

**MINUTES
of the
LEGAL COMMITTEE
Hilton Garden Inn
Casper, WY
June 25, 2013**

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Those in attendance at the Legal Committee meeting were as follows:

MEMBERS AND ALTERNATES PRESENT

ALASKA	--
ARIZONA	--
CALIFORNIA	Jeanine Jones Betty Olson
COLORADO	John Stulp Dick Wolfe
IDAHO	Jerry Rigby John Simpson
KANSAS	--
MONTANA	--
NEBRASKA	--
NEVADA	--
NEW MEXICO	Scott Verhines
NORTH DAKOTA	Michelle Klose (via phone)
OKLAHOMA	J.D. Strong
OREGON	Phil Ward
SOUTH DAKOTA	Kent Woodmansey
TEXAS	Carlos Rubinstein
UTAH	Dennis Strong Norm Johnson

WASHINGTON

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WYOMING

Pat Tyrrell
Chris Brown
Sue Lowry

GUESTS

Ramsey Kropf, Patrick, Miller, Kropf & Noto, Aspen, CO
Lisa Vjota, Government Accountability Office, Washington, DC (via phone)
Scott Leedom, Southern Nevada Water Authority, Las Vegas, NV
Greg Ridgley, Office of the New Mexico State Engineer, Santa Fe, NM
Dave Mitamura, Texas Water Development Board, Austin, TX
Curtis Seaton, Texas Commission on Environmental Quality, Austin, TX
Herman Settemeyer, Texas Commission on Environmental Quality, Austin, TX
Jeff Fassett, HDR Engineering, Cheyenne, WY
Anne MacKinnon, A. MacKinnon Consulting, Casper, WY
John Shields, Wyoming State Engineer's Office, Cheyenne, WY
Steve Wolff, Wyoming State Engineer's Office, Cheyenne, WY
Coleman Smith, Bureau of Reclamation, Mills, WY

WestFAST MEMBERS

Becky Fulkerson, U.S. Bureau of Reclamation, Washington, DC
Jean Thomas, USDA Forest Service, Washington, DC
Eric Stevens, Federal Liaison

STAFF

Tony Willardson
Nathan Bracken
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

Norm Johnson, who conducted the meeting on behalf of Legal Committee Chair Maria O'Brien, called the meeting to order.

APPROVAL OF MINUTES

The minutes of the meeting held in Denver, Colorado in April 2013 were presented. Norm moved to approve the minutes, Jerry Rigby seconded, and the motion passed unanimously.

2013-2014 DRAFT COMMITTEE WORK PLAN

Nathan Bracken discussed the Committee's proposed work plan for 2013-2014. He said the work plan is very similar to the draft version presented to the Committee during the Council's June meeting in Denver, Colorado. Among other efforts, it contemplates an analysis of legal mechanisms involving water permits for energy as part of a grant from the Western Governors' Association, a report that will look at the issues associated with implementing state conservation programs, and continued efforts in support of Indian water rights settlements.

Sue Lowry moved to approve the work plan as presented, J.D. Strong seconded, and the motion passed unanimously.

WYOMING UPDATE: WATER RIGHTS FOR HYDRAULIC FRACTURING

Pat Tyrrell described the process for acquiring water rights for hydraulic fracturing operations in Wyoming, as well as a recent decision he made regarding water rights for energy development in Laramie County. The decision contained the state's most fully recorded public interest determination.

Pat also said hydraulic fracturing in Wyoming uses an estimated four to ten acre-feet of water per well, and that estimated statewide water use for hydraulic fracturing was 2,408 to 6,020 acre-feet in 2012, and 5,356 to 13,390 acre-feet in 2011.

THE ARANSAS PROJECT V. SHAW

Carlos Rubinstein gave a presentation on *The Aransas Project v. Shaw*, in which a federal district court found that the Texas Commission on Environmental Quality's (TCEQ) operation of the state's surface water permit system caused an unlawful "take" of 23 endangered whooping cranes in violation of the Endangered Species Act. In reaching this decision, Carlos said the court reasoned TCEQ had the authority to modify or amend existing prior appropriation water rights and to deny issuance of new permits to protect the cranes. The decision enjoined TCEQ from approving new water permits, but the Fifth Circuit Court of Appeals has agreed to review the decision and granted an emergency stay of the decision. It also ordered expedited briefing.

DIVIDING THE WATERS INITIATIVE

Ramsey Kropf, a partner with Patrick, Miller, Kropf, and Noto, described the Dividing the Waters Initiative, which is affiliated with the National Judicial College and 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 resources they need to resolve these disputes effectively. Among other efforts, she noted that the initiative has produced a bench book to assist judges as they evaluate certain concepts, such as groundwater models.

Ramsey invited the Committee's members to visit with administrative offices and the governors' offices in their states to make them aware of the initiative. She also said the names of judges who could benefit from the initiative can be submitted to the initiative anonymously.

LITIGATION AND LEGISLATION UPDATE

Nathan updated the Committee on notable litigation and legislation. He reported that Senator John Barrasso (R-WY) has introduced legislation (S. 1006) that would prohibit the Environmental Protection Agency and the U.S. Army Corps of Engineers from finalizing their draft Clean Water Act (CWA) guidance and from using the guidance as a basis for rulemaking.

He also noted that Title X of the Water Resources Development Act bill (S. 601) that the Senate passed last month contains a Water Infrastructure Finance and Innovation Authority (WIFIA) provision. The provision is similar to other WIFIA proposals that have been introduced this Congress in that it would authorize a mechanism to provide loans and loan guarantees for flood control, water supply, and waste water projects.

Next, Nathan reported that Senator Max Baucus (D-MT) has re-introduced legislation (S. 715) that would authorize \$80M for each of fiscal years 2014 through 2035 to support the construction of authorized rural water projects. The funding would come from receipts accruing to the Reclamation Fund. Baucus introduced similar legislation last Congress (S. 3385), and Nathan testified before the Senate Energy and Natural Resources Committee in support of that bill on behalf of the Council.

Senator Kay Hagan (D-NC) and Rep. Bob Gibbs (R-OH) have also re-introduced legislation (S. 802/H.R. 935) that would amend the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the CWA to clarify that FIFRA-compliant pesticide applications do not require National Pollutant Discharge Elimination System permits.

With respect to notable litigation, Nathan described the 5th Circuit Court of Appeals decision in *Iowa League of Cities v. EPA*, which held that two letters EPA sent to Senator Chuck Grassley (R-IA) regarding mixing zones and blending qualified as regulations that should have been developed pursuant to the Administrative Procedures Act.

COUNCIL-NARF SYMPOSIUM ON THE SETTLEMENT OF INDIAN RESERVED WATER RIGHTS CLAIMS

Nathan reported that the Council and the Native American Rights Fund will hold their next biennial Symposium on the Settlement of Indian Reserved Water Rights Claims on August

13-15, at the Buffalo Thunder Resort near Santa Fe, New Mexico. The four pueblos involved in the Aamodt settlement will serve as hosts. Assistant Secretary of the Interior for Indian Affairs Kevin Washburn and Assistant Secretary of the Interior for Water and Science Anne Castle are scheduled to speak, along with a number of other state, federal, tribal, and other experts. New Mexico MCLE has also approved the Symposium for 13.7 hours of CLE credit.

OTHER MATTERS

There being no other matters, the meeting was adjourned.