Resource Law Notes Newsletter, no. 14, May 1988

University of Colorado Boulder. Natural Resources Law Center

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Natural Resources Law Center Announces Two Programs for Ninth Annual June Conference Series

WATER QUALITY CONTROL: INTEGRATING BENEFICIAL USE AND ENVIRONMENTAL PROTECTION, June 1-3, 1988

Protecting water quality is essential to preserve the many beneficial uses of western water resources. This conference addresses the dominant federal requirements in the Clean Water Act, including the important major revisions enacted by Congress in 1987, with special attention to western problems regarding nonpoint source pollution. Developments in groundwater quality regulation are considered, as are selected issues concerning the implications of state and federal water quality regulation for the traditional exercise of water rights.

AGENDA
Wednesday, June 1, 1988
The Clean Water Act: Selected Issues
9:15 Prof. William H. Rodgers, Jr., The Water Quality Legal Framework

NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY, June 8-10, 1988

Indian reservations constitute about 2.5% of all land in the country and 5% of all land in the American West. During the last two decades, Indian natural resources issues have moved to the forefront as tribal governments have dramatically expanded their regulatory programs, judicial systems, and resource development activities. This major symposium will address current developments and assess likely future directions in the areas of tribal, federal, and state regulation; tribal-state intergovernmental agreements; financing; mineral leasing; recreational development; wildlife management; taxation; and water litigation and management.

AGENDA
Wednesday, June 8, 1988
9:15 Prof. Robert A. Williams, The Historical Policy of Federal Restraints on Resource Development in Indian Country
9:55 Susan M. Williams, The Governmental Context for Development in Indian Country: Modern Tribal Institutions and the Bureau of Indian Affairs
10:55 Prof. Richard B. Collins, Taxation in Indian Country
Lunch Dave Frohnmayer, Attorney General, State of Oregon

continued on page 2
Water Quality Control: Integrating Beneficial Use and Environmental Protection—continued from page 1

Thursday, June 2, 1988

**Groundwater Quality**
8:45 Prof. Robert L. Glicksman, Federal Groundwater Pollution Law
10:35 Larry Morandi, State Legislative Options for Protecting Groundwater Quality
11:20 Prof. George Cameron Coggins, A Proposal for an Outrageous, Albeit Effective, Strategy to Prevent Groundwater Pollution

**Quality/Quantity Issues**
1:45 Lawrence J. MacDonnell, Water Rights Implications of Water Quality Regulation in Colorado
2:30 Kathleen Ferris, Effluent: Making Use of a Valuable Resource in Arizona
3:35 Lee Kapaloski, Effects of Upstream Transfers on Water Quality Permitting

Natural Resource Development in Indian Country—continued from page 1

1:30 Kevin Gover, Environmental Regulation in Indian Country: Federal, Tribal, and State Pollution Laws
2:15 Thomas N. Tureen, Financing Development in Indian Country

Thursday, June 9, 1988

9:00 Reid Chambers, Mineral Leasing in Indian Country
9:45 William A. White, The Industry Perspective: The Pros and Cons of Mineral Development in Indian Country
10:35 Donald R. Wharton, Navajo Resource Economic Development: The Dine Power Project

2:00 Prof. Bernard P. Becker, Cooperative Agreements Between the Tribes and the States: Licensing at Leech Lake
2:50 Douglas Nash, Wildlife Management: State and Tribal Jurisdiction at Umatilla
3:20 Steve Moore, Federal Taxation of Resort Development, Commercial Fishing, and Reindeer
3:50 Howard Arnett, Fisheries Management in the Regional and International Contexts: The Columbia River Basin

Friday, June 10, 1988

9:00 Jeanne Whiteing, Survey of Recent Developments in Indian Water Cases: Litigation and Negotiation
10:00 David Dornbusch and Jeff Fassett, The Wind River Litigation
10:50 Marcia Beebe Rundle, The Montana Reserved Water Rights Compact Commission

Lunch
1:30 Steve Shupe, Marketing of Indian Water
Respondents: Myron B. Holburt, Scott B. McElroy, Robert S. Pelcyger, Steve Reynolds
3:00 End of conference

Both conferences will be held at the University of Colorado School of Law in Boulder. The standard registration fee is $495 until two weeks before each program, and $545 thereafter. The rate for anyone from any level of government is $350; for public interest groups and academics it is $250.

The fee includes a course notebook, two lunches, a cookout dinner on Flagstaff Mountain Wednesday evening, and a reception on Thursday.

For further information, please contact the Center at (303) 492-1288.

4:10 Panel: Water Rights and Water Quality—Finding an Accommodation
Respondent: David R. Sturges

4:00 Lunch

Gary Cargill, Regional Forester, U.S. Forest Service

Congressman Ben Nighthorse Campbell (invited)

Lunch

4:30 Panel: The Making of Tribal Resource Policy
Respondent: David R. Beringer, The San Joaquin-Sacramento Delta

End of conference

3:00 Adjourn

For further information, please contact the Center at (303) 492-1288.
Burlington Northern Foundation Funds Fellowship

The Natural Resources Law Center of the University of Colorado School of Law is pleased to announce the creation of the Burlington Northern Natural Resources Law Fellowship. The Center is seeking applicants for this position for either Fall or Spring semester 1988-1989. This position is made possible by a grant from the Burlington Northern Foundation, representing the Burlington Northern Railroad Company, the Glacier Park Company, the Meridian Minerals Company, and Meridian Oil Inc.

The Burlington Northern Fellow will spend a semester in residence at the School of Law, researching a topic concerned with energy, mineral, or public land law. Emphasis is on legal research, but applicants from law-related disciplines, such as economics, engineering, or the social sciences, will also be considered. While in residence Fellows will participate in activities of the Law School and the Center and will have opportunity to discuss their work with faculty and students in both formal and informal sessions. Fellows are expected to produce some written work suitable for publication by the Center.

Candidates may be from business, government, legal practice, or universities. A stipend of $20,000 is available for the semester, along with additional support for secretarial and research assistance.

Instream Flow Protection Symposium Draws Large Crowd

The Center's symposium on Instream Flow Protection, held on March 31-April 1, drew 160 registrants from 17 states, the District of Columbia, and Canada. Almost half of these registrants were from some branch of government, whether federal, state, local, regional or tribal. The other half represented private legal practice, businesses, public interest groups, academia, or the media.

The program was strongly oriented toward examining the experience to date under the various state programs established in recent years to protect instream flows. Thus most of the speakers and panelists were from state agencies. Following a general overview of the approaches being taken in the western states, provided by conference organizer Steven J. Shupe, the discussion turned to issues in establishing the quantity of flow. Next, specific illustrations of program implementation and enforcement in the states of Washington and Colorado were presented.

The following day federal claims for instream flows were discussed. Then the issue of who should be able to claim instream flow rights was explored. Developments in the transfer of consumptive use rights to instream flow use were considered next. Professor Harrison C. Dunning then discussed the Public Trust Doctrine. A conference wrap-up was provided by Professor Charles F. Wilkinson.

Based on materials prepared for the symposium, plus several additional papers, the Center will publish a book on instream flow law and practice in the West. A notice will be sent out as soon as this book is available.
Swedish Professor is Center Fellow
February 1988

Associate Professor Reinhold Castensson from the University of Linköping, Sweden, spent the month of February at the School of Law studying the prior appropriation doctrine in the western United States, its implications for water rights distribution, and the relationship between water quality regulation and water use. Castensson, who is in the Department of Water in Environment and Society at the University of Linköping, is the third visitor from that University to spend time at the University of Colorado, in an ongoing exchange. CU Chancellor James N. Corbridge, Jr., visited Linköping in 1985, as a Visiting Scholar, studying procedures and jurisdiction of Swedish courts.

Ray Moses is Natural Resources Law Distinguished Visitor

Raphael J. Moses (CU Law '37) spent two days in residence at the University of Colorado School of Law, March 22-23, as the Center's 1988 Natural Resources Law Distinguished Visitor. This program allows an individual who has achieved prominence in natural resource law, whether in government, private practice, or academe, to mingle with faculty, students, and guests from the community for a few days.

Moses, from the Boulder law firm of Moses, Wittemyer, Harrison & Woodruff, addressed the water law class of Prof. David H. Getches, and the advanced natural resources seminar offered by Prof. Charles F. Wilkinson. He also presented a "brown bag" lunch talk to students and faculty, and a reception was held in his honor, to which friends and colleagues from the community were invited.

Center and Boulder County Bar Cosponsor Exploration of Front Range Water Alternatives, Saturday, April 16, 1988

Jeris Danielson, Colorado State Engineer, provides an inventory of state water resources. (upper left)

D. Monte Pascoe of Ireland, Stapleton, Pryor and Pascoe in Denver, gives status report on Two Forks Dam from the Denver Water Board. (lower left)

Hamlett J. (Chips) Barry, Executive Director of the Colorado Department of Natural Resources, describes water-related activities underway in his office. (above)
The Federal Onshore Oil and Gas Leasing and Reform Act of 1987*

Lyle K. Rising, Attorney
Office of the Solicitor
Department of the Interior
Denver, Colorado

On December 21, 1987, Congress enacted the Federal Onshore Oil and Gas Leasing and Reform Act. The new amendments make three fundamental changes in the Mineral Leasing Act. The first and most important change is that all land offered for oil and gas leasing must first be offered competitively. The second major change requires that a plan of operations and reclamation be filed and approved before the operator may commence on-the-ground operations. This second change at first glance appears to be more cosmetic than real because the Congress enacted requirements that had previously been in the Department's regulations and orders. But this change also shifted authority over surface operations on Forest Service lands from the Bureau of Land Management (BLM) to the Forest Service. The third fundamental change adds to the Mineral Leasing Act extensive provisions for preventing fraud in the sale of Federal oil and gas leases. This includes both civil and criminal penalties. These three changes are the principal focus of this discussion.

The old system of leasing did have a provision for competitive leasing—but only for those areas that were within a known geological structure (KGS) of a producing oil field. Under the old system, 7% of all land was leased competitively and 93% was leased noncompetitively. A major reason leading to these amendments was that much of the land leased noncompetitively was very valuable.

The old system also had problems with the competitive leasing scheme. First and foremost, the very idea of a known geological structure is a legal notion. It has no scientific basis per se, though geologists have done the best they could over the years with this term of art. Nevertheless, litigation on this issue was extensive. See, e.g., Arkla Exploration Co. v. Texas Oil & Gas Corp. 734 F.2d 347 (8th Cir. 1984); Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984). The other problem with the old competitive lease system was the difficulty in placing an accurate value on properties not yet drilled or in production. Where there had been comparable sales in the area, it was easy to determine the minimum bid which the BLM would accept. Where there had been no such comparable sales, the BLM's estimates were as inaccurate as industry's as to the worth of a parcel. See Harold Green v. Bureau of Land Management, 93 IBLA 237 (1986).

Congress attempted to solve all the foregoing problems by abolishing both the competitive and noncompetitive parts of the old system. The competitive part of the new system is different from the old in several important respects. Congress abolished the entire concept of a known geological structure of a producing oil field for all future leases. From now on, all land will be first offered competitively. This includes land that has never before been leased as well as land in expiring leases. Another significant change is that Congress has done away with evaluations by the BLM to determine whether an applicant has offered a minimum acceptable bid. Congress replaced the BLM determination of a minimum acceptable bid with a statutory minimum acceptable bid of $2 per acre for all competitive leases. 30 U.S.C. Section 226(b)(1)(B). Another change in the competitive system is that all bidding will be done orally at public auctions held at least quarterly by the BLM. 30 U.S.C. Section 226(b)(1)(A). The previous system used sealed bids which were opened on the day of the sale.

Summarizing the competitive part of the statute, all land must be put up for competitive leasing before it may be leased noncompetitively. The Congress has established a minimum acceptable bid of $2 per acre, which may be raised by regulation after 2 years. There will be no more KGS or known geological structure determinations, nor will there be any evaluation of a bid to determine minimum acceptable bids. That has been determined by statute.

Noncompetitive Leasing
As often happens in sales, of course, some items linger on the shelf. If the land put up for lease in a competitive sale receives no bids or receives inadequate bids, then, in no more than 30 days, the land will be available for noncompetitive leasing. In order to obtain the lease, an application must be filed showing the applicant's qualifications along with a

* The article is a shortened version of a presentation given at the "Workshop on Federal Onshore Oil and Gas Leasing Reform Act of 1987" in Denver, Colorado, on March 18, 1988. The views expressed in the paper are solely those of the author and should not be taken as the views or position of the Department of the Interior.
was high, BLM developed a system whereby all applications were minimal. To deal with situations where interest in an area qualified person to file that application and the land is available for leasing, then that applicant is entitled to the lease. The old system of noncompetitive or over-the-counter leasing also provided for issuing the lease to the first qualified applicant. This worked well enough when interest in a tract was minimal. To deal with situations where interest in an area was high, BLM developed a system whereby all applications would be considered to have been simultaneously filed and a drawing would be held. Conflicts arose which caused the rules for the drawing to become very complicated—Byzantine, in fact. To some extent, the Congress intended to do away with the complex system of drawings. See H.R. Rep. No. 100-378 (Pt. 1), 100th Cong., 1st Sess. 12 (1987).

But the problem still remains of how to treat fairly all of those who wish to apply for the same parcel at the same time on a noncompetitive basis. The proposed regulations provide for an informal drawing for all applications submitted on any single day of availability after a competitive sale. See 53 Fed. Reg. 9214, 9217, 9225 (March 21, 1988).

Payments Under the New Law

What is this new system going to cost in terms of fees, rentals, and royalties? For filing fees, there is a $75 fee charged for noncompetitive leases and BLM will require a $75 administrative fee for competitive leases in addition to the bonus bid. Rentals will be $1.50 per acre for the first 5 years of either competitive or noncompetitive leases. For the second 5 years, the rental will be $2 per acre. This rental provision applies only to new leases, not to old ones. For old leases, the rental rate is currently $1 to $3 per acre per year and is subject to the Secretary’s discretion. Royalty rates for noncompetitive leases remain fixed at 12.5%. The royalty rate for competitive leases shall be not less than 12.5%. At least for the time being, it appears that the competitive bidding will be strictly on the basis of bonus bids. The minimum royalty rate has been set by the new amendments at the same amount as the annual rentals.

Grandfather Clause and New Regulations

No new statutory scheme would be complete without a grand-father clause and a new set of regulations. These new amendments are no different. The grandfather clause, found at section 5106 of these amendments, provides that all offers and bids pending on December 22, 1987, shall be processed under the old law. There are a few minor exceptions for military and forest reservations in Illinois, Arkansas, and Florida. But, all pending bids and applications either have been or will be processed.

The Congress also ordered the Secretary to promulgate new regulations within 180 days of the enactment of these new amendments. The Department published proposed regulations at 53 Fed. Reg. 9214 (March 21, 1988) and will publish final regulations by June 17, 1988. As part of the rulemaking, the BLM held six test sales, as also ordered by Congress. 53 Fed. Reg. 6013 (Feb. 29, 1988). Three BLM offices held sales based on nominations of tracts by industry. Those offices are New Mexico, Utah, and Eastern States. Three other offices held sales on everything that was legally and practically available at this time. Those offices are Colorado, Montana and Wyoming. The results of the test sales will be analyzed and incorporated into the final regulations which will be effective upon publication in the Federal Register.

Lease Operations

We turn now from the leasing side of the new amendments to the operational side—that is, what happens once the lease is issued and the lessee want to begin on-the-ground operations. The second major change brought about by the amendments is to make statutory the present regulatory requirement that an application for permission to drill (APD) must be submitted before permission may be granted to enter the land for drilling purposes. See 43 C.F.R. 3163.

There are several important aspects to this statutory change. First, the Secretary must give at least 30 days public notice before approving any APD’s. There are no exceptions to this 30-day notice requirement anywhere in the statute. The BLM has already had a case arise where it would have been desirable to issue permission to drill immediately, but because there is no exception to the 30-day notice requirement in the new law, the approval was not possible. The message to operators here is that an APD should be submitted well in advance of the expiration date of the lease in order to avoid expiration because of an untimely application.

Notice Requirement

The manner of giving notice under this section is simple. The notice is posted in "the appropriate local office of the leasing and land management agencies." 30 U.S.C. Section 226(f). Essentially, the agency posts a narrative description of the proposed action together with a map of the area to be affected. The new law specifically states that this 30-day public notice requirement is in addition to any other notice required by law.

Forest Service Authority

The new amendments refer to the "appropriate land management agency." This phrase has taken on a new meaning under these amendments. Now under 30 U.S.C.
Section 226(h) the Secretary of Agriculture has new authority in two important areas. First, the Secretary of Agriculture, specifically, the Forest Service, is explicitly authorized to veto oil and gas leasing on National Forest land. Second, all surface-disturbing activity on National Forest lands must now be approved by the Forest Service before the commencement of drilling activity. The BLM retains approval authority for applications for permission to drill on National Forest lands.

Under the Mineral Leasing Act of 1920, whenever the Interior Department or BLM received an application for a lease in a National Forest, it would ask for a recommendation on whether to lease and under what conditions. While BLM usually followed the Forest Service recommendation, it did not have to.

The new amendments change this practice in a substantial way. The Forest Service now has an absolute veto over oil and gas leasing in National Forests. Moreover, the Forest Service now has complete regulatory authority over all surface-disturbing activities on National Forest lands. However, BLM still has jurisdiction over the mineral estate. It still issues the oil and gas lease, and the BLM still has regulatory authority over the drilling into the mineral estate. The new law will require a good deal of cooperation between Forest Service and the BLM in order to prevent undue delay in either leasing or approval of drilling operations. There is reason to be optimistic that such cooperation will proceed relatively smoothly since the BLM and the Forest Service have been operating in just this way on acquired lands for many years.

Surface Regulations
The new amendments, in essence, require two things before on-the-ground operations may begin. First, a complete plan of operations must be filed. As a practical matter, this will include a reclamation plan. Second, a bond must be posted which is adequate to ensure reclamation of the site plus the reclamation of all land and water resources. 30 U.S.C. Section 226(g). In all likelihood, BLM’s existing regulations for applications for permission to drill and for bonding may prove to be adequate for an interim period or even for the long term. However, the Forest Service currently has no regulations for approving applications for permission to drill, nor does the Forest Service have any bonding program for oil and gas leases at this time. The reason for the lack of Forest Service regulation is clear—the BLM has always had legal authority over oil and gas operations on the National Forest lands until the enactment of this new law. Obviously, the Forest Service will have to promulgate regulations to set operational and reclamation standards. They may be as simple as current BLM regulations or they could be much more stringent along the line of current regulations for the surface mining of coal. Compare 43 C.F.R. 3163 with 30 C.F.R. 700. One presently unresolved question is whether the new statute requires each agency to be responsible for adequate bonding.

Reclamation Standards
Congress has also added substantial teeth to the enforcement of the new operational and reclamation standards. The Secretary must deny issuance of any new oil and gas leases or approval of assignments of existing leases to anyone who has failed or refused "in any material way" to comply with a reclamation standard promulgated pursuant to the new amendments. For large companies holding numerous leases, this kind of sanction could be onerous. There are exceptions, of course, for alleged violations for which review is pending. The sanction applies even if the violation was committed by a subsidiary, an affiliate, or an operator under the control of the company.

A review of the sections on notice and reclamation discloses that Congress has required that notice of planned operations must be posted in the appropriate land management office for at least 30 days. In the case of the National Forest, the Forest Service is the appropriate land management agency for determining whether a lease will issue and for approving and enforcing operation, reclamation and bonding plans. Moreover, both BLM and the Forest Service must now promulgate regulations setting forth the performance standards for operation, reclamation, and bonding. Finally, the enforcement sanctions for violation of a performance standard may be quite severe, as they may prohibit the issuance of other Federal oil and gas leases or approval of assignments to the violator, its subsidiary, or affiliates.

Congress has also added substantial teeth to the enforcement of the new operational and reclamation standards.

Prevention of Fraud
We now come to the last major change brought about by the new amendments—the prevention of fraud.

Congress was especially concerned about schemes by which noncompetitive leases were being segmented into small parcels each of which was sold for substantial prices. It dealt with this problem in two ways. First, it gave the Secretary of the Interior the discretionary authority to disapprove any assignment of less than 640 acres in the lower 48 states and less than 2,560 acres in Alaska. Assignments of smaller acreages can be approved for reasons relating to production such as spacing requirements—but the burden is on the applicants to show that that is the case. It is difficult to see how this restriction on assignment of small parcels will hinder legitimate business. See 30 U.S.C. Section 187B.

The second way that Congress chose to deal with fraud was by enacting a new section 41 of the Mineral Leasing Act called "ENFORCEMENT." This section creates two classes of crimes and civil penalties. The first crime consists of any group of individuals or entities conspiring or in some way scheming to defeat any statutory or regulatory provision of the Mineral Leasing Act. The second class of crime consists of obtaining money or property by means of any misrepresentation regarding Federal oil and gas leases. The penalty for any violation can be severe. The fine can be up to $500,000
per violation and the prison term can be for as much as 5 years. These criminal penalties would, of course, be prosecuted by the Department of Justice, which, in most cases, means the United States Attorney.

There are also lengthy provisions for civil proceedings for acts constituting the same crime. The Attorney General can file suit in a U.S. district court having jurisdiction and seek an injunction, a civil penalty of $100,000, restitution, and a bar to further leasing or activity under the Mineral Leasing Act. If a corporation is guilty of a violation under the Mineral Leasing Act, then so is the officer who authorized it or carried it out. Likewise, the corporation is equally liable for the acts of its officers, employees, or agents unless it can show that it did not know and did not authorize what was going on. None of the remedies are exclusive—one may be convicted criminally and held liable in a civil action in addition.

One of the unusual features of this enforcement section is the authorization for states to sue in Federal courts on the same basis as the Attorney General of the United States, at least in civil actions. A real incentive for a state to initiate prosecution is that the statute allows retention of any monies the court awards for civil penalties or damages.

Miscellaneous Provisions

There are two sections of the new amendments which call for study and reports. Section 5110 of the new amendments calls for an annual report for 5 years by the Secretary to the Congress on how the new law is working. Section 5111 of the new amendments orders the Comptroller General and the National Academy of Sciences to conduct a study of just how well oil and gas resources are incorporated into land use plans under BLM's and Forest Service’s existing authority. The report must also make recommendations on any improvements which could be enacted into law. The bill which originally passed the House required that extensive land use planning be completed before leases could issue. See H.R. 2851, reprinted at H.R. Rep. 100-378 (Pt. 1), 100th Cong., 1st Sess. 3, 4 (1987). During the Conference Committee, the provision was deleted as a requirement, but was retained as a matter for study.

Finally, another provision of the new law (section 5112) prohibits leasing in wilderness study areas. That section essentially consolidates existing law on wilderness study areas—that is, no leases may issue for any existing wilderness study areas—either BLM or Forest Service—nor may any leases issue in further planning areas. There are two exceptions to this leasing prohibition. If the Congress has specifically allowed the leasing or if a land use plan has released the area from further wilderness study, the leasing is permissible. One example of legislative release may be found in the Wyoming Wilderness Act of 1984, 98 Stat. 2807.

Issues and Trends in Western Water Marketing

Steven J. Shupe*

The transfer of water entitlements is playing an increasingly significant role in meeting water demand projections in the western United States. Expanding municipalities, private developers, recreationalists, speculators, and other interests have been purchasing water rights in areas where new sources of developed water are scarce and expensive. This article looks at issues and trends emerging in the field of water marketing in the West. It is compiled from excerpts from the “1987 Year in Review” issue of the Water Market Update, a monthly newsletter tracking the business activities, legal developments, and public interest aspects of water transfers and use.

Water transactions in 1987 showed the breadth and complexity of activities that fall under the general term, “water marketing”. Most significant is that water marketing in 1987 represented the movement of far more paper than water—most purchasers are buying water rights for future use rather than obtaining actual water to meet today's needs. This reflects the fact that western water markets are generally being driven by the perception of future demands rather than by immediate water shortages: e.g., Albuquerque is holding out a standing offer to buy senior water rights that it will not need to use until after the year 2025 [February p. 1];** a number of Colorado Front Range cities are purchasing irrigation shares to supply anticipated growth in the next century [November p. 2-4]; Arizona developers are identifying 100-year supplies in order to meet requirements of current state laws.

The prospective nature of water rights purchases makes the future character and prices associated with water marketing uncertain. 1987 saw some cities already trying to unload surplus water entitlements they previously bought as a result of overly optimistic growth projections. [July p. 1] Also, 1987

** Each month and page citation refers to the specific reports in the 1987 Volume 1 of WATER MARKET UPDATE where additional information on this topic was reported. For copies of back issues, write Water Market Update, P.O. Box 8854, Santa Fe, NM 87504. (505) 983-9637.
prices in several active trading areas fell significantly below past prices which had been inflated in anticipation of growing demands. For example, water rights prices in northeastern Colorado currently stand at $1,000 per acre foot (af), down from a high in 1981 of about $3,000/af. [April p. 11] Phoenix area groundwater rights also showed a price decline in 1987, while irrigation district shares that had been bought a few years ago in central Utah for more than $1,000/share are now trading for less than one-fourth of this amount. [September p.2]

These examples of price declines do not indicate that water marketing is slowing down, only that the forces driving water reallocation are complex and sometimes unpredictable. This complexity is also reflected in the fact that marketing water in the West and elsewhere is not simply the buying and selling of water entitlements. Water marketing can involve the financing of on-farm conservation measures in order to salvage water for additional use. [October p.2] It can mean innovative water banking in which surplus surface waters are stored underground during wet years for future exchange during droughts. [March p.3] Water marketing may involve a dry year option in which farmers agree to defer irrigating during droughts in return for monetary payments from thirsty cities. [June p.8] It can mean selling excess reservoir storage space or releasing dammed water to maintain downstream recreation and water quality. [September p.9] Water marketing can incorporate water rate structures to promote household conservation [September p.6], and it can involve creative financing to purchase municipal supplies [December p.12]. Additional water marketing concepts are expected to arise from across the nation as water quantity and quality problems become increasingly acute.

Major Controversies

Many of the various forms of water marketing during the past year carried a strong measure of controversy. Local communities worried about their tax and economic bases. Downstream users grew concerned over losing return flows. Recreational interests became worried about how transfers will affect the flow regime. People in other areas grew concerned about precedents set by proposals that could eventually have an impact in their regions.

Marketing proposals often created internal divisions within interest groups and communities as well. For example, some environmental advocates in 1987 promoted water marketing as a way of reducing the need for new dams, while others expressed concern that widespread marketing will eventually result in the public having to pay to protect free-flowing waters. Also, water marketing pitted neighbor against neighbor in rural communities when some farmers decided to cash in on municipal offers to purchase senior irrigation rights, to the potential detriment of the remaining farmers.

1987 saw many of these controversies, as well additional conflicts, come into play in various transactions and transfer proposals. Three issues of particular importance rose to the surface during the past year:
1. The effect of water right transfers on rural communities.
2. Off-reservation leasing of Indian waters.
3. The appropriate role of federal and state governments in water marketing.

Issue 1: Rural Effects of Water Transfers

In 1987, controversies arose in several states over the potential effect of water right transfers on rural areas. Concerns were expressed in farming communities in the Arkansas River basin of southeastern Colorado [February p.9], in the Warm Springs Valley north of Reno [June p.10], and in western Arizona [July p.10] regarding specific municipal water rights purchases. Fears over the long term effects of water marketing on rural areas also were reported in parts of California and New Mexico. [October p.10, November p.12] Although the concerns are varied, common ones expressed include erosion of the local tax base, insufficient water for remaining irrigators, land use effects of dryer up acreage, the impact on farm-related businesses, and a general loss of the cultural integrity of rural communities.

Rural advocates undertook to reduce the effect of water transfers in 1987 through a number of strategies. One approach was to go to court to protect the interests not only of the remaining water users but of the general rural community. In southeastern Colorado, this approach resulted in a settlement in which the purchasing city agreed to leave specified amounts of water in the river for local irrigators and agreed to pay for the revegetation of the acreage from which it had transferred water rights. [February p.9] A similar adjudicatory strategy was pursued by northern New Mexicans who objected to neighbors selling their water rights to a proposed resort development. The district court judge struck down the proposed water transfer based upon it potential effect on other water users as well as on the general public welfare. [January p.9]

Another strategy that was explored in 1987 for protecting rural areas involves buying water rights by a local entity to prevent purchase by customers outside the region. The Kern County Water Agency in central California held hearings on this idea, proposing to impose a “zone of benefit” tax on property within the county in order to fund the purchase of water rights that might otherwise be transferred away from the county. [October p.10] In New Mexico, the concept of Water Trusts was explored as a way for community members to band together to purchase water rights for continued use within the area. [November p.12]

Area-of-origin legislation was another strategy pursued by rural advocates during the past year as a means of mitigating the effects of water transfers. Although the efforts were not always successful (e.g., failure of a transfer moratorium bill in Arizona and a transfer tax bill in Colorado), some measure of benefit was achieved. For instance, the Arizona legislature enacted HB-2462 this past summer that deems municipally-held water ranches in rural counties “taxable property” for the purposes of calculating a county’s revenue share and levy limit. [May p.4]

... a number of bills passed that promote water transfers.
As the new year gets underway, rural communities are assessing the strategies asserted in 1987 and other ways of protecting themselves from the potential effects of water transfers. In many communities, there is a reluctant acceptance that rural political strength may be insufficient to stop water marketing altogether. But through coordinated efforts among the rural areas, dialogue with purchasing municipalities, and planning, rural advocates are hopeful that they can ensure that water transfers destroy neither the economic viability nor the cultural heritage of their communities.

**Issue 2: Indian Water Leasing**

1987 was a critical year regarding the issue of Indian water leasing. Two major Indian water rights settlement bills reached Congress, each with provisions allowing for the off-reservation leasing of tribal waters in order for the tribes to raise money for economic development. One involved the settlement of the water claims of the five mission bands who are members of the San Luis Rey Indian Water Authority north of San Diego [May p.7], while the other implemented the Colorado Ute Indian Water Settlement. [August p.7] Initially, it appeared that the bills might pass with the water leasing provisions intact since the local non-Indian interests had approved the concept and the federal government was favorably inclined towards tribal water marketing [March p.7].

...it is uncertain whether off-reservation leasing will play an important role in regional water markets...

As the months passed, however, off-reservation leasing of Indian waters met with increasing resistance from the western states. (For background on Indian water leasing and Congressional approval, see January p.6.)

Although the issues are complex, the basic positions expressed in 1987 can be summarized as follows. A number of Indian tribes view water leasing as a potential short term means of raising capital for establishing long term economic activities on reservations. The federal government sees water marketing as a promising way for Indian tribes to obtain economic development funds without tapping heavily into the federal treasury. Many western states fear that tribal water marketing unfairly shifts the federal financial responsibility owed to Indian tribes onto states and local water users. They also fear that if a precedent is set allowing for tribal water marketing, numerous western tribes will request payments from non-Indians who have historically used water to which the tribes are legally entitled—or worse yet, begin reallocating that water to the highest bidder.

Many representatives of federal, tribal, and state interests are attempting to break through suspicions and fears in order to negotiate water leasing agreements that are satisfactory to all. During the closing months of 1987, amendments to the leasing provisions of the San Luis Rey Indian Water Settlement Act were reached that should enable final passage of the act. [December p.7] In Arizona, Phoenix and other local water interests agreed to a negotiated settlement regarding water rights of the Salt River Pima-Maricopa Indian Community that included a 99-year lease to Phoenix of tribal water entitlements. [December p.6] Also in late 1987, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation initiated a study of water leasing options that can be undertaken jointly with the state of Montana in accordance with the compact they reached in 1985.

Where these proposals go in the future depends upon a number of factors and attitudes found in Washington D.C. as well as in the West. As 1988 unfolds, it is uncertain whether off-reservation leasing will play an important role in regional water markets or if the whole concept will die in Congress. One point remains clear, however. Regardless of the outcome of the off-reservation leasing controversy, Indian water rights will continue to assert a powerful influence in the future of western water resources.

**Issue 3: The Role of Government**

Throughout 1987, the concept of water marketing was discussed by federal officials, state legislators, and other parties interested in defining the proper role of government in emerging water markets. Some argued that government should take a passive role and allow the market to function freely without intervention. Others lobbied for laws and policies that either promoted private marketing (such as reducing transaction costs) or put constraints on transfers (e.g., area-of-origin protection bills). Some legislators even considered ways in which the state could become an active player itself in water marketing.

Many people expected the U.S. Department of the Interior to take a clear stance in 1987 on water marketing and transfers. A number of critical marketing questions face Interior because of the extensive irrigation water it supplies through the Bureau of Reclamation projects. [January p.5] A particularly crucial issue is who should benefit from the increased revenues generated when federally supplied water is transferred from irrigation to municipal use.

No clear answers were provided by the Department of the Interior during 1987 regarding this and other water marketing questions. On October 1, however, Interior announced the proposed restructuring of the Bureau of Reclamation and the shifting of its focus from construction to comprehensive management. [November p.8] In reports released concurrently with the announcement, Interior came out cautiously in favor of water marketing and directed the bureau to establish policies and procedures, particularly relating to the marketing of conserved waters.

State officials also grappled with trying to define the role of water marketing in their jurisdictions. The Western Governor’s Association, following extensive staff input, came out in July with a Management Directive that was relatively neutral regarding the role of water marketing in state water policy. [August p.11] It did, however, encourage the Department of the Interior to promote voluntary transfers of federally supplied water.

Individual state legislatures also addressed water marketing issues. Whereas legislation to inhibit water marketing
generally failed, a number of bills passed that promote water transfers. For example, Oregon enacted a bill that allows irrigators to sell water salvaged through conservation techniques. [June p.4] California legislators voted to facilitate water transfers in the Imperial and Coachella valleys of southern California by removing the potential of liability from entities that reduce return flows to the Salton Sea. [October p.4] A number of state legislators, including those in New Mexico, Nebraska, and Wyoming, began assessing how the state could become directly involved in water acquisitions and sales. [April p.5, July p.5, November p.4]

A Preview of 1988

1988 promises to be an important year in water marketing and transfers. New proposals, major deals, policy decisions, and other events will take place during the year that will help shape the future of water reallocation. Although no predictions are certain, the following list reflects areas where important decisions and actions are likely to occur in 1988.

• The Senate Committee on Energy and Natural Resources where crucial debates and votes will influence the course of off-reservation leasing of Indian waters.
• The Arizona legislature where private developers, municipalities, and rural lobbyists will vie for and against legislative packages in order to further their respective positions in controlling Arizona's water future.
• The San Francisco Bay-Sacramento Delta region where water quality hearings, Bureau of Reclamation marketing plans, and state legislation in 1988 will help determine the future extent of water exports to a thirsty Southern California.
• The Colorado River basin where one or more private entrepreneurs, Indian tribes, and upper basin states will fight the entrenched "Law of the River" to promote interjurisdictional marketing of water entitlements to lower basin customers.
• The Board room of the Central Utah Water Conservancy District as it cuts a final deal for purchasing more than 100,000 af of water rights in the Salt Lake City area.
• El Paso, Texas, which may consider innovative water transfer and exchange proposals following the New Mexico state engineer's denial of the city's interstate groundwater applications.
• The headquarters of the U.S. Department of the Interior in which policy decisions need to be made regarding the role of federally-supplied waters and federal facilities in western water markets.
• Oklahoma, where water marketing pressures will quickly build if the state supreme court affirms its ruling that undermines existing water transfers to non-riparian lands.
• Western Nevada where cooperative water transfer and exchange arrangements will be pursued by various entities to overcome water disputes and to prevent future water supply crises.

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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.

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

Lawrence J. MacDonnell, Director
Katherine Taylor, Coordinator
Nancy McGee, Secretary
Fleming Law Building, Room 171
Campus Box 401
Boulder, CO 80309-0401
(303) 492-1286

Resource Law Notes
Natural Resources Law Center
University of Colorado
School of Law
Boulder, CO 80309-0401

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