

**MINUTES  
of the  
LEGAL COMMITTEE  
Sheraton Denver Downtown  
Denver, CO  
April 4, 2013**

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**MEMBERS AND ALTERNATES PRESENT**

<b>ALASKA</b>	--
<b>ARIZONA</b>	--
<b>CALIFORNIA</b>	Jeanine Jones Tom Howard
<b>COLORADO</b>	Paul Frohardt Steve Gunderson Hal Simpson Jennifer Gimbel
<b>IDAHO</b>	John Simpson Gary Spackman
<b>KANSAS</b>	David Barfield
<b>MONTANA</b>	--
<b>NEBRASKA</b>	--
<b>NEVADA</b>	Roland Westergard
<b>NEW MEXICO</b>	Maria O'Brien
<b>NORTH DAKOTA</b>	--
<b>OKLAHOMA</b>	J.D. Strong
<b>OREGON</b>	Phil Ward
<b>SOUTH DAKOTA</b>	--
<b>TEXAS</b>	--
<b>UTAH</b>	Dennis Strong

**WASHINGTON**

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**WYOMING**

Chris Brown

**GUESTS**

Brent Newman, Denver, CO  
Greg Lanning, Cheyenne, WY  
Mark Branson, Ch2M Hill, Boise, ID  
Cory Hooper, Ch2M Hill, Denver, CO  
Bret Bruce, U.S. Geological Survey, Denver, CO  
Robert Boyd, Bureau of Land Management, Denver, CO  
Roy Smith, Bureau of Land Management, Lakewood, CO  
John Echohawk, Native American Rights Fund, Denver, CO  
Robert Mace, Texas Water Development Board, Austin, TX  
Karen Kwon, Colorado Attorney General's Office, Denver, CO  
Peter Nichols, Berg Hill Greenleaf & Ruscitti, LLP, Boulder, CO  
Michael Weintz, Southern Nevada Water Authority, Las Vegas, NV  
Greg Ridgley, New Mexico Office of the State Engineer, Santa Fe, NM  
Herman Settemeyer, Texas Commission on Environmental Quality, Austin, TX

**WESTFAST**

Eric Stevens, Incoming Federal Liaison  
Jean Thomas, USDA Forest Service, Washington, DC

**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 October 2012 meeting in San Antonio, Texas were presented for approval. Maria asked that the portion of the minutes on page 5 that describes the Western Governors' Association (WGA)/WSWC water transfers report use the term "intrastate" instead of the term "interstate," and asked that "Hope" be changed to "Hopi" on page 6. The minutes were moved for approval as amended by Maria and seconded. The motion passed unanimously.

### **PROPOSED LETTER**

The Committee reviewed a proposed 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. There were no questions or comments about the proposed letter. A motion to recommend that the WSWC send the letter was made, a second was offered, and the motion passed unanimously.

### **2013-2014 DRAFT COMMITTEE WORKPLAN**

The Committee reviewed a draft workplan that would detail its activities from July 1, 2013 to June 30, 2014. Nathan Bracken explained that the Committee will need to adopt the workplan at its summer meetings in Casper, Wyoming, on June 25, 2013, and asked for comments on the following work items:

**A. Energy-Water Analysis:** Nathan explained that the WGA has contracted with the WSWC to help carry out a Regional Transmission Expansion Planning (RTEP) project with the Department of Energy, Sandia National Laboratory, and the Western Electricity Coordinating Council. The purpose of RTEP is to study energy generation and transmission requirements and to develop long-term, interconnection-wide transmission expansion plans.

The WSWC's contract with the WGA requires it to prepare an analysis of legal and administrative issues associated with new permits or transfers of water for energy development in Texas and the states of the Western Interconnection. The analysis may include a handful of case studies on how water supplies are being provided or may be acquired for new energy projects and on how energy development is affecting water supply and management in the West.

Nathan said the WSWC has already carried out much of the work for this analysis for the WGA/WSWC water transfers report and under another WGA-funded project that looked at concentrated solar projects in the West. The WSWC will utilize this prior work in preparing the

analysis. Since this effort is required under a contract with the WGA, it will have priority over other projects in the workplan.

**B. WSWC Water Conservation Report:** Nathan explained that the Legal Committee workplan has long contemplated a report on the issues states face when implementing a conservation program. However, this report has been placed on the “backburner” to complete a number of WGA requested efforts, including the recent WGA/WSWC water transfers report. Now that those efforts are complete or coming to a close, there is a renewed focus on a report. Nathan asked if this report should focus on urban conservation, agricultural conservation, or both. After some discussion, the Committee agreed that the report should focus on urban and agricultural conservation. The Committee also noted that some effort will likely be required to define the term “conservation” as the report is developed.

**C. Federal Non-Tribal Water Rights Project:** The Legal Committee worked with WestFAST in 2012 to issue a questionnaire to the western states and relevant federal agencies that sought information on issues and challenges that involve federal non-tribal water right claims,<sup>1</sup> as well as examples of successful state and federal efforts to resolve these claims. The questionnaire also asked what, if any, steps the WSWC and WestFAST should take to improve the effective resolution of these claims.

The results of the questionnaire indicated broad support for the WSWC to develop a clearinghouse of information to assist with the effective resolution of federal non-tribal water rights claims. A number of questionnaire responses also suggested that the WSWC hold a workshop to develop and gather background information for the clearinghouse.

Based on the results of the questionnaire, the draft workplan proposes that the WSWC and WestFAST hold a one-day, invitation-only workshop in 2014 to bring together 40-50 state and federal officials to identify the specific issues, tools, and information to be included in the clearinghouse. The workshop would also provide insight into the framework, design, and format of the clearinghouse (e.g., a report, regularly updated website or database, etc.). WSWC staff and the WestFAST Liaison would follow up with the individuals who completed the questionnaire to gather insight into possible experts to invite and their potential availability. One possibility would be to hold the workshop in conjunction with the WSWC’s spring 2014 meetings in Washington, D.C. If this time and place proves unworkable, another possibility would be to carry out the workshop via a webinar or series of webinars.

**D. Ad Hoc Group on Indian Reserved Water Rights:** The draft workplan proposes that the WSWC continue to work with the Native American Rights Fund (NARF) and the WGA to support the negotiated settlement of Indian reserved water rights claims. As part of this effort, the WSWC and NARF will hold their biennial Symposium on the Settlement of Indian Reserved

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<sup>1</sup> For the purposes of the questionnaire, the term “federal non-tribal water right claim” encompassed federal reserved right claims, federal state-based claims, and claims relating to the aforementioned federal agencies that do not involve water right claims made by a tribe.

Water Rights Claims on August 13-15 in Santa Fe, New Mexico. The four pueblos of the Aamodt Settlement will serve as hosts.

**E. Clean Water Act (CWA) Jurisdiction:** Nathan explained that the draft workplan proposes that the Committee continue to work with the other WSWC committees to monitor and respond to CWA jurisdiction developments, including the EPA/Corps proposed guidance

### **COLROADO LEGAL ISSUES: FEDERAL APPLICATION OF THE ESA**

Colorado Assistant Attorney General Karen Kwon discussed Colorado's concerns about federal application of the Endangered Species Act (ESA). In particular, she said habitat designation for the southwestern willow flycatcher in the Rio Grande River Basin has raised the possibility of flow requirements at the Colorado-New Mexico state line, as well as the assertion of federal authority over storage limitations at Elephant Butte Reservoir in New Mexico, a key component of the Rio Grande River Compact between Colorado, New Mexico, and Texas. Kwon also said the presence of the endangered humpback chub in the Grand Canyon could influence the operations of Glen Canyon Dam in Arizona.

### **EPA WATER TRANSFERS RULE LITIGATION**

Colorado Attorney Peter Nichols discussed litigation involving EPA's water transfers rule, which exempts certain types of water transfers from National Pollutant Discharge Elimination System (NPDES) permits. A number of eastern states and the State of Washington are challenging the rule in the Southern U.S. District Court of New York. Alaska, the Arizona Department of Water Resources, Colorado, Idaho, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Wyoming have intervened in the case to argue that EPA's rule is the only permissible reading of the Clean Water Act and that requiring NPDES permits for transfers would supercede state law and interfere with interstate compacts, among other things.

### **INDIAN WATER RIGHTS UPDATE**

NARF Executive Director John Echohawk discussed Indian water rights settlements in the 113<sup>th</sup> Congress, noting that legislation (S. 434) to authorize the Blackfeet settlement in Montana has been introduced. John further noted that funding remains a challenge for settlements, noting that the WGA, WSWC, and NARF have long worked as part of the Ad Hoc Group on Indian Water Rights to support the development of a permanent funding mechanism, such as the Reclamation Fund, for authorized settlements. Lastly, he said there is a need for settlement "champions" in Congress given the retirement of long-time settlement supporters, such as retired Senators Jon Kyl (R-AZ) and Jeff Bingaman (D-NM).

### **DIVIDING THE WATERS INITIATIVE**

Maria provided a brief description of the Dividing the Waters Initiative within the National Judicial College, which is working to help train judges and decision makers regarding water disputes. The goal of the effort is to connect judges, special masters, and referees who preside over complex water litigation to the information and training resources they need to resolve these disputes effectively. Maria explained that she sits on the Initiative's Board of Advisors and distributed a handout on the effort, asking Committee members to "spread the word" in their home states.

### **DONATIVE INSTREAM FLOWS:**

Peter Nichols provided a quick update on the efforts of a coalition of organizations that are working on a revenue ruling request to the Internal Revenue Service (IRS) that asks the agency to affirm that charitable contributions of appropriative water rights are tax deductible. The coalition recently submitted the revenue ruling request to the IRS and would appreciate any support the WSWC or its members could provide.

### **OTHER MATTERS:**

Jean Thomas mentioned that the Forest Service is "wrestling" with the issue of water rights for ski areas and will hold open houses in the coming weeks.

John Simpson mentioned a March federal district court decision (*The Aransas Project v. Shaw*) in Texas, which held that the Texas Commission on Environmental Quality's operation of its surface water right permitting system violated the ESA by causing a take of endangered whooping cranes. Carlos Rubinstein offered to provide additional information on the case and Nathan agreed to circulate the case among the Committee's membership.

There being no other matters, the meeting was adjourned.