Resource Law Notes Newsletter, no. 5, May 1985

University of Colorado Boulder. Natural Resources Law Center

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Resource Law Notes

The Newsletter of the Natural Resources Law Center
University of Colorado, Boulder • School of Law

Number 5, May 1985

Two Conferences Scheduled for June

As part of its sixth annual summer program, the Natural Resources Law Center is presenting two conferences. The first, June 3-5, 1985, considers **Western Water Law in Transition.** The prior appropriation doctrine has governed the allocation and use of water in the western United States since the 1850s. The shifting nature of water demand is bringing about changes in the traditional legal system. This conference will consider the fundamental principles of the prior appropriation doctrine together with the important new developments in the law now underway throughout the West.

PROGRAM

June 3, 1985

9:00 a.m. Charles F. Wilkinson & James N. Corbridge, Jr., *The Prior Appropriation System in Western Water Law: The Law Viewed Through the Example of the Rio Grande Basin*
12:10 p.m. Judge Jean Breitenstein, *Western Water Law in Historical Perspective*
1:30 p.m. Lawrence J. Wolfe, *Administering Water Rights: the Permit System*
3:20 p.m. Ray Petros, *Administering Water Rights: the Colorado System*
5:45 p.m. Cocktails and banquet

June 4, 1985

8:30 a.m. J. David Aiken, *Developments in Groundwater Law*
10:00 a.m. A. Dan Tarlock, *Interstate Transfers of Water: Opportunities and Obstacles*
11:00 a.m. David Robbins, *Representing the Water Client*
1:45 p.m. Julia Epley, *Water Quality Considerations*
2:30 p.m. Steven J. Shupe, *Legal Implications of Instream Flows and Other Nonconsumptive Uses*
3:30 p.m. Harrison Dunning, *The Public Trust Doctrine: Conflict with Traditional Western Water Law?*
4:15 p.m. John Krautkraemer, *Inefficiency, Waste, and Loss: Water Supplies of the Future?*
5:00 p.m. Cocktails

June 5, 1985

8:45 a.m. Charles T. DuMars, *Federal/State Relations in Theory and Practice*
10:15 a.m. Michael D. White, *Unresolved Issues in Federal Reserved Rights*
11:15 a.m. Lawrence J. MacDonnell, *The Endangered Species Act and Western Water Development*
12:00 noon David Getches, *The Future of Western Water Law*
1:30 p.m. Richard Collins, *Putting Undeveloped Indian Water Rights to Use*
3:00 p.m. Henry Caulfield, *Financing Water Projects: Where Do We Go From Here?*
Panel respondents: J. William McDonald, Dunn Krahl, Robert Kerr, Chris Paulson

The second conference, June 10-11, 1985, considers **Public Lands Mineral Leasing: Issues and Directions.** Federal leasing programs, especially for oil and gas and coal, have been undergoing important changes in recent years. This conference will provide an overview and an update for those involved in public lands mineral development. Significant new issues also will be addressed.

PROGRAM

June 10, 1985

9:00 a.m. Larry McBride, *Current Developments in Public Lands Administration*
9:45 a.m. John R. Little, Jr., *Lands Available for Mineral Leasing*
11:00 a.m. Terry N. Fiske, *Pitfalls in Federal Oil and Gas Leasing*
12:00 noon Robert F. Burford, *Federal Lands Leasing Policy in the Second Reagan Administration*
1:30 p.m. Robert E. Boldt, *Royalty Management I: Current Status*
2:00 p.m. R. Carol Harvey, *Royalty Management II: Industry Concerns*
3:00 p.m. Karin Sheldon, *Environmental Considerations in Public Lands Mineral Leasing and Development I*
3:30 p.m. Jerry Muys, *Environmental Considerations in Public Lands Mineral Leasing and Development II*
4:00 p.m. Joe Young, William L. Shafer, Connie Brooks, Abe Phillips, *The Noncompetitive Oil and Gas Leasing System: What Should Be Done?* (Panel Discussion)

June 11, 1985

9:00 a.m. B. Reid Haltom, *Operating Under New Laws Pertaining to Mineral Development on Indian Lands*
9:45 a.m. John Latz, *The Federal Coal Leasing Program: Practice, Procedures, Current Status*

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Two Conferences, continued

10:45 a.m. Gail Wurtzler, *Special Issues I: Diligence Requirements*
11:30 a.m. Governor Ed Herschler, *State Interests in Federal Lands Leasing*
1:00 p.m. Marilyn Kite, *Special Issues II: Lease Adjustments and Royalty Requirements*
1:45 p.m. Sandra Blackstone, *Getting the Coal Leasing Program Back on Track: The Linnowes Commission and Beyond*
2:45 p.m. Thomas Cope, *Leases for Other Minerals: Selected Problems*
3:30 p.m. Lawrence J. MacDonnell, *State and Local Regulation Affecting Public Lands Mineral Lease Activities: What Are the Limits?*

The conferences will be held at the University of Colorado School of Law in Boulder. A separate field trip is scheduled following the water law conference on Thursday, June 6, 1985 and will involve visits to see major transmountain diversion works and agricultural irrigation practices. For further information, please contact the Center at (303) 492-1286.

Resources Center Hosts Forest Management Forum

A one-day program on "Management of National Forests in the Rocky Mountains" was held at the University of Colorado School of Law on March 28, 1985. Organized and presented by the Natural Resources Law Center, the program explored a number of topics of widespread interest including below cost timber sales, recreation uses, forest access and rights of way, and reserved water rights claims for watershed management.

The historical background and present legal context were introduced by Professor Charles Wilkinson, visiting professor at the University of Colorado School of Law. Other speakers included Dave Anderson and Jim Beavers from the Forest Service, Professor Al Dyer from Colorado State University, Dewitt John from the Governor's Policy Office in Colorado, Charles Lennahan from the Office of General Counsel and Steve Shupe, a Denver attorney. Additional panel participants included Jim Torrence, Regional Forester for the Rocky Mountain Region of the Forest Service, Jim Riley of Intermountain Forestry Services and Michael Scott of the Wilderness Society. The luncheon speaker was Craig Rupp, former Regional Forester for the Rocky Mountain Region.

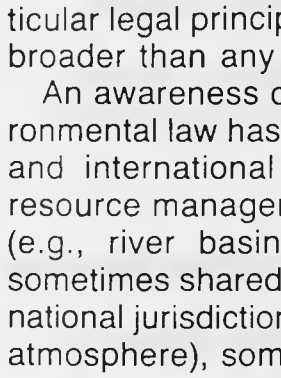
Professor Charles F. Wilkinson (left) and participants enjoy buffet lunch at National Forest Program.

The program attracted over 100 registrants. Most came from Colorado but Idaho, Wyoming, Utah and New Mexico also were represented. A diversity of interests also was represented including private attorneys, federal, state and local government, business and industry, environmental organizations, academics and students, and others.

Outlines of the presentations are available from the Center for $15. Cassette tapes of the full day may be purchased from the Center for $40. Individual segments are also available.

Law, Development . . . And the Sri Lankan Elephant

by
Barbara Lausche, NRLC Research Fellow



Barbara Lausche

I recently returned from a short law consultancy in Sri Lanka involving an interdisciplinary project to advise on national conservation policy. Sri Lanka, like many developing countries, is experiencing increased population pressures and competition for limited resources, particularly land and water. Similarly, it is receiving substantial multilateral assistance for capital-intensive development projects, most notably for irrigated agriculture.

My recent work in Sri Lanka provides an opportunity to discuss here the kinds of development circumstances that are increasing interest in and inquiry about environmental law in many developing countries. Before I turn specifically to Sri Lanka and its elephants, a key trigger that raised environmental awareness generally, some explanation is needed about my field, international environmental law.

What Is International Environmental Law?

Today, more than 20,000 laws and regulations and over 300 treaties exist worldwide related to living resources management and environmental protection. The volume of court cases and jurisprudence has increased to similarly impressive figures. This world body of law is composed of international, regional, and national components and may be casually referred to as "international environmental law." The dynamic relationship between all operating levels is a key characteristic of international environmental law. International criteria provide impetus and in some cases the requirement for improved or strengthened national measures. Conversely, national legislation ultimately may influence international or regional standards. This feature causes particular legal principles and guidelines to acquire a character broader than any individual level alone would provide.

An awareness of this global-national continuum for environmental law has increased as science reveals the regional and international character of many environmental and resource management problems and solutions. Resources (e.g., river basins, watersheds, migratory species) are sometimes shared among States, others are located beyond national jurisdiction (e.g., the "global commons" oceans and atmosphere), some are affected by activities of more than

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Returning Land Management Under FLPMA to the Principles of the Public Land Law Review Commission

by
Clyde O. Martz


Clyde Martz

Clyde O. Martz is a partner in the Denver firm of Davis, Graham and Stubbs. He is a graduate of Harvard Law School and was on the faculty at the University of Colorado School of Law for 14 years. He has served as Assistant Attorney General of the United States and Solicitor of the Department of the Interior. Mr. Martz is Chairman of the Advisory Committee for the Natural Resources Law Center. The following article is based on a presentation given at the Federal Land Policy and Management Act Conference at the Law School in June 1984.

There have been many references during the conference to the Public Land Law Review Commission report. It has been suggested that this report might be a starting point for multiple-use public land management, land use planning, and the like. I would prefer to think of it as a milestone in the evolution of public land policy from its origins a century and a half ago, when the policy of the country was to encourage western migration, to encourage the development of resources, to encourage people to settle and develop the public lands.

In consequence of that policy, we had some 2,000 laws passed, mostly single-purpose statutes, designed to provide for the solution of a particular problem addressed by the Congress in connection with public land management.

In the 1930's, 1940's, and 1950's, the country, the administration, and the Congress became aware of the fact that we could not go on with land dispositions in the future as we had in the past. The Taylor Grazing Act in 1934 in effect provided a reservation of all the lands administered by Bureau of Land Management—not by the Bureau of Land Management at the time, to be sure, its predecessor—for the purpose of classification and giving some thought as to what was the best use of the residual public lands. That was followed by multiple-use statutes such as the 1955 Surface Resources Act and the Multiple-Use Sustained-Yield Act for the Forest Service in 1960. But it was the consideration of the Wilderness Act in the early 1960's that led the Congress and the administration, particularly the committees of the Congress, to raise the question: How much land do we have to commit to single-purpose use? How much land should be transferred to private ownership in the public interest? How much land should be committed to multiple use development?

The Public Land Law Review Commission

Congressman Aspinall and others in the House Interior Committee planted the seed for a study of public land policy, one unlike the Hoover Commission study years before and the Materials Policy Commission study under Truman which had focused on specific problems and specific issues. Here they envisaged taking a comprehensive look at the entire public land trust for the people as a whole. They recognized early on that, out of the land structure of the United States that had formerly been in public ownership, some 58% had been transferred by patents to private ownership. Of the land that was left, some 300,000,000 acres, or about 40% of the lands, had been placed in Park, Forest, and Fish & Wildlife reservations. As the Public Land Law Review Commission proceeded with its study, it found that of the remaining lands 15% were covered by mining claims or oil and gas leases. And out of that, twelve one-hundredths of 1% of the land had been disturbed by mineral development—twelve one-hundredths of 1% had been disturbed by actual mineral development; and six one-thousandths of 1% had been disturbed to a point that reclamation was not a reasonable alternative. With the oil and gas leasing, it was discovered that just short of 1% of the lands were disturbed by any oil and gas exploration or development.

The Public Land Law Review Commission was established and I had the privilege of serving for a period of time on the advisory council. While there has been some criticism of the Public Land Law Review Commission, it is my perception that it was the most carefully programmed body to secure a nonpartisan, thorough analysis of public land policy you could create. The Commission itself was made up of six members of the House of Representatives divided three from the majority party, three from the minority party; six members from the Senate, again split three from the majority party, three from the minority party; six more appointed by the President among people who had no government ties but were experienced and proficient in public land analysis. That group selected Wayne Aspinall as chairman. He was the 19th member of the Commission. Then by direction, that Commission appointed an Advisory Council of representatives from the various agencies of the United States that had an interest in public land management, together with 25 advisors from throughout the United States who were carefully selected by the Commission because of the qualifications they might have by experience, professional assignment, or interest in developing a public land policy. In addition, an advisory body was put together comprised of representatives selected by each of the 50 governors to convey to the Commission the positions of the respective states with respect to federalism and the impact of proposed public land policy upon the particular states.

The PLLRC Report

The Commission held 33 days of hearings in ten different locations. They met 102 days, a substantial number with the Advisory Council and the Governors' Representatives who had input for each aspect of the policy development. As a consequence of that, in 1970 after five years of study, the Commission came out with the report, *One-Third of the Nation's Land.* The mission of the Commission was to develop a policy that would provide maximum benefits to the general public. The Commission concluded that Congress, under Article 4, Section 3 of the Constitution, should have jurisdiction to set parameters on public land management and that the administrative body should implement policy within those parameters.

The report included a definition of the general public that was to be benefited. It was divided into six parts: a national public, the regional public, the federal government as sovereign, the federal government as proprietor, state and local government, and the users of public lands and resources. The recommendation of the Commission was that

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a policy be developed that would, so far as possible, provide proportionate and equal benefits to all aspects of the general public. It recommended that the policy of large-scale disposal of public lands reflected by the majority of statutes in force at that time be revised and that future disposals should involve only those lands that will achieve maximum benefit for the general public in non-federal ownership. All lands designated for a specific use were to be classified or reclassified to determine the use that would provide the maximum benefit to all six elements of the general public. Congress should provide controlling standards, guidelines and criteria for the exercise of authority by the executive agencies in order to set a uniform national policy. And Congress should reserve to itself the power to withdraw public lands or otherwise set them aside for limited public uses and end an era where some two-thirds of the available lands prior to the Taylor Grazing Act had been withdrawn by executive order.

This was a public land policy which, to me, made a lot of sense. I was vice chairman of an American Bar Association committee that was given the responsibility of evaluating the report and making a report to the Board of Governors. That report contained the consensus of our group that it was an apolitical report, that the recommendations of the Commission had been formed on the basis of 33 contract studies that covered all areas of public land investigation, a set of contract studies that covered over two and a half feet on the shelf: five studies on all aspects of environmental impact; studies on forage and grazing development and protection; Bureau of Land Management analyses on alternatives in policy setting and implementation; minerals, oil and gas, all aspects of development. This report was, as you have seen, the basis for FLPMA, enacted some six years later.

Shifts in Perspective

However, during that six years, there was a significant change in the perspective of America. NEPA and the Clean Air Act had been passed in 1970, The Federal Water Pollution Control Act in 1972, the Endangered Species Act in 1973. These laws reflected an environmental consciousness in the public and the Congress that had not been there before. Much of it was good, most of it was good—but it led, I think, to a label consciousness in our society. We used labels to give credit or discredit to concepts and there were several of these labels that you are familiar with. One is planning. Now, no one will argue but that planning is a good thing. BLM had, I think the record will show, been planning for several decades before FLPMA was ever passed, but planning is a captivating word because it says that if you are an intelligent, honest, dedicated person, you will support planning prior to action. Another is public participation. Now, that's a good thing. No one can quarrel about the importance of public participation in decision making. A third label is environmental protection and enhancement. We're all for that—it is a good thing. Another common one was federalism—that because part of these publics are the state and local governments, it is important in the concept of federalism that we have an integrated policy. These are all good things and I endorse every one of them. But just like one martini to me is a very good thing, it doesn't mean that a gallon of martinis is that much better for me.

Federal Land Policy and Management Act

What happened during the debates on FLPMA was a perception that these kinds of labels are all good and therefore we would give priority to these labeled concepts over the guidelines suggested by the Public Land Law Review Commission, such as multiple-use, maximum benefit to the general public, multiple-purpose rather than single-purpose objectives. FLPMA was adopted in 1976. And one of the interesting exercises I would commend to you is to compare the Statement of Purposes in FLPMA to the recommendations in the Public Land Law Review Commission report. You will see if you make this comparison the change in slant that occurred between the study and implementation. Multiple use is endorsed in the Policy Statement "except as otherwise provided in this Act." This is the kind of clause that changed the thrust of the policy from that of the Commission to one that was oriented toward the maximization of these labeled concepts.

I think one of the more interesting pieces of evidence in this regard is Section 102(b) of FLPMA. Section 102(a) set out the policies of the Act which tend to parrot, subject to qualifications I have suggested, the Public Land Law Review Commission recommendations. And then 102(b) says—I don't know of any other precedent in federal legislation for this sort of thing—"The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by the Act." In other words, we've given you a statement of policies, but they aren't the policies of the Act; what we're going to do is what we specifically provide for thereafter.

And herein lies some of the discrepancies in policy. The Public Land Law Review Commission had urged planning, but it was a performance-type planning. It was classification of lands for uses, determining what the needs of the public land were, and when they would be made available for private or public uses. It would be a kind of planning in which goals are set as the first step, and then developmental decisions are made as you go along to achieve those objectives.

Now, planning is stated as an objective in Section 102(a) of FLPMA in much the same language as the Public Land Law Review Commission report, except again, it is qualified "as provided in the Act." And you go then to Sections 201 and 202(a) on the inventory in land use planning procedure and you see a substantial change from a performance standard to what the contract people call a design standard that requires a series of decisions to be made step-by-step in the development of a use or application, leaving the goal in the abstract and dwelling upon the mechanics.

Public participation is a good thing, as I have said. However, FLPMA has carried public participation to a point beyond comment, which gives to the decision makers and planners the benefit of public input, into a kind of participation in decision making, and this has led, it seems to me, to a concentration on form and procedures more than on the substance of the decision. When you add NEPA review to the planning process and to the implementation process, this becomes particularly true. The focus in NEPA is on complying with certain set procedures—and I think the results of NEPA application are largely delay.

Delays Under NEPA

A graphic illustration of this result is provided in the case of *Southeast Alaska Conservation Council v. Watson* in the federal district court in Anchorage. Back in 1974 and 1975, some 2,000 acres of land had been located under the General Mining Law on national forest lands. A plan of operations had been filed pursuant to Forest Service regulations for doing what was called bulk sampling work on the claim, that is, tunneling to the point that you can get a bulk sample

of the mineralized rock for testing and evaluation to determine what kind of milling circuitry would be required. An EIS was prepared on the bulk sampling program and the chief of the Forest Service issued a record of decision approving the bulk sampling program with road access to the forest area. An appeal was taken to the Secretary of Agriculture who determined that helicopters should be used in the bulk sampling program.

In the deliberations leading to passage of the Alaska Native Interest Claims Act (ANILCA), Congress recognized that these claims represented a discovery of what was thought to be the largest molybdenum deposit in the world. Thus, Congress excluded from the wilderness area that it was establishing in Misty Shores, an area of almost 100,000 acres around the Quartz Hill mining claims, and provided expressly in Section 503(f) of ANILCA that mining development shall be permitted to continue within the monument area on these particular claims. The access question was addressed, and in Section 503(h) of ANILCA, Congress declared that the chief of the Forest Service shall issue a special use permit "for a surface access road for bulk sampling" across the Monument for access to the Quartz Hill claims within a short, specified statutory time frame of one year, conditioned upon the completion of an EIS. The operator, when ANILCA was passed, immediately filed a plan of operation, the same one that had been filed in 1977, for bulk sampling on the mining claims which had been located prior to the withdrawal of the lands for the monument and were recognized by Congress as being vested rights.

An environmental objector came in and sought an injunction on the grounds that Congress had commanded that a second EIS be prepared. A second EIS was prepared. Prior to the time the injunction was entered, the miner had completed about 50% of the work contemplated by the plan of operation. When the second EIS was completed, the environmental objector came in and sought an extension of the injunction and still another EIS because the second EIS had been based upon the virgin character of the property, but by the time that statement was prepared, work had already been occurring. The court so ordered it, and it was prepared. The third EIS was completed; the project went forward under the plan of operations that had been prepared in 1977.

During the entire litigation period for two years, no attack was made upon any environmental impact statement; no suggestion was made of any mitigation that would be required for the protection of the environment; no showing was made that there was any environmental damage being done that was not contemplated under the plan of operation. The purpose of the action was delay, nothing more.

Accommodating Objectives

Now this is my concern with the NEPA process. It is my concern with the public participation process. Both are good until they reach the point that they can be used as vehicles for restricting legitimate action and giving to private attorney generals a right to override, as in this Quartz Hill case, a determination that has been made by Congress and had been carefully spelled out in the committee report.

Now this, to me, is a problem that needs to be addressed very carefully in considering the public lands. We have got to find a way to protect the legitimate purposes of public participation, environmental analysis, and federalism, without making the procedure and the form an end in itself.

This is also a concern in the planning process. Planning is important, but we have got to find a way to avoid making planning an end in itself. Planning has got to be connected with decision making. Sixty percent of the budget of BLM was committed for EIS preparation and planning during the late 1970's and early 1980's. That leaves only about 40% of all appropriations for everything else—for land management, for forage protection, for implementation of policies, for providing accommodations between conflicting uses. In order to achieve the objective of the Public Land Law Review Commission, which I think is a great one, of the public lands being a resource of the people they ought to be administered in a way that can give maximum benefit to as many sections of the general public as possible.

Administration Implementation

Another problem that needs to be addressed with respect to implementation of FLPMA policy is administrative legislation. The Public Land Law Review Commission made it clear that Congress, under the Constitution, should set policy with respect to the protection and disposition of the public lands. The executive branch should implement that policy. If the policy does not make sense and cannot be implemented, then the administrative body should go to Congress with a legislative program to provide correction.

Udall v. Tallman, as you know, was a 1965 case before the United States Supreme Court which sustained the determination of Secretary Udall on the grounds that as the administrator implementing the statute, he and his department were best qualified to determine legislative intent. Therefore the interpretation of the agency should be given great weight by any court, unless it is clearly unreasonable, arbitrary, or capricious. This is a sensible rule. The administrators are the best qualified to interpret. But where it becomes a problem is when the administrator says, "I don't like what Congress did. Out of all the inconsistent provisions in legislative history, I can give it a meaning that is more favorable to my policy objectives and under *Tallman* my interpretation will be sustained."

Such an approach requires protection of that policy decision by a legal opinion of staff attorneys. Over the past couple of decades, I have perceived—and I experienced—pressure on the legal staff from policy officers within the department to write legal opinions to support policy determinations, so that legal opinions become more policy documents or briefs, if you will, than legal opinions. Now these opinions, aside from giving protection to a policy judgment of the department, have essentially the same weight as a regulation within the department—not outside perhaps—but within the department, in establishing departmental policies. But they are not subject to the Administrative Procedure Act's review provisions.

Appeals and challenges to decision making within the Department of Interior go to the Interior Board of Land Appeals (IBLA). But IBLA's jurisdiction is severely limited. First of all, Board examiners are officers in the Department of Interior under the general supervision of the Undersecretary who has power to remove any case from IBLA at any time and make the determination himself. More than that, IBLA really has no jurisdiction to question a regulation of the Department or the constitutionality of a provision of the statute.

Issues in the Legislation Itself

Over the past two and one-half days we have looked at a series of problems arising under FLPMA. Some of the problems such as those arising under Section 314 of FLPMA are statutory. The *Locke* case is likely to go to the United States

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Supreme Court. How is it going to be determined? The equities are very strong in favor of protecting the Locke's interest. But to reach that result, the Supreme Court has to struggle with a very difficult legal issue—whether what amounts to a statute of limitations with reasonable advance notice is constitutional in establishing a conclusive presumption. In my mind there is no question but that Congress did not intend to create a conclusive presumption of abandonment in a case where the conclusive evidence shows that the claim is in operation, that a substantial investment has been made in it, and there is no basis for presuming an intent to abandon. That this is so is indicated by the fact that in each of the cases that I'm aware of and am associated with, where a determination of abandonment has been made under FLPMA 314, on recommendation of the Secretary, Congress has routinely passed special legislation to reinstate the claim.

Congress is aware of the problem. The object of the recording was to give BLM a list of the claims upon the public lands and to set up a procedure—recommended, incidently, by the Public Land Law Review Commission—that would eliminate the stale claims. This is the kind of thing which I think Interior has an obligation to bring before Congress with recommendations for changes. I don't know why Interior in this administration is so reluctant to present proposals to Congress for changes in the law where those changes are desirable to achieve the objectives of the Act.

Another statutory issue relates to limitations on sale of lands. For instance, Interior has taken the position that it cannot sell the surface of land under Section 203, even when all of the conditions of Section 203 are met, if there is an unpatented mining claim on the property. The theory is that the unpatented mining claim might go to patent and give title to the surface. Historically, before FLPMA that was a real problem because the Secretary could not condition a patent. Section 208 of FLPMA specifically authorizes the Secretary to attach conditions upon a patent. There is no reason in the world why the Secretary could not patent land subject to existing mining claims. If the claims are valid, the claim would take precedence over the grant of the surface. If in a contest proceeding, the claim is invalid, the patentee's title would be protected. If there is uncertainty on the part of Interior as to the meaning of the Act, then it should seek clarification as to what Congress had in mind.

Some Recommendations

The problem of administrative legislation and the absence of judicial review opportunities could be addressed by legislation that would either create a land court or permit a litigant to bypass the Interior Board of Land Appeals and go directly to court in certain types of situations. One such situation would be for declaratory relief. There is no reason why an action should go up through the Interior Board of Land Appeals if the claimant is challenging a regulation, the interpretation of a statute, an opinion of the solicitor, and the like. There is precedent for this in the Contract Disputes Act of 1968 which permits, in a government contract situation, for a party to bypass the Board of Contract Appeals and go directly to the Court of Claims to raise interpretative questions and get declaratory relief. That kind of a provision would go far to eliminate the uncertainties that we have in the intent of Congress and the meaning of FLPMA eight years after the fact. There ought to be a vehicle by which these 314 questions, for instance, can be taken to an appropriate court for a determination. Another type of proceeding that might be taken directly to a court is a prayer for mandatory relief as, for example, where land is being withdrawn other than under the provisions of Section 204 by the inaction of the Department in making necessary determinations or completing a plan that is required as a prerequisite for sale.

Finally, I would like to recommend to our official contingent that either through congressional oversight hearings or as an Interior project, a study be initiated to see how FLPMA is working in practice, and in such study, not only address these interpretative issues, which I think can be dealt with directly, but also include a cost-benefit analysis to determine how much value we are getting out of the extensive commitments of funds dedicated to present planning and NEPA processes. In the end. I would like to see us, through these kinds of studies, get back to an analysis of how far we have come from what I think was a balanced Public Land Law Review Commission set of principles, and chart a course for the future that will address both cosmetic variations in the Act, as necessary to remove ambiguities and facilitate implementation, and find a course that will assure objective implementation by the administrative agencies.

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one state (e.g., mineral deposits). International legal initiatives encompass such resource issues as species trade, wetlands and migratory animals protection, transnational air and oil pollution, dangerous substance control and drinking water standards.

As a member of the United Nations, Sri Lanka in recent years has become increasingly active in multilateral environmental activities, undertaking several obligations and cooperative arrangements related to its management of resources. Species trade, wetlands conservation, law-of-the-sea, reservation of forests, and regional environmental cooperation are some of the current law-related international topics before the national government. Pollution concerns are growing as well. The recent Bhopal, India chemical disaster has raised concern over local "Bhopals."

Sri Lanka's use of technical assistance in international environmental law increasingly has parallels in other countries. Generally, such technical assistance is part of an interdisciplinary effort at problem-solving that also includes scientists and managers. International environmental law assistance in development principally operates as a tool to

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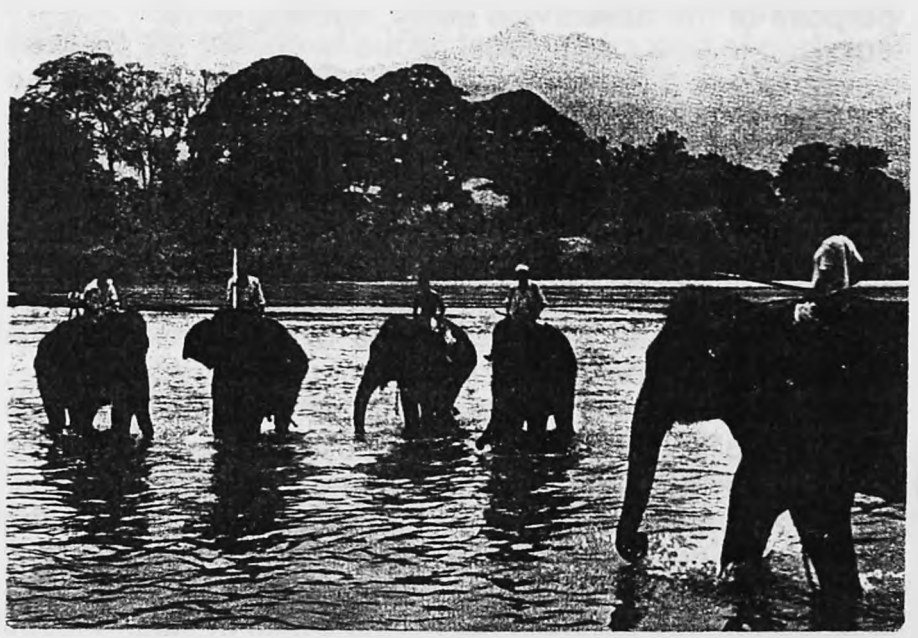

The problem of the Sri Lankan elephants occurred when resource development clashed with environmental and social issues.

identify and reconcile development goals, bring together concerned interests, and suggest options (drawing from global and other country experiences) in policy, law, and administration. The approach is in sharp contrast to the traditional Western use of litigation to resolve environmental conflict.

Sri Lanka and the Elephants

Modern Sri Lanka is a country experiencing increased population pressures and complex resource conflict problems not uncommon to third world countries. This tropical island in the Indian Ocean contains more than 15 million people on a land area of some 25,000 square miles. Growing problems of unemployment and increased demand for food imports to feed local populations were principal factors in the country's move in the 1950's toward development of a major irrigated agricultural project using the Mahaweli Ganga river.

Today, the Mahaweli project of Sri Lanka is internationally known as one of the largest development schemes ever undertaken in Southeast Asia. It encompasses some 3000 square miles, about one-eighth of the country, and involves more than two billion dollars of multi-donor investment in hydroelectric, irrigation, and resettlement activity.

Initial planning for the Mahaweli project began over 20 years ago, during a period when the complexity of environmental interrelationships was less well understood. While the project is a feat of civil engineering, early planning made no provisions for those aspects of the Mahaweli Ganga region which were not directly linked to hydroelectric generation or irrigated agriculture. The process did not adequately foresee related environmental and social problems, of which the elephant is symbolic, arising as the project became operational.

Historically, the Mahaweli project area has been habitat for the Sri Lankan elephant, the most revered of the country's wildlife embodying powerful cultural and religious significance. Buddhist traditions prevent killing of elephants, and the very small foreign market for live elephants precludes exportation as a management tool. As the elephant range and habitat have been reduced to make way for irrigated agriculture, there has been no comparable reduction in the elephant population. Conflicts between farmers and elephants have increased as both compete for the same land. Agricultural crops have become attractive sources of food for the elephant. Destruction of farm property and some loss of life have resulted from the intensified conflict.

The elephant problem, now reaching crisis levels, has accentuated the setbacks that can occur when resource development is undertaken without adequate analysis of related environmental and social impacts. On the one hand, the need continues for "maximizing" food production; on the other hand, strong social values require protection of the elephant and habitat otherwise available for agriculture. Thus, the elephant might be viewed as symbolizing unanticipated problems that threaten primary food production goals of the Mahaweli project.

More important to my involvement in Sri Lanka, the elephant problem helped spark an increased awareness of resource development issues and problems generally. In the process of deliberations domestically and with international experts, related questions concerning land use and development practices for the Mahaweli project area are being raised. Concerns now exist regarding such resource issues as proper watershed management, sedimentation from denuded catchment areas, ground water pollution and overdraft as agricultural settlements intensify, and land and water pollution from agricultural chemicals.

Development schemes inevitably produce change in social and environmental relationships. Today, the legal systems in many developing countries are evolving rapidly in response to changing development demands, growing resource conflicts, and evolving international standards. In Sri Lanka, the interdisciplinary team of which I was a member participated in one aspect of this process of change—the preliminary formulation of a written conservation policy based upon analyses of resource problems and national and international law principles. The purpose of the policy is to help guide decision-makers in resource planning and management so as to minimize conflict between conservation and agricultural production goals. It is a beginning attempt at integrated resource management that now involves the participation of concerns broader than the elephant issue, including land use, forestry, mining, and water.

This new kind of decision-making process in development has accelerated the need for state-of-the-art information about international environmental law and experiences of other countries in natural resource conservation and development. Today, American universities give little attention to these emerging processes and needs. With the interest and support of such organizations as the C.U. Natural Resources Law Center, U.S. institutions and individuals increasingly will be available to help provide such information and technical assistance.

Publications of the Natural Resources Law Center

Books

- *Special Water Districts: Challenge for the Future,* James N. Corbridge, ed. Book containing edited papers from the workshop on Special Water Districts, Sept. 11-13, 1983. $15.

Conference Materials

- *Management of National Forests in the Rocky Mountains* 130 page notebook of outlines and materials from 1-day, March 1985 forum. $15.
- *The Federal Impact on State Water Rights,* 365 page notebook of outlines and materials from 3 day, June 1984 conference. $60.
- *The Federal Land Policy and Management Act,* 350 page notebook of outlines and materials from 3 day, June 1984 conference. $60.
- *Groundwater: Allocation, Development and Pollution* 450 page notebook of outlines and materials from 4-day, June 1983 water law short course. $55.
- *New Sources of Water for Energy Development and Growth: Interbasin Transfers,* 645 page notebook of outlines and materials from 4-day, June 1982 water law short course. $55.

Occasional Papers

- "The Rights of Communities: A Blank Space in American Law," Joseph L. Sax, Professor of Law, University of Michigan. NRLC Occasional Papers Series. 16 pgs. $2.50.
- "Nuisance and the Right of Solar Access," Adrian Bradbrook, Reader in Law, University of Melbourne, Australia. NRLS Occasional Papers Series. 54 pps. $5.
- "Tortious Liability for the Operation of Wind Generators," Adrian Bradbrook, Reader in Law, University of Melbourne, Australia. NRLC Occasional Papers Series. 74 pps. $5.
- "The Access of Wind to Wind Generators," Adrian Bradbrook, Reader in Law, University of Melbourne, Australia. NRLC Occasional Papers Series. 77 pps. $5.

Reprints

- "Implied Covenants in Oil and Gas Leases" reprint of two articles by Stephen F. Williams, Professor of Law, University of Colorado. 40 pages. $4.50.

The Natural Resources Law Center

The Natural Resources Law Center was established at the University of Colorado School of Law in the fall of 1981. Building on the strong academic base in natural resources already existing in the Law School and the University, the Center's purpose is to facilitate research, publication, and education related to natural resources law.

The wise development and use of our scarce natural resources involves many difficult choices. Demands for energy and mineral resources, for water, for timber, for recreation and for a high-quality environment often involve conflicting and competing objectives. It is the function of the legal system to provide a framework in which these objectives may be reconciled.

In the past 15 years there has been an outpouring of new legislation and regulation in the natural resources area. Related litigation also has increased dramatically. As a result, there is a need for more focused attention on the many changes which are taking place in this field.

The Center seeks to improve the quality of our understanding of these issues through programs in three general areas: legal and interdisciplinary research and publication related to natural resources; educational programs on topics related to natural resources; and a distinguished visitor and visiting research fellows program.

For information about the Natural Resources Law Center and its programs, contact:

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