law, the WSWC reiterated long-standing WSWC policies that oppose federal preemption of state water law during a June 2011 hearing before the House Subcommittee on Water and Power in June 2011. The WSWC also sent a letter to the Subcommittee that set forth specific objections to the bill on August 1. Various other WSWC members sent letters opposing the bill, and Jeanine thanked those members for their efforts.

The House passed the bill in February 2012, but the measure appears to be "dead on arrival" in the Senate because of opposition from California Senators Dianne Feinstein (D) and Barbara Boxer (D). Jeanine also noted that emotions surrounding the bill are high, due in part to the fact that the San Joaquin Valley has a number of agriculturally-dependent communities with significant rates of unemployment that have been impacted by water shortages and curtailments.

CLEAN WATER ACT GUIDANCE/LITIGATION AND LEGISLATION UPDATE

Nathan Bracken updated the Committee on notable legislation, litigation, and other efforts involving the Clean Water Act (CWA). With respect to the CWA guidance that the Environmental Protection Agency (EPA) and the Corps of Engineers have prepared, Nathan explained that the agencies have submitted the guidance to the Office of Management and Budget (OMB) for final review. It is uncertain as to when OMB will complete its review.

However, versions of the final guidance submitted to OMB have been leaked. Those versions are very similar to the earlier draft that was first released for comment in 2011, and continues to use a "watershed" approach to determine jurisdiction under the U.S. Supreme

Court's *Rapanos* decision. The WSWC had commented on this approach and expressed concern that it did not provide a clear limit to CWA jurisdiction. However, the EPA has made a few changes, including new language stating that groundwater is not subject to CWA jurisdiction. The WSWC had expressed concern that the earlier draft's use of "subsurface flows" to determine jurisdiction could be construed as extending CWA jurisdiction to groundwater.

The guidance is controversial and Republicans have introduced a number of bills or riders in the House and Senate to prevent EPA and the Corps from finalizing the document or using it as the basis for similar guidance or decisions regarding the scope of the CWA. These include a stand-alone bill (H.R. 4295/S. 892) and a rider in the House Energy and Water Development and Related Agencies Act of 2013 (H.R. 5325), which includes appropriations for the Corps. Similar riders will likely be included in the House appropriations bill for EPA. As of the date of the meeting, Congress had not passed any of these measures.

Lastly, Nathan updated the Committee on the status of litigation involving EPA's water transfers rule, which clarifies that certain types of transfers do not require a National Pollutant Discharge Elimination System (NPDES) permits under the CWA. EPA promulgated the rule in 2008, and a number of organizations and states subsequently challenged it in multiple courts. Those cases were consolidated in the 11th Circuit. The 11th Circuit subsequently stayed the consolidated rules challenge case pending the outcome of a related case before the 11th Circuit commonly known as the "Lake Okeechobee Case." That case upheld the rule in 2009 and the U.S. Supreme Court denied certiorari in 2010, allowing the consolidated rules challenge to proceed. Petitioners then moved to transfer the case to another jurisdiction, which the 11th Circuit denied. The case is fully briefed and the 11th Circuit has scheduled oral argument for the week of August 27, 2012 in Miami.

FEDERAL NON-TRIBAL WATER RIGHTS SURVEY

WestFAST Chair Jean Thomas of the Forest Service gave an update on the Federal Non-Tribal Water Rights Subcommittee, which has prepared 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. As requested at past meetings, WSWC staff has postponed issuing the survey in light of the WSWC's work on the WGA/WSWC water transfers report. Following some discussion, the Committee instructed staff to issue the survey following meetings after the deadline for the WSWC to submit comments on the latest draft of the transfers report. The survey will be issued to WSWC members as well as WestFAST representatives for the Forest Service, the Bureau of Land Management, the Fish and Wildlife Service, the Bureau of Reclamation, and the U.S. Army of Corps of Engineers.

EXEMPT WELLS IN WASHINGTON

Mary Sue Wilson, a Senior Assistant Attorney General for Washington, gave a presentation on permit-exempt groundwater uses in Washington. Washington's groundwater statute (Section 90.44.050 of the Washington Code) provides five types of permit-exempt uses:

(1) stock watering purposes; (2) lawn or non-commercial gardens not exceeding ½ acre in area; (3) single or group domestic uses not exceeding 5,000 gpd; and (4) industrial purposes not exceeding 5,000 gpd; and (5) cluster pilot development in Whitman County as provided in Section 90.44.052 of the Washington Code. A large number of permit-exempt wells have been installed in recent years and the Attorney General’s Office has issued a number of opinions interpreting the statute.

Mary Sue described the various court decisions that have interpreted the statute over the years, including but not limited to decisions that have found that the “single or group” limits developments relying on permit exempt wells to 5,000 gpd for the entire development (*Ecology v. Campbell & Gwinn*, 43 P.3d 4), and that the plain language of the statute does not limit the amount of groundwater that can be withdrawn without a permit for stock watering purposes (*Five Corners Family Farmers v. Ecology & Easterday*, 268 P.3d 892). Mary Sue also discussed a new groundwater rule in Upper Kittitas County that only allows withdraws from new appropriations in a specified areas if the withdrawals are fully mitigated.

Lastly, Mary Sue noted that permit-exempt wells have received a fair amount of attention in recent years, explaining that the wells have become “the only game in town” in water short areas because they do not require agency action, as well as rural areas that do not have access to public water supplies. Many landowners also believe that they have a right to install a private well and there is a false sense that permit-exempt wells are “exempt from everything,” when they are only exempt from permitting and are still subject to other regulations.

TAX DEDUCTIBILITY OF CHARITABLE CONTRIBUTIONS OF APPROPRIATIVE WATER RIGHTS

Tom Hicks with the Resource Renewal Institute discussed an effort by representatives from his organization and a number of conservation groups and other entities to submit a request to the Internal Revenue Service (IRS), asking it to issue a revenue ruling affirming that charitable contributions of appropriative water rights are tax deductible. He invited those WSWC members who may be interested in the effort to urge the IRS to accept the group’s request.

In response to questions from WSWC members about the possible risks of asking the IRS to weigh in on this issue, Tom explained that there are “always risks.” He described a previous effort to get a private letter ruling on this issue in a specific case in which the IRS’ initial feedback indicated that water rights were not tax deductible and the letter request was withdrawn. However, Tom explained that this led the group to re-frame the issue as a “state rights” issue to improve the chances of a positive result.

OTHER MATTERS

There being no other matters, the meeting was adjourned.