

**MINUTES
of the
LEGAL COMMITTEE
The Lodge at Deadwood
Deadwood, SD
October 3, 2013**

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MEMBERS AND ALTERNATES PRESENT

ALASKA	--
ARIZONA	Sandra Fabritz-Whitney (via phone)
CALIFORNIA	Tom Howard Jeanine Jones
COLORADO	Trisha Oeth Steve Gunderson James Eklund
IDAHO	Jerry Rigby John Simpson
KANSAS	Tracy Streeter
MONTANA	John Tubbs
NEBRASKA	Brian Dunnigan
NEVADA	Roland Westergard
NEW MEXICO	Greg Ridgley Maria O'Brien Scott Verhines
NORTH DAKOTA	Michelle Klose Jennifer Verleger Todd Sando
OKLAHOMA	J.D. Strong
OREGON	Phil Ward

SOUTH DAKOTA

Kent Woodmansey
Steve Pirner
Jeanne Goodman
Eric Gronlund
Mark Rath

TEXAS

Carlos Rubinstein
Curtis Seaton

UTAH

Dennis Strong
Norm Johnson
Walt Baker

WASHINGTON

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WYOMING

Pat Tyrrell
Sue Lowry

GUESTS

Victor Anderson, Wenck, Cheyenne, WY
Andrea Travnicek, Wenck, Bismarck, ND
Mark Limbaugh, The Ferguson Group, Washington, DC
Dr. Frank Kelly, U.S. Geological Survey, Sioux Falls, SD
Carlee Brown, Western Governors' Association, Denver, CO
Paul Blanchard, Northwest Pipe Company, South Jordan, UT
Scott Leedom, Southern Nevada Water Authority, Las Vegas, NV
Bob Bacon, Missouri Department of Natural Resources, Jefferson City, MO
Dennis Todey, South Dakota Office of Climate and Weather, Brookings, SD
Doug Kluck, National Oceanic and Atmospheric Administration, Kansas City, MO

WESTFAST

Eric Stevens, Federal Liaison

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. In light of a pending snowstorm, Maria explained that the WSWC had agreed to hold condensed meetings and would forego the Full Council meeting. As such, the WSWC would convene in full at certain points during the various committee meetings to address business items requiring the Full Council's attention, including the approval of external policy positions.

APPROVAL OF MINUTES

The minutes of the meeting held in Casper, Wyoming in June 2013 were presented for approval. A motion to approve the minutes was made, and a second was offered. The motion passed unanimously.

SUNSETTING POSITION

The Committee reviewed sunsetting Position #327, which supports legislation requiring the federal government to pay state filing fees in general stream adjudications. The position also urges Congress to appropriate moneys for the payment of unpaid fees that states have incurred as a result of processing federal claims or objections in adjudications.

Jerry Rigby mentioned that Idaho would "love to be reimbursed" and noted that the federal government filed thousands of claims in its Snake River Adjudication with only 7 ultimately being allowed.

Maria moved to re-adopt the position and Norm Johnson seconded the motion. The motion passed unanimously.

Phil Ward then convened the Full Council to consider the Committee's recommendation. A motion to re-adopt the motion was made, a second was offered, and the motion passed unanimously.

Phil then introduced two resolutions of appreciation for Paul Frohardt of Colorado, who retired this summer, as well as Dennis Strong of Utah, who will retire at the end of October. The WSWC approved the resolutions by acclamation. The WSWC also presented Dennis and Steve Pirner with jackets in appreciation of their service to the WSWC. Dennis said: "I've had a storybook career. The best part is my relationship with water professionals."

BUREAU OF RECLAMATION WATER CONTRACTING POLICY CHANGE

Due to the shutdown of the federal government that went into effect on October 1, Deputy Assistant Secretary of the Interior for Water and Science Tom Iseman was unable to present on recent changes to the Bureau of Reclamation's water contracting policies.

In light of Tom's absence, Nathan Bracken gave a brief overview of the policy changes. He said the changes are intended to better align Reclamation's definitions for "irrigation" and "municipal and industrial (M&I) water use" with relevant law, and to improve the parameters for contract price negotiations associated with future transfers of project water. The changes are also aimed at filling "policy gaps" and clarifying existing policies as they relate to the cost of Reclamation-supplied water.

Nathan explained that Reclamation has issued an earlier version of the changes for public comment in 2011. The original proposal would have assumed that deliveries of project water to lots of less than 10 acres for non-commercial irrigation purposes would qualify as M&I use subject to market rates, which are often substantially higher than irrigation rates. The original draft changes also would have applied whenever a contracting action is required. This prompted the WSWC to write a comment letter to Reclamation in March 2012, which expressed concern that "...existing users that need to renew, amend, or supplement their contracts will need to do so under the new policy, which would re-classify many uses recognized under state law as M&I even though the state water rights, project purpose, and place of use remain unchanged." The WSWC's letter also supported Reclamation's then-current definitions of irrigation and M&I, under which project water could be used for "irrigation" if it was an untreated, raw water supply applied to any outdoor use regardless of acreage.

The final policy changes do not include the 10-acre threshold. Instead, they state that "irrigation" is "...the use of contract water to irrigate land primarily for the production of commercial agricultural crops or livestock, and domestic and other uses that are incidental thereto." However, the policies clarify in a footnote that this definition "...does not include uses such as watering golf courses, lawns, and ornamental shrubbery used in residential and commercial landscaping gardens, parks, and other recreational facilities; pasture for animals raised for personal purposes or for nonagricultural commercial purposes; cemeteries; and similar uses (except to the extent that some of these uses may be incidental to uses that are primarily agricultural). It also does not include commercial agricultural uses that do not require irrigation, such as fish farms and livestock production in confined feeding and breeding programs."

John Tubbs, who recently returned to state employment in Montana after serving in Tom's position and was familiar with the changes, further added that uses that do not qualify as commercial agriculture will be considered to be M&I.

Phil also noted that ornamental shrubbery is Oregon's "#1 Crop" and wondered how the changes will impact his state.

After some discussion, the Committee agreed to attempt to schedule a webinar with Tom after the meetings to discuss the final policy.

SOUTH DAKOTA UPDATE: LONGVIEW FARM DECISION

Steve Pirner described litigation involving his state's domestic wells statute, which allows for the use of up to 18 gpm for stock watering and other uses without a water right permit. Longview Farm, a 4,900-head confined hog farm, sought to provide water for its operations under the statute, prompting the Yankton Sioux tribe to challenge the use as a commercial operation requiring a water right permit. A state circuit court agreed, prompting Longview Farm to apply for and obtain a water right permit.

Steve further noted that the decision prompted the South Dakota Legislature to amend the statute to clarify that water used for livestock, even a confined feeding operation, is to be considered a domestic use. The legislation passed 62-1 in the House and 39-0 in the Senate.

MISSOURI RIVER ISSUES AND NATURAL FLOWS

Michelle Klose reported the results of a discussion that took place between the WSWC and representatives from the U.S. Army Corps of Engineers on October 2 to discuss the Corps rulemaking intended to clarify definitions in its water supply policies and to specify the policies and methodology it will use to determine prices for water supply contracts. Dave Ponganis, Regional Director of Programs for the Corps' Northwest Division participated in the discussion, along with Jim Fredericks and Christina Austin-Smith with the Corps' Northwestern Division, as well as Tiffany Vanosdall with the Corps' Omaha District. Of note, carry over funds from the prior fiscal year allowed the Corps officials to participate in the discussion notwithstanding the federal shutdown.

Ponganis said water supply was not an initial authorized purpose of many Corps reservoirs and that his agency is pursuing the rulemaking to understand how water supply fits into its core operations. He also said the Corps is concerned about access across Corps lands to reach water in its reservoirs. In response, WSWC members expressed concern that the rulemaking has not included adequate state consultation, and that the Corps' decision to restrict access to natural flows in the Missouri River infringes upon the states' primary and exclusive authority over water allocation and administration.

Michelle noted that the Corps is re-interpreting the Flood Control Act of 1944 and the Water Supply Act of 1958 as authorizing it to control access to 100% of the water located behind its dams in the Missouri River Mainstem regardless of the natural flows that would exist without the dams and which belong to the states. Although Ponganis stated during the meeting that the Corps is in the early stages of developing a rule, Michelle noted that she received reports following the meeting that indicated that the Corps has submitted a draft rule to the Office of Management and Budget for interagency review.

Michelle further said that the Corps is pursuing the rulemaking, in part, to address issues that have been raised during the conflict between Alabama, Georgia, and Florida over Lake Lanier. This is problematic because Lake Lanier involves a different set of circumstances, including the location of the reservoir in a riparian state and the fact that its water supply would not exist without the construction of the day, which is not the case in the Missouri River. John

Tubbs noted that the dispute over Lake Lanier is “heating up” as evidenced by a recent lawsuit that Florida filed against Georgia in the U.S. Supreme Court. Of note, the litigation marks the first time one of the three states involved in the dispute has sued one of the other states. The prior litigation involving Lake Lanier targeted the Corps.

Michelle further stated that North Dakota is looking for continued support from the WSWC and other states on this issue. After some discussion on potential next steps, the Committee agreed to form a subcommittee to look at possible WSWC action, including efforts to pursue possible legislative action. Michelle, Todd Sando, J.D. Strong, and Jennifer Verleger volunteered to participate in the subcommittee.

COLORADO RIVER ISSUES ROUNDTABLE DISCUSSION

The Committee held a roundtable discussion of developments in the Colorado River Basin. Jeanine Jones of California began with a summary of the 2007 Interim Guidelines, which provide for the coordinated operation of Lake Mead and Lake Powell, as well as shortage sharing in the Lower Basin.

Arizona: Sandy Fabritz-Whitney reported on developments in her state via phone, noting that there has been no reduction to water users in the lower basin as of yet. This is due in part to the structure of the 2007 Guidelines, which are more “proactive than reactive.” Sandy then discussed the recently completed Colorado Basin Study, which projected a possible 3.2 MAF imbalance between available water supplies and demand by 2060 in the basin. Arizona is working to prepare for potential imbalances through a number of efforts, including but not limited to “fully maximizing” its reclaimed water and pursuing a “very aggressive and proactive” water conservation program. The Arizona Water Banking Authority has also stored 3.9 MAF in its aquifers, including 600,000 AF of storage for the Southern Nevada Water Authority.

Utah: Dennis Strong noted that the basin is experiencing its 14th year of drought and that the trend for Lake Powell has “sort of stabilized.” However, Lake Mead continues to go down because outflows exceed inflows, which raises the possibility of increased evapotranspiration.

New Mexico: Scott Verhines and Greg Ridgley said their state has a “strong interest” in making the guidelines work. New Mexico also has the same interests as the other Upper Basin states with respect to Minute 319, which it supports.

Wyoming: Pat Tyrrell said the basin states need to do “a lot of work” to address the declining levels of Lake Powell and Lake Mead. This will take “combined partnership” with the states and the federal government and will likely be “hard and painful.” In particular, Pat noted that the Lower Basin states will need to address storage, while the Upper Basin states will need to continue discussions on managing supply. Drought could also lead to a “much worse” situation if “we don’t get more water in the system.” Notwithstanding these challenges, Pat said the 2007 Interim Guidelines put the states in a “better position” and show that they can work together to address difficult challenges.

Colorado: James Eklund of Colorado gave a brief update, stating that it will take "...a process that leads to a package solution. Both basins will need to do things. You can hang together, or hang separately. Working together is important."

California: Jeanine said the states' ability to continue working together cooperatively "is really important."

OTHER MATTERS:

Maria adjourned the meeting early following the conclusion of the roundtable in light of the pending snowstorm. As a result, the Committee did not address the remaining items on the agenda. Maria did note, however, that the briefing books contained written summaries for the Litigation and Legislation Update (Tab N) and the recently concluded Symposium on the Settlement of Indian Reserved Water Rights Claims.

There being no other matters, the meeting was adjourned.