

MINUTES
of the
171st COUNCIL MEETING
of the
WESTERN STATES WATER COUNCIL
Sheraton Denver Downtown
Denver, CO
April 5, 2013

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MEMBERS AND ALTERNATES PRESENT

ALASKA	--
ARIZONA	--
CALIFORNIA	Jeanine Jones Tom Howard
COLORADO	Jennifer Gimbel Dick Wolfe
IDAHO	John Simpson Gary Spackman
KANSAS	David Barfield
MONTANA	--
NEBRASKA	Brian Dunnigan
NEVADA	Roland Westergard
NEW MEXICO	Maria O'Brien Scott Verhines
NORTH DAKOTA	Todd Sando
OKLAHOMA	J.D. Strong
OREGON	Phil Ward
SOUTH DAKOTA	--

TEXAS	Carlos Rubinstein
UTAH	Walt Baker
WASHINGTON	--
WYOMING	Pat Tyrrell Sue Lowry Chris Brown

GUESTS

Greg Lanning, Wyoming State Engineer's Office, Cheyenne, WY
Tim Kilgannon, U.S. Army, Denver, CO
Mark Branson, Ch2M Hill, Boise, ID
Julia Miller, U.S. Army/Marstel-Day, Denver, CO
Bret Bruce, U.S. Geological Survey, Denver, CO
Tom Iseman, Western Governors' Association, Denver, CO
Holly Probst, Western Governors' Association, Denver, CO
Jim Ogsbury, Western Governors' Association, Denver, CO
Robert Mace, Texas Water Development Board, Austin, TX
Dave Mitamura, Texas Water Development Board, Austin, TX
Harris Sherman, U.S. Department of Agriculture, Washington, DC
Michael Weintz, Southern Nevada Water Authority, Las Vegas, NV
Greg Ridgley, New Mexico Office of the State Engineer, Santa Fe, NM
Curtis Seaton, Texas Commission on Environmental Quality, Austin, TX
John Stulp, Office of Colorado Governor John Hickenlooper, Denver, CO
Herman Settemeyer, Texas Commission on Environmental Quality, Austin, TX

WESTFAST

Eric Stevens, Federal Liaison, Salt Lake City, UT
Jean Thomas, USDA Forest Service, Washington, DC
Becky Fulkerson, U.S. Bureau of Reclamation, Washington, DC (via phone)
Lee Koss, Bureau of Land Management, Washington, DC (via phone)

STAFF

Tony Willardson

Nathan Bracken
Cheryl Redding
Sara Larsen

WELCOME AND INTRODUCTIONS

WSWC Chair Phil Ward welcomed those in attendance at the meeting.

J.D. Strong read a resolution of appreciation for Dean Couch, the longtime General Counsel for the Oklahoma Water Resources Board and a WSWC member. J.D. said Dean has retired but is still consulting with the Board on certain issues. J.D. moved to adopt the resolution, Sue Lowry seconded, and the motion passed unanimously.

Pat Tyrrell read a resolution of appreciation for former South Dakota Chief Engineer Garland Erbele, a former WSWC Chair. Garland retired as Chief Engineer to work as a consultant in the private sector. Pat moved to adopt the motion, Todd Sando seconded, and the motion passed unanimously.

Phil read a resolution of appreciation for Washington Assistant Attorney General Barbara Munson, who has retired. Phil moved to adopt the resolution, Walt Baker seconded, and motion passed unanimously.

Tony Willardson read a resolution of appreciation for Jennifer Gimbel, who is leaving her position as Director of the Colorado Water Conservation Board. A motion to adopt the resolution was made, a second was offered, and the motion passed unanimously. Tony then presented Jennifer with a framed copy of the resolution. Jennifer said: "I love this group. I always have."

APPROVAL OF MINUTES

The minutes of the 170th meeting held in San Antonio, Texas were moved for approval. A second as offered and the motion passed unanimously.

THE IMPORTANCE OF WATER TO COLORADO'S FUTURE

John Stulp, Special Policy Advisory for Water to Colorado Governor John Hickenlooper, discussed the importance of water to Colorado's future, noting that the state is entering its third year of drought and is looking at ways to provide water for future demands. The "four legs of the stool" that comprise the state's future demand strategy include: (1) alternative and traditional transfers of agricultural water rights; (2) new supply development; (3) conservation; and (4)

identified projects and processes (IPPs). With respect to transfers, John said Colorado is working to avoid “buy and dry” transfers as much as possible.

John also discussed hydraulic fracturing in Colorado, noting that it constitutes a small part of the state’s water consumption – about 14,000 to 15,000 acre-feet per year out of the state’s total 16 million acre-feet diversion. He also said that it takes about 3.5 acre-feet to fracture a well in Colorado.

THE WESTERN GOVERNORS’ ASSOCIATION(WGA)/WSWC PARTNERSHIP

Recently appointed WGA Executive Director Jim Ogsbury discussed efforts within WGA to strengthen its presence in Washington, D.C., improve coordination between its program areas, and review its affiliate relationships. In particular, Jim said the WGA is aggressively engaging the governors in its operations and activities. To this end, Jim has visited with 12 of the governors in their home states to find out what will make the WGA a more “useful tool.” This has resulted in a renewed focus on implementation and a desire to make things happen at the federal and regional level. The goal is to ensure that the WGA continues to be a place where “big ideas” happen. In addition, Jim said he intends to more evenly split his time between Denver and Washington, D.C.

Jim then explained that the WGA is looking at ways to increase its funding base. Currently, it receives 60% to 70% of its funding from federal and non-governmental organization grants, which may not be the most stable source going forward. Grant funding also raises questions about whether the WGA’s efforts are beholden to the governors or the grant providers.

Jim has also promised the governors a “top to bottom” review of the WGA. In carrying out this effort, he has learned that the WGA was “incredibly siloed” with different program directors doing a good job of developing their programs but doing so in an independent manner. Jim said this created a limited amount of strategic coordination, which he has attempted to address by hiring Holly Probst, formerly the Executive Director of the Western Business Roundtable, as the WGA’s policy coordinator. She will work to ensure that the WGA’s overall policy efforts coincide with the governors’ needs. Moreover, the WGA has hired newspaper veteran Joe Rassenfoss as its Communications Director.

As for the WGA’s affiliate relationships, Jim praised said the WSWC as the “least of his problems” and as being “extremely effective” and a “great resource.” He further said that the WSWC’s belief that it is accountable to the WGA is “music to my ears,” that “there is nothing to fix” with respect to the WGA’s relationship with the WSWC, and that the relationship should only improve over time.

Lastly, Jim announced that WGA Water Program Manager Tom Iseman will leave in April to become a Deputy Assistant Secretary for Water and Science within the Department of

the Interior. He will work under Assistant Secretary for Water and Science Anne Castle. Jim said he was unsure if the WGA would replace Tom with a water-specific policy expert and that the WGA will likely rely even more on the WSWC.

USDA AND WESTERN WATER RESOURCES

U.S. Department of Agriculture (USDA) Under Secretary for Natural Resources and Environment Harris Sherman, a former WSWC member, discussed significant increases in the size and scale of western wildfires, which are affecting watersheds in the region. Harris said wildfire will remain a serious problem for a long time, and that active management efforts focused on cultivating partnerships with relevant stakeholders are the best defense. Harris then said there is an increasing need for water managers to incorporate operation and maintenance into their budgets for forest management.

In response to questions, Harris said sequestration “will not be painless” and noted that there is “not a lot of flexibility” in the sequester. In particular, the Forest Service’s budget is about \$800 million less than 2010, with a 5% cut from the sequester and the possibly of another 2% cut. Furthermore, the Natural Resources Conservation Service is looking at a 7% to 8% cut. Taken together, Harris said government will need to be more efficient and cited \$700 million the USDA saved in last three years due to efficiency measures. These savings have limited the number of furloughs.

WESTFAST REPORT

WestFAST Chair Jean Thomas of the Forest Service reported that her team is working on ways to improve collaboration between its member agencies. In particular, she said WestFAST Liaison Eric Stevens has developed a draft document outlining ways the federal agencies can cooperate with the states. Eric based the document on interviews he conducted with WSWC members. The next step will be to do the same with federal agencies. Lastly, Jean said WestFAST is looking at ways to improve collaboration between its agencies.

Phil asked how the federal agencies view WestFAST and whether they think it is worthwhile. Jean said the team “got off to a great start” but that there is a need to discuss this issue further, particularly about “what’s next” and how WestFAST should function. Funding the liaison position continues to be a challenge.

WATER RESOURCES ISSUES IN COLORADO

Dick Wolfe discussed current water resources issues in Colorado. He began by describing investigations over groundwater levels in the South Platte River Basin and efforts to

comply with the Republican River Compact, including enforcement actions and other efforts to address over-pumping in the Republican River Basin. In the Arkansas River Basin, efforts are underway to look at alternatives to “buy and dry” water right transfers from agriculture.

Next, Dick reported on litigation in the Rio Grande Basin, explaining that Texas has filed a complaint with the U.S. Supreme Court against New Mexico, alleging that New Mexico is not allowing adequate amounts of water to pass through to Texas under the Compact. Notwithstanding the litigation, Colorado, New Mexico, and Texas are trying to move forward in a collaborative way.

Lastly, Dick discussed issues involving the Gunnison Sage Grouse, which has been proposed for listing under the Endangered Species Act (ESA). He said there are large areas in Colorado where there is substantial habitat for the bird and that those areas are well populated. This has raised concerns about the possible impacts of an ESA listing for the bird.

REPORTS OF COMMITTEES

A. Water Resources Committee: Jennifer Gimbel described her Committee’s recommendation that the WSWC revise and re-adopt two current positions. The first urges Congress and the Administration to “...give a high priority to federal programs, such as the [National Oceanic and Atmospheric Administration’s Regional Integrated Sciences and Assessments] that provide the translation function between basic scientific research on climate and weather extremes and the application of that research to real-world water management situations at the regional, state, and local levels.” A motion to re-adopt the position as amended was made, a second was offered, and the motion passed unanimously.

The second position is a letter to Senate Energy and Natural Resources Committee Chair Ron Wyden (D-OR) and Ranking Member Lisa Murkowski (R-AK) supporting implementation of the Rural Water Supply Act of 2006. A motion to adopt the position was made, a second was offered, and the motion passed unanimously.

Next, Jennifer said her Committee recommended that the WSWSC adopt one new external policy position that calls for federal legislative and administrative actions that support “...reasonable hydropower projects and programs that enhance our electric generation capacity and promote economic development, through streamlined permitting processes, while appropriately protecting environmental resources.” The position also calls for energy and water conservation programs to minimize demands on natural resources and ecosystems. Since the position was proposed after the 30-day notice, Jennifer explained that the members would need to give unanimous consent to consider it. A motion to consider the position was made, a second was offered, and the motion passed unanimously. Subsequently, a motion to adopt the position was made, a second was offered, and the motion passed unanimously. Jennifer then explained that the WSWC’s Rules of Organization require that external policy positions adopted under

unanimous consent, such as this one, are sent to the WGA for a 10-day review before they can become final

B. Executive Committee: Pat Tyrrell gave a brief overview of the WSWC’s budget and finances, noting that “we’re about \$50,000 under budget right now.” WSWC staff will also prepare a strategic directions survey to gather more information on the WSWC’s direction, focus, and ways to improve its efforts. The survey will be available online.

C. Water Quality Committee: J.D. Strong reported that his Committee did not have any actions items for the WSWC to consider, but did discuss possible work items for its 2013-2014 workplan, including a potential project on hydraulic fracturing and an focused conference on the interaction between water quantity and water quality.

D. Legal Committee: Maria O’Brien reported that her Committee recommended that the WSWC send a letter to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers, asking the agencies not to issue the draft Clean Water Act (CWA) guidance they submitted to the Office of Management and Budget for final review last year. The letter is based on comments the WSWC sent the agencies in 2011 (WSWC Position #330.5), and expresses a preference for rulemaking to determine the extent of CWA jurisdiction. A motion to send the letter was made, a second was offered, and the motion passed unanimously.

STATE REPORTS

New Mexico: Scott Verhines reported that drought continues to be the “number one” issue in his state. 2012 was the hottest year on record in New Mexico and over 70 water bills were introduced in the state legislature, most of which were introduced over concerns about what the future may look like. The Pecos River was hit the hardest and the Rio Grande was hit “really hard” as well. Currently, four major reservoirs with a total capacity of 1.6 MAF only have 1.3% of storage. This has led some downstream right holders to believe that upstream users are “doing something wrong.” Greg Ridgley reported that the New Mexico Supreme Court has issued a decision in its “Tri-State” case, upholding 2004 regulations that the State Engineer’s Office issued for priority administration of water rights in the state. Greg also discussed the Lower Rio Grande Adjudication, which includes federal claims asserted for the Rio Grande project.

Oklahoma: J.D. reported that drought is “the issue” in his state. While Oklahoma has seen some relief, he said they have a handful of major reservoirs that are low. Oklahoma is also working to implement most of the 8 priority recommendations from its 2012 update to the state water plan. The Oklahoma Legislature is working on a number of issues, including water infrastructure financing. It also passed a “Water 2060 Act” that calls on the state to use no more water that it does now by 2060. It will accomplish this goal through reuse, conservation, desalination of brackish water supplies, and incentive-based approaches. J.D. said he will rely on WSWC members for insights and assistance. Lastly, J.D. reported on the status of *Tarrant v. Herrmann*, which is before the U.S. Supreme Court. The case involves a claim by a Texas water

district that the Red River Compact entitles it to appropriate a portion of Texas' water under the compact from within Oklahoma. Tarrant is also arguing that Oklahoma statutes that prohibit out-of-state diversions violate the Dormant Commerce Clause of the U.S. Constitution. Oklahoma opposes this effort and does not believe that the Compact authorizes cross-boundary diversions. The Court will hear oral arguments on April 23 and will issue a decision later this summer.

Kansas: Dave Barfield said drought is also a big issue for Kansas and that the Governor has been very involved. There are a number of new legislators (55 out of 120). The Governor is focused on reducing regulatory reach and the Secretary of Agriculture is looking at ways to reduce the number of dams and stream obstructions. They are thinking about leaving the current definition but creating an exemption for certain types of dams. Litigation over the Republican River Compact is ongoing and the special master issued a draft report in January for the bulk of the case.

Texas: Carlos Rubinstein reported that Texas is battling with drought and dealing with senior calls in several basins. Carlos then discussed a March federal district court decision (*The Aransas Project v. Shaw*), which held that the Texas Commission on Environmental Quality's (TCEQ) operation of its surface water right permitting system violated the ESA by causing a take of endangered whooping cranes. Among other things, the Court has instructed TCEQ to seek an environmental take permit and prohibited it from issuing new water right permits in the two affected basins. TCEQ argued that this prohibition would prevent them from responding to the drought. The judge modified this to allow them to take action to protect public health and safety. The case clearly has a lot of impact and TCEQ has appealed the decision to the 5th Circuit, which has agreed to review the decision and has issued an emergency stay. Next, Carlos reported on Texas' "tortured history" with Mexico involving the 1944 Treaty. Disputes involving the treaty are escalating "very quickly," and Mexico is already in arrears, which is causing significant concern for a number of municipalities. Carlos also expressed concern about the International Boundary and Water Commission's handling of the issue. Robert Mace said Texas is considering taking \$2 billion from its rainy day fund to leverage against \$6 billion in bonding authority to implement its water plan. The proposal has passed the Texas House and is currently pending before the state Senate. Robert said the "odds look good" that it will pass.

California: Jeanine Jones introduced Tom Howard, the Executive Director of the State Water Resources Control Board and a new WSWC member. Jeanine then said this will be the second dry year in her state. "Massive litigation" is expected in the Bay-Delta. Jeanine also discussed efforts involving flood management, noting that the state passed a flood bond a few years ago and recently completed a report that found that one in five Californians live in a flood plan. The potential cost to address this issue is in the \$100 billion range. Tom said there is a "great deal of interest" in hydraulic fracturing and that the public wants water quality to be assured. Tom further noted that the Truckee River Operations Agreement is "in the hands" of the court, and that there is a lot of interest in addressing non-point source pollution.

Nebraska: Brian Dunnigan said drought has had a “huge impact” in Nebraska, with 100% of the state currently facing drought. Of this percentage, 75% is experiencing exceptional drought. The Nebraska Department of Natural Resources has also issued a call in the Republican River Basin to comply with Republican River Compact. With respect to legislative issues, Brian mentioned two bills. The first (LB 516) would provide a funding source for water projects through a \$1.25 sales tax. The second (LB 517) would create a task force that looks at 250 projects and make priority recommendations. Republican River Compact litigation is ongoing.

Wyoming: Pat said Wyoming is still struggling with its budget. The state’s legislative session is over and Governor Matt Mead used a line item veto to remove language that would have required state agencies to propose possible budget cuts. One water bill that passed will clarify the state’s water export law. Pat further said “water is as scarce as money in Wyoming,” reporting that Wyoming has around 80% normal snowpack and 67% of its normal streamflow.

Nevada: Roland Westergard passed.

Utah: Walt Baker reported that his Governor will hold a number of water-focused meetings around the state that will culminate in a “Water Summit” to take place in October. The Summit will review the state’s strategic plan for water. Walt also said the Utah Legislature has established a committee to address non-point source pollution and nutrients in particular. Among other potential efforts, Walt described an effort to provide amnesty for agricultural producers who make a good faith effort. The Committee will look at possible funding mechanisms, including a “toilet tax” paid by publically owned treatment works.

North Dakota: Todd Sando said North Dakota continues to be different from the rest of the country, with major flooding predicted in two-thirds of the state. March was also the coldest on record. At the same time, the Missouri River drainage remains very dry. The state’s economy continues to be doing well, although it is experiencing issues with growth and infrastructure. Hydraulic fracturing continues to be an economic driver and Todd said the state is fining right holders for over-pumping, noting that they fined some “gas folks” \$600,000 and \$900,000 in two instances and they paid the fine “without blinking an eye.” In addition, farmers are making a lot of money selling their water rights, which has prompted some municipalities to try and sell their rights. The state does not need new taxes and is looking to cut taxes.

Colorado: Jennifer Gimbel passed.

Oregon: Phil Ward reported that the Klamath Basin Adjudication is completed, which gives his office the ability to manage the basin for the first time. The Klamath Tribe has senior rights to lake levels and tributaries while there are a large number of junior users, creating a high potential for conflict and violence if the tribe makes call. Phil also discussed the U.S. Supreme Court’s decision in *NEDC v. Decker*, which upheld the EPA’s interpretation of its regulations that stormwater runoff from logging roads does not require a National Pollutant Discharge Elimination System permit. The case was brought against the Oregon Forester and Phil thanked

the other states for their support in the case.

FUTURE COUNCIL MEETINGS

The WSWC will next meet on June 24-26 in Casper, Wyoming. It will also hold its biennial Symposium on the Settlement of Reserved Indian Water Rights Claims with the Native American Rights Fund on August 13-15 in Santa Fe, New Mexico.

OTHER MATTERS:

There being no other matters, the meeting was adjourned.