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Spring 1995

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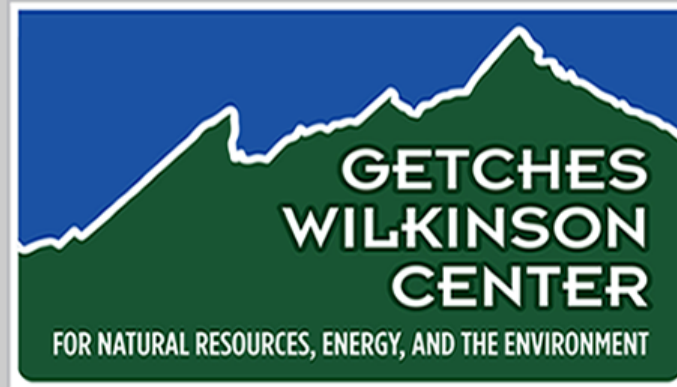
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RESOURCE LAW NOTES

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Number 34

Spring Issue, April 1995

Betsy Rieke Nominated to Become Center Director

Betsy Rieke, Assistant Secretary for Water & Science in the Department of the Interior, has been nominated by Dean Gene R. Nichol of the School of Law for the position of Director of the Natural Resources Law Center, subject to approval by the University of Colorado Board of Regents. The appointment is scheduled to be effective August 1. The Center is delighted with the prospect of having someone of her experience and stature to continue its work.

Rieke will replace Larry MacDonnell, the Center's first and only director, from 1983-1994. The January issue of *Resource Law Notes* featured a tribute to MacDonnell, during whose tenure the Center gained a national reputation for research and publication and for professional educational conferences.

Rieke has recently been credited with helping water interests in California reach a truce in battles over the Sacramento-San Joaquin Delta. She will speak on her experience with these negotiations at the Center's June, 1995, conference on "The Bay-Delta Accord: A Stride Toward Sustainability" (see article this page). She will also speak on April 27 at the Hot Topics in Natural Resources lunch in Denver on the 1994 agreement among the United States and the states of Colorado, Nebraska, and Wyoming to

pursue a basin-wide recovery plan for habitat protection on the Platte River.

Before going to Washington in 1993, Rieke served in the Arizona Department of Water Resources, as Director from 1991-93, and earlier as Chief Legal Counsel. She also practiced with the law firm of Jennings, Strouss & Salmon in Phoenix, specializing in water law and administrative and legislative matters.

For over a decade she worked on implementing Arizona's Groundwater Code, passed in 1980 to provide a dependable long-term water supply for Arizonans. She has also chaired various negotiations to resolve Arizona's fractious water battles.

Born in Buffalo, N.Y., Rieke graduated in 1965 from Oberlin College and received her law degree with highest distinction in 1981 from the University of Arizona. She is divorced and the mother of Frederick Martin Rieke, a post-doctoral researcher in biophysics at Stanford University, and Eowyn Ann Rieke, a medical student at Brown

University who plans to be a primary care physician.

CU Law Professor David Getches has been Interim Director for the Center since January 1, and will serve until Ms. Rieke's arrival in August.



Annual June Conference:

Sustainable Use of the West's Water, June 12-14, 1995

Sustainable development is on the policy agenda for the '90s. What does sustainability mean? Is it a realistic concept? Are water rights compatible with sustainable use? The Center's 16th annual summer conference will explore the meaning of sustainability in the context of the West's demands, development, and natural values. Presentations by leading experts will address the broad concept of sustainable development, with

a particular look at Arizona's experience. The focus will be on efforts in several states to promote sustainable water use.

The basic registration fee is \$495, with lower fees for government (\$395), and for full-time employees of non-profit or academic institutions (\$245) until Friday, June 2, at which time all fees go up \$50. The brochure is being mailed in April. For a copy, please call the Center.

See page 2 for Conference agenda

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Sustainable Use of the West's Water: Conference Agenda

Monday, June 12

- 8:30 **Welcome**
Gene R. Nichol, Dean
- 8:40 **Introduction to the Conference**
David H. Getches, Interim Director, Natural Resources Law Center
- 9:00 **Sustainability: Myth and Reality**
Professor Kai Lee, Center for Environmental Studies, Williams College
- 9:45 **Sustainable Use of Natural Resources: A Native American Perspective**
Ted Strong, Columbia River Inter-Tribal Fish Commission
- 10:50 **Perspectives on Western Water Management from the International Sustainable Development Effort**
Sandra Postel, Director, Global Water Policy Project, Cambridge, Mass.
- 11:35 **Is Sustainable Agriculture Possible in the Arid West? The Example of the Ogallala Aquifer**
Professor John Opie, Center of Technology Studies, New Jersey Institute of Technology
- 12:20 **Lunch**
Speaker: Molly Harriss Olson, President's Council on Sustainable Development
- 1:45 **Politics, Aridity and Engineering**
Michael J. Brophy, Ryley, Carlock & Applewhite
- 2:30 **Agriculture's CAP Experience: Sustainability for Whom?**
Professor Paul Wilson, Department of Agricultural and Resource Economics, Arizona State University
- 3:35 **New Problems and New Solutions**
Herb Dishlip, Arizona Department of Water Resources
Donald Glaser, Office of Program Analysis, U.S. Bureau of Reclamation
- 4:45 **Discussion among Prior Speakers and Audience Participation**
- 6:15 **Cookout on Flagstaff Mountain**

Tuesday, June 13

- 8:30 **Is Sustainable Use of the Columbia River Possible?**
John Volkman, Counsel, Northwest Power Planning Council
- 9:15 **A Response to *Kansas v. Colorado*: Sustainable Use of the Arkansas River?**
David Harrison, Moses Wittemyer Harrison & Woodruff
- 10:20 **The Denver Basin Aquifer in the Long Term**
Charles B. White, Brownstein, Hyatt, Farber & Strickland
Robert E. Brogden, Bishop-Brogden Associates, Inc.
- 11:05 **Restoring the Rio Grande**
Professor Denise Fort, University of New Mexico School of Law
- 11:50 **Lunch (on your own)**

- 1:45 **The Henry's Fork: Finding Mutual Interest in the Watershed**
Janice Brown, Executive Director, Henry's Fork Foundation
Dale Swensen, Manager, Fremont-Madison Irrigation District
- 3:20 **What Is Sustainable Water Use in the West?**
Professor Charles F. Wilkinson, University of Colorado School of Law
Panel of Prior Speakers: Comments and Reactions
- 5:00 **Reception on the lawn**

Wednesday, June 14

- 8:30 **Conservation at the Zuni Pueblo: Lessons in Sustainability**
Jim Enote, Zuni Conservation Project
- 9:15 **Managing Reclamation Facilities for Ecosystem Benefits**
Lawrence J. MacDonnell, Consultant, former Director, Natural Resources Law Center
- 10:20 **State Initiatives that Encourage Sustainable Water Use: A Panel**
Moderator: Craig Bell, Western States Water Council
Montana: Matthew McKinney, Montana Consensus Council
New Mexico: Lucy Moore, Western Network
Oregon: Mary Lou Soscia, Oregon Watershed Project
Washington: Ken Slattery, Washington Department of Ecology
- 12:00 **Lunch**
The Bay-Delta Accord: A Stride Toward Sustainability
Elizabeth A. Rieke, Assistant Secretary, Water and Science, U.S. Department of the Interior
- 1:45 **The Debate: Are Water Rights and Sustainable Water Use Compatible?**
Professor Eric Freyfogle, University of Illinois College of Law
Stuart Somach, DeCuir & Somach
- 3:00 **End of Program**

Associates Breakfast on Tuesday, June 13, During Water Conference

The Center extends to those who have contributed (or wish to contribute before the conference) to our Associates Program in the past year an invitation to join NRLC staff and conference speakers for a special breakfast before the conference on the morning of Tuesday, June 13. Please call Kathy Taylor at the Center for additional details.

Spring Visitors Study Groundwater Management; Natural Gas Deregulation

The Center has enjoyed two visitors this spring. Elisabeth Pendley, the 1995 El Paso Natural Gas Law Fellow, is studying the implications for the natural gas industry of Order No. 636 issued in 1992 by the Federal Energy Regulatory Commission (FERC). Order No. 636 successfully restructured the natural gas industry and resulted in numerous changes throughout that industry, concurrently raising many legal issues, such as the necessity for the local distribution company's obligation to serve; unbundling of services at the local level; the ability to compete with aggregators, marketers and brokers; and the reconfiguration of the gas



pipelines and local distribution companies.

Ms. Pendley is on leave from KN Energy, Inc. of Lakewood, Colorado, where she has been Assistant General Counsel since 1993, responsible for resolving complex FERC regulatory issues and dealing with state regulatory commissions of Wyoming, Colorado, and Texas. Previously she worked at FERC in Washington, D.C. Her J.D. is from the University of Wyoming, and B.A. from Mary Washington College of the University of Virginia.

William Blomquist, Professor of Political Science, Indiana University, Indianapolis, is the author of the book *Dividing the Waters: Governing Groundwater in Southern California* (1992). His areas of specialization include American constitutional law, judicial process, and state and local politics. While in Colorado, he is studying comparative approaches to groundwater management in Arizona, California, and Colorado. His Ph.D. in Political Science is from Indiana University, Bloomington, and both M.A. and B.S. from Ohio University.

Deadline for Applications for 1996 El Paso Natural Gas Fellowship is July 15

The Center is pleased to invite applications for the spring 1996 El Paso Natural Gas Law Fellowship, which offers a stipend of \$20,000 and other support from the Law School. Generously underwritten by the El Paso Natural Gas Foundation, the fellowship is for research in **oil and gas, energy, minerals or related public lands 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, the Fellow will participate in activities of the Law School and the Center, and will have opportunities to exchange ideas with faculty and

students in both formal and informal sessions. The Fellow is expected to produce written work suitable for publication in a professional journal.

Those wishing to apply should send a resume and a letter detailing their research and publication plans to David H. Getches, Professor of Law, Campus Box 401, Boulder, CO 80309. Letters of reference (no more than three) may be sent directly to Professor Getches, Interim Director of the Natural Resources Law Center. For additional information about the El Paso Natural Gas Fellowship, contact the Center (303) 492-1288.

Hot Topics in Natural Resources Spring Series

Will Shafroth, Director, State Board of the Great Outdoors Colorado Trust Fund, discussed how lottery funds approved in 1992 for parks, wildlife, trails and open spaces have been used and



what the implications will be for state and local governments, at February 9 Hot Topics in Natural Resources CLE lunch in Denver.

Laurie Mathews, Director, Colorado Division of Parks and Outdoor Recreation, moderated and Rick Hum, Summit County Commissioner, commented from the perspective of local government.



Other Hot Topics scheduled this spring included a talk in March by Elisabeth Pendley, 1995 El Paso Fellow, on Implications of FERC Order No. 636 on the Natural Gas Industry.

On Thursday April 27, NRLC Director Designate Betsy Rieke will discuss efforts to negotiate a basin-wide recovery plan for habitat protection on the Platte River at the third Hot Topic, entitled "Whooping Cranes & Piping Plovers: Watershed Problem Solving on the Platte." Jim Lochhead, Executive Director of the Colorado Department of Natural Resources, will moderate, and Jeff Fassett, Wyoming State Engineer, and Mike Jess, Nebraska Director of Water Resources, will comment on their states' concerns.

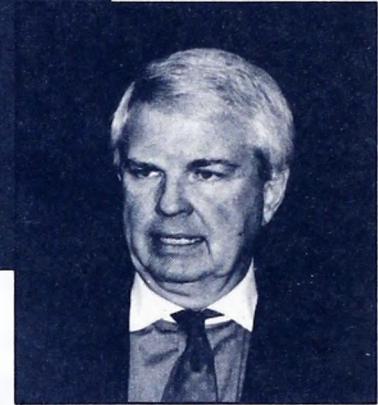
Joint Effort with Boulder County Bar and American Planning Association Growth Management Symposium Draws Burgeoning Crowd

Two Colorado Governors - Roy Romer and Richard Lamm - lent weight to concerns about the impacts of growth on Colorado communities and the state as a whole at the Center's annual symposium organized in collaboration with the Boulder County Bar Association, held March 3.

As Governor Romer commented, growth is seen by some as a value, by others as a threat, making it difficult to set policy at the statewide level. Efforts to manage growth arouse concerns for private property rights and individual freedoms, and yet most people recognize that their quality of life is related to keeping growth within some manageable limits. Therefore, the most successful growth management tends to come at the local level, where there is opportunity to build understanding of the consequences of growth and to reach consensus on the appropriate methods for managing it.



The addition of a third sponsor, the Colorado Chapter of the American Planning Association, swelled registrations to over 150, creating a lively discussion of what techniques are available to state and local governments, and what objections there may be to their use.



Colorado Governor Roy Romer (left) chats with CU Law Dean Gene R. Nichol.

Former Colorado Governor Richard Lamm.

Pursuing the Elusive Goal of "Sustainable Development" Through International Efforts

Anita Margrethe Halvorsen¹

The global environment is deteriorating in large part because humanity has accumulated an enormous potential to destroy life on earth. The depletion of the stratospheric ozone layer is a prime example of this problem. The ozone layer shields us from harmful ultraviolet rays that can cause skin cancer, blindness, and destroy certain plankton, which are the basis of the marine food chain. Some of this deterioration occurred before we had knowledge of the manner in which our

actions were affecting the environment. However, we are now fully aware of the fact that we are using natural resources and the environment in a way that threatens the survival of future generations.

Fortunately, humanity has begun to mend its ways and is launching international efforts leading to sustainable development. New international institutions are now promoting a shift toward a sustainable path. For instance, an unprecedented international cooperation effort led to the adoption of the Montreal Protocol in 1987. This protocol regulates chlorofluorocarbons (CFC's), the man-made chemical compounds that deplete the ozone layer. This article will discuss some of the progress that has been made in pursuing sustainable development through efforts at international cooperation that build on the model of the Montreal Protocol.

The term sustainable development first became widely used in 1987 when the

World Commission on Environment and Development (WCED) published its report *Our Common Future*. In that report it was defined as development that fulfills the social, economic, and environmental needs of the present without jeopardizing the needs of future generations. The World Commission called for the integration of environmental considerations into all policy decision making and planning in order to achieve sustainable growth. The report was adopted by

¹ Doctoral Candidate at Columbia University School of Law; Law degree from the University of Oslo; LL.M. Columbia University; Former Senior Executive Officer, Royal Norwegian Ministry of Environment. Ms. Halvorsen taught European Economic Community Law at the University of Colorado School of Law in the Spring of 1992. She was a Visiting Research Fellow at the Natural Resource Law Center for the academic year 1992-93. Most of the material used to prepare this paper stems from United Nations sources; for present purposes most references have been omitted.



the UN General Assembly that same fall, thereby demonstrating that the world community had finally acknowledged environmental and developmental issues as interdependent. It had taken fifteen years from the time environmental issues were first introduced into the international arena at the United Nations Conference on the Human Environment, held in Stockholm in 1972, until development was accepted as being inseparable from the environment.

Sustainable development does not mean returning to pre-industrial conditions. It urges economic growth, with key roles being played by governments, business, and industry in alleviating poverty and improving living standards, while preventing global environmental degradation. Progress toward sustainable development has been hindered partly due to a conceptual misunderstanding. Economic growth and environmental protection are not contradictory goals. Industrialized and developing countries alike are beginning to recognize the fact that unhampered industrial development, at the expense of the environment erodes the potential for long-term development.

Anti-pollution technology has made many industries more profitable by enabling them to become more resource efficient. Many industries have reached the conclusion that concern for the environment leads to financial savings and increased competitiveness. Clean-up costs surpass the cost of pollution prevention. Business and industry that traditionally regarded the natural resources as unlimited sources of energy and raw materials are now beginning to internalize the costs of pollution control and waste disposal as costs of doing business rather than shifting them to society at large or to future generations.

Governments are beginning to use national accounts in order to factor in the loss of natural resources. In addition, subsidies on environmentally degrading activities are being removed. Finally, environmental concerns are more commonly being taken into consideration in evaluation of proposed grants of development funds as well as on domestic issues.

The United Nations Conference on Environment and Development (UNCED), held in Rio in June of 1992, was a breakthrough in the effort to integrate environment and development issues. In essence a compromise was reached between developing countries

and industrialized countries. Developing countries agreed to change their social and economic policies in an effort to move toward sustainable economic development. Industrialized countries also agreed to address consumption and production patterns in order to pursue a more sustainable path, in addition to helping developing countries with technical and financial assistance. In

***Capacity 21
concentrates on
domestic
environmental
problems in the
developing countries
by financing
programs that
benefit mainly the
local environment.***

contrast to the Stockholm conference, which concentrated on centralizing management and technical expertise, the Rio conference focused on individuals, their communities and non-governmental organizations (NGOs).

Five new legal instruments were adopted at Rio, including the Framework Convention on Climate Change (31 I.L.M.849) and the Convention on Biological Diversity (31 I.L.M.822). The principles contained in the non-binding Rio Declaration (UN Doc. A/CONF.151/5 (1992)) set out the rights and responsibilities of States in the area of sustainable development. A set of 15 Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (UN Doc. A/CONF.151/26 (1992)) was also adopted by the Rio Conference. And Agenda 21 (UN Doc. A/CONF.151/4 (1992)), also a non-binding instrument, was launched as a comprehensive action program representing the blueprint on how to get onto the path of sustainable development.

Agenda 21 is a 40 chapter document

covering virtually every conceivable aspect of human activity affecting the environment. Areas analyzed range from toxic chemicals to poverty issues to the role of trade unions in promoting sustainable development. It provides a framework for global and national action for sustainable economic development and protection of the environment.

In conjunction with the preparations for UNCED, the UN Development Program (UNDP) launched a program called Capacity 21. The UNDP's major function is to assist developing countries to accelerate their economic and social development by providing technical assistance related to their national development plans and priorities. Capacity 21 was created to help developing countries build the capacity to formulate and implement national programs of sustainable development. Unlike the Global Environmental Facility, described below, which concentrates on projects with global environmental benefits, Capacity 21 concentrates on domestic environmental problems in the developing countries by financing programs that benefit mainly the local environment.

Since the Rio Conference, the UN Commission on Sustainable Development (CSD), conceived by Agenda 21, was established in December of 1992 with responsibility for implementing Agenda 21. Both the Framework Convention on Climate Change and the Convention on Biological Diversity have since been ratified, in 1993 and 1994 respectively. Furthermore, conferences have been held on high seas fisheries and the sustainable development of small island states. Lastly, the Convention to Combat Desertification, which was called for at the Rio Conference, was concluded in July 1994. This international legal agreement to curb the degradation of dry lands was signed in October and will enter into force once ratified by 50 states.

The CSD is responsible for reviewing how well national governments and international law and institutions are protecting global natural resources and helping developing countries become full partners in these agreements. The CSD functions as a subsidiary body of the UN Economic and Social Council (ECOSOC). It is made up of high-level representatives of 53 nations elected from UN member states. Each member has a three-year term and membership rotates among governments and different

geographical regions. The Secretariat of the Commission is located in New York at the new Department of Policy Coordination and Sustainable Development. In addition, a High level Advisory Board of 21 experts was established, which is to advise the CSD.

The functions of the CSD are to monitor the implementation of Agenda 21 through-out the UN system, review national reports on how states are implementing Agenda 21, review progress in the implementation of the commitments set forth in Agenda 21 by donor countries, and review and analyze information provided by NGOs.

The Commission held its second

One of the major problems in the follow-up to the Rio conference is that states are not fulfilling their financial commitments made in Rio.

session on May 14-27, 1994. The multi-year thematic program, instituted at the 1993 session and based on the grouping of the chapters in Agenda 21, established the scope of the discussions. Some of the topics were cross-sectoral issues, such as finance and transfer of technology, decision making processes, and changing consumption and production patterns. Other topics were sectoral issues that included freshwater, health, and toxic chemicals.

One of the major problems in the follow-up to the Rio conference is that states are not fulfilling their financial commitments made in Rio. For Agenda 21 to be implemented \$625 billion are needed, the bulk of this being covered by developing countries through the redeployment of their own resources. Another portion of the total amount, \$55 billion, will be covered through existing Official Development Assistance (ODA).

Without additional finances very little action will take place as far as developing countries are concerned. Delegates to the session stated that this was due partly to the recession still affecting many industrialized countries. Instead of increasing their official development assistance (ODA), some donors have actually cut back on their contributions.

CSD is definitely a forum in which to keep the "spirit" of Rio alive. But its monitoring of implementation of Agenda 21 on the national level leaves a lot to be desired. Reports specifying what each country has done to implement Agenda 21 were few, mainly because the guidelines were too complicated. Suggestions for using indicators for sustainable development have not yet been agreed upon.

In addition to funding from ODA, the implementation of Agenda 21 is also to be funded by the Global Environmental Facility (GEF). The GEF is the main financial mechanism for sustainable development projects. It is run jointly by the World Bank, the UN Environment Program (UNEP), and the UN Development Program (UNDP). The GEF sponsors programs for helping developing countries participate in solving global environmental problems. The Facility has four mandated funding areas: preventing climate change, loss of biodiversity, depletion of the ozone layer, and protecting international waters.

The GEF was established in 1990 as a pilot program for three years to invest in projects that promote and adopt environmentally sound technologies which will produce global benefits in the four areas mentioned above. In March 1994 the GEF was restructured and refunded with \$2 billion. Originally, the GEF was administered by the World Bank; now it will have a more independent status. The Facility now has an Assembly, a governing Council, and a Secretariat. In addition, a Scientific and Technical Advisory Panel will provide advice. The World Bank has been invited to be the trustee of the GEF Trust Fund. Participation in the GEF is now open to any state member of the United Nations or any of its specialized agencies, enabling universal membership.

The Assembly will consist of the representatives of all the states participating in the GEF. It will meet every three years to review the general policies of the Facility, its operations, and its membership. The Council will consist of 32 members; 16 from the developing

countries, 14 from the developed countries, and two from central and eastern Europe and the former Soviet Union. The Council's functions are, among others, to: review the operation of the Facility, ensure that GEF programs are monitored and evaluated on a regular basis, and review and approve the administrative budget of the GEF. The Secretariat, headed by a chief executive officer appointed by the Council, reports to the Assembly and the Council.

The GEF finances the incremental costs of ensuring that a project benefits the global environment. For instance, if a developing country has a project which is economically viable, say a fossil fuel power plant, but requires supplementary finances to bring about global benefits (e.g., to switch the technology in order to use natural gas, thereby lowering emissions of carbon dioxide), then it would be eligible for GEF funding. GEF also finances innovative and demonstration projects, which have a good investment potential.

In conclusion, it is clear that humanity has begun to head in the right direction, toward sustainable development through efforts in international cooperation. Awareness of the interdependence of environmental and developmental issues has greatly increased in the last two decades. However, there is still a great deal of work to be done. The newly established UN Commission on Sustainable Development needs to be strengthened in its role as a monitor of the global environmental situation. In addition, developing and industrialized countries alike, must fulfill their commitments made at the Rio conference.

Glossary of Acronyms

CFCs: man-made chemical compounds that deplete the ozone layer.

UNCED: United Nations Conference on Environment, also commonly referred to as Rio.

UNDP: UN Development Program

ECOSOC: UN Economic and Social Council

CSD: UN Commission on Sustainable Development

NGO: Non-Governmental Organizations

ODA: Official Development Assistance

GEF: Global Environmental Facility

Tailoring the Federal Role in Natural Resources Policy to the Places and the People of the West

Professor David H. Getches

On April 7, 1994 Congressman George Miller, Chairman of the Committee on Natural Resources of the U.S. House of Representatives, held oversight hearings in Salt Lake City on "The Changing Needs of the West." Professor David H. Getches, Interim Director of the Natural Resources Law Center, was asked to testify on the federal role in natural resources and environmental policy. Following is an edited transcript of his comments.



Few people are entirely happy with the federal role in natural resources and environmental policy in the West. As westerners we have mixed feelings about the history of federal programs and policies. Some we view with regret; some with no regret.

Consider the past federal actions that cause us to regret the federal government's role.

- We regret single-minded policies, no matter how urgent they seemed at the time, that depleted or damaged our public lands and threatened neighboring communities. We are paying hundreds of millions of dollars to clean up uranium mill tailings that were the result of a federal effort to meet a national defense need in the 1950s.

- We regret decisions that failed to account for the health of natural systems on lands managed by the government. Timber-cutting policies for the public lands are widely criticized, especially on old growth forests. The story of bringing the spotted owl to the brink of extinction is notorious. In the forests that were home to spotted owls the government also allowed timber companies to clear all the yew trees out because they were considered a "weed species." Now we find that the bark of the yew is needed to make a drug for treatment of uterine cancer.

- We regret actions that caused the problems that we are today paying dearly to correct, although our response is motivated by a newly-found awareness of the value of species diversity. There once were federal programs to poison squawfish and other species considered "trash fish" below Flaming Gorge Dam on the

Green River. Now we are spending millions of dollars to recover the squawfish because it is an endangered species protected by federal law.

- We regret not anticipating the consequences of federal development projects. For instance, when the government built the irrigation systems of California's Central Valley it failed to deal adequately with the inevitable drainage from the fields that would be served. The excess irrigation water collected in one place and attracted thousands of birds — so many that someone in the federal establishment decided it should be called Kesterson Wildlife Refuge. Then they discovered the return flows were so polluted with selenium from the soils in irrigated fields that the "refuge" had become a poisonous, bird-killing sump.

The list of regrets about the federal government's role in natural resources management is long. But we have no regrets at all about many wise federal decisions and policies.

- We are thankful for Congress's action 120 years ago to set aside Yellowstone National Park as a "pleasuring ground" for future generations.

- Today no one regrets the decisions *not* to build Marble Canyon or Bridge Canyon Dams that would have flooded Grand Canyon, or *not* to build Echo Park Dam that would have flooded Dinosaur National Monument.

- We do not regret establishing a national system to regulate grazing with the Taylor Grazing Act in the 1930s when Congress realized that public rangelands were being despoiled by uncontrolled grazing.

- Few now regret that Congress enacted the Mineral Leasing Act in 1920 to protect the public lands from runaway exploitation of oil and gas resources.

- When we adopted sweeping national laws to control air and water pollution in the 1970s, there was little question it was a federal responsibility to deal with a problem that had become bigger and more complex than the states could handle. The results of those acts prove their worth whatever imperfections they may still harbor.

If some decisions of the federal government are inappropriate and others are salutary, it is useful to ask what decisions in each group have in common with one another. Most of the "no regrets" decisions follow themes that could inform the kind of decisions the federal government ought to make in the future:

- They are based on a long view of natural resources stewardship.

- They show a commitment to fundamental and widely-shared values in our society.

- And they respond to identifiable national interests in lands, resources, and the environment.

By contrast, the decisions and policies that we regret tend to focus on short-range benefits, they lack a compass that is influenced by broadly held values, and they often disregard important national interests.

This suggests three criteria for the federal role in setting natural resources policy in the future:

1. The federal government's role should be to add depth and perspective when it participates in natural resource decisions.

Major resource decisions must transcend jurisdictional lines and transcend generations. One way of thinking about resource commitments is to adopt a "philosophy of permanence." This ideal is borrowed from the cultures of Native Americans who saw themselves in relation to a particular place. They knew their lives as individuals were short, but that as a people belonging to a place

they had a long past and a long future. The place connected them with their ancestors who had passed through before them and generations who would come later. They knew that people past and future depended on animals and fish and plants and so they conformed their activity to an ideal that ensured that all of these living things would have permanence.

Today, ecologists and land managers are expressing the ideal of permanence in scientific terms like ecosystem protection and socio-economic terms like sustainability. It is appropriate for agencies to seek new land management paradigms that look beyond the provincialism of agency jurisdiction and to be conscious of systems rather than specific resources. BLM programs certainly affect neighboring lands managed by the Park Service or Forest Service as well as lands regulated by state and local governments. Thus federal agencies appropriately search for ways to integrate management of all those lands. And they realize that environmental and economic health — the destiny of natural and human communities — are intertwined.

2. The government's public land decisions should reflect fundamental, broad-based values of society.

This requires understanding what motivates people and what "communities of interest" — governmental and business, environmental and scientific, rural and urban — are involved. With natural resources policy it is important to design processes that respect and include effects and interests that may not otherwise be well-represented. Fundamental fairness — equity and our constitutionally-rooted ideals of due process and democracy — commands that policies for lands owned by everyone in the nation not be dictated from on high by a few. Instead they should be influenced by people who live on and near the affected lands, people who depend on them for a livelihood, as well as by those who live far away but who visit the lands or just care deeply about them. Cattlemen, naturalists, chambers of commerce, bike riders, people who use petroleum products, and people who seek quiet and peace of mind, all are part of "communities" who find value in the public lands and all need to be heard in making the policies and decisions. And all must be prepared to make reasonable accommodations.

There is a broad, emerging acceptance that the long-term survival of humanity

requires self-discipline. Increasingly, the lifestyle of industrialized countries like the United States threatens survivability of human life on earth. It demands production of toxics, consumption of nonrenewable natural resources, and encroachment on habitat of other species, eroding the diversity of life, which we now realize is vital to the health and survival of all species, including humans. This ecological perspective — first a biological reality — has taken on ethical dimensions as we realize that it implicates our responsibilities to our fellow humans, not just to an abstract "natural world." It is necessarily part of responsible policies set by governments.

3. The United States is responsible for expressing and standing up for what are truly national interests.

Our national heritage and our Constitution vest certain duties and powers in the President and Congress. What are the peculiar national interests the federal government has in natural resources?

Congress's power over commerce has led to adoption of national standards for clean air and clean water that protect human health and welfare while leveling the commercial playing field so that states

Can these lofty ideals be institutionalized by a cumbersome federal establishment dominated by political pressures? . . . I think so.

and localities do not use lax standards as an inducement to bring in new business.

The government has assumed legal responsibilities through treaties that promise safe passage for migratory birds and delivery of quantities of water to other countries, and treaties with tribes that promise land and water and secure hunting and fishing rights.

There are moral responsibilities, too,

like keeping faith with old promises, express and implied, that induced economic activity and the dependence of some individuals and communities on resource exploitation. Times change and so do policies, economics and social values. But we have to keep in mind equity for those who relied on past policies but who are now facing dislocations as resource extraction declines because of depleted resources, changing markets, or evolving environmental values. Though not as strong or binding as legal obligations, there is moral force in the argument that the government should support the best efforts of public land neighbor communities to make a transition from what was to what will be.

We have a unique heritage in this country of open public lands, that considers wild places and animals and spectacular national features—unparalleled in any other nation—to be part of a legacy that we expect to pass on to our children. It is understood to be a high calling of the national government to hold this natural patrimony in trust for future Americans.

Can these lofty ideals be institutionalized by a cumbersome federal establishment dominated by political pressures? The government is notorious for its blunt-instrument approaches to problem solving. Can we really expect it to design new institutions and processes that follow broad ideals, are sensitive to the uniqueness of each place and each case and that, at the same time, are clear and resolute in furthering national goals? I think so. But it is going to require even greater tolerance for the complexity of the decisions and the diversity of affected interests. There must be new and flexible institutions and laws. And it requires the federal government to yield some of its traditionally centralized control.

Part of the solution is to include local communities in public land decisions. But communities of interest are broader than those who happen to live near public lands. The challenge is to make ecologically sound public lands decisions that are accountable to all the affected interests.

Is an *ad hoc*, localized approach to public land policy too revolutionary or impractical? I don't think so. In fact, there are several examples, large and small, of the federal government's becoming more innovative in its management of public lands and resources by targeting ecosystems or regions or watersheds and allowing policy to be

there are several examples . . . of the federal government's becoming more innovative in its management of public lands and resources

tailored to the landscape while respecting communities of interest.

- The now-famous efforts of diverse interests in Colorado's Gunnison Basin is a model for how consensus between traditional rivals over use of the public lands can be achieved if they are given latitude to find new ways, and are allowed to share some of the federal government's traditional decision making power. Ranchers and environmentalists sat down together with federal and state officials to work out grazing policy affecting lands they both loved and used.

The particular results of the revolutionary Gunnison Basin approach may not constitute a template to guide public land grazing policy every place in the West. But the *process*, involving local ranching and environmental interests as well as national interests represented by federal officials and national environmental groups, deserves emulation. This idea, on a local or watershed scale, could be adopted for consensus decision making in a variety of issues concerning the public lands.

- Consider also the Pyramid Lake/ Truckee River example where competing interests included two Indian tribes, the urbanizing Reno-Sparks area, a national wildlife refuge, two federally-listed endangered fish species, and two federal Reclamation projects. A solution was crafted at the hands of people who had not been around the same table before. There were multiple, sometimes conflicting federal interests, and anybody else with a bona fide interest was also welcome at the table. A solution was possible only through the contributions, innovations, and concessions of everyone from the tribes to environmentalists to the cities to the power company. But it depended in the first instance on federal facilitation to open up

the process and transcend traditional divisions of agency responsibility.

- The Northwest Power Planning Act is a much grander, legislatively-created device for institutionalizing more inclusive, locally-based public resource decision making that was formerly dominated a single-purpose federal agency. The Act created a Commission to consider multiple communities of interest affected by the way the Columbia River system is developed and used — states, tribes, power generators and consumers, and the fishing industry. It has improved measurably the old way of allowing federal dams operated primarily for power generation to drive decisions that affect a wide variety of interests. Its shortcomings in not being able to revive the ailing salmon fishery are largely related to its failure to include an even broader range of interests like agriculture and timber whose demands result in depletion or pollution of the river system. Nevertheless, it is an improvement on the legacy of federal resource decisions.

- The Alaska National Interest Lands Conservation Act (ANILCA) was a radical departure from traditional federal models of resource management because it tailored policy to the landscape. There, the national interest was so great that Congress refused to bow to shortsighted and transient political resistance. The nation had the resolve to allocate over 100 million acres to a variety of federal programs allowing for different kinds and levels of resource use and preservation so far as compatible with national interests and values.

The political process accommodated both local and national interests to the ecological and social situation of Alaska. It was sensitive enough to hear the Alaska Native voice and build in some protection for the subsistence hunting and fishing lifestyle that is the cultural keystone of the Native villages and rural Alaska communities. It also heard out old sourdoughs who cautioned that an absolute ban on mining and resource development would be inappropriate economically and culturally. Congress modified the Organic Act formulas for parks, wildlife refuges and national forests to allow greater use of certain resources and thereby to fit the local social and economic situation. And it also accounted for the interests of future Americans in securing some of the nation's vast, unspoiled natural heritage in Alaska's wild mountain ranges,

untamed rivers, gigantic glaciers, and diverse wildlife populations.

To sum up, the federal government must pursue greater depth and broader perspective in setting public land policy. Federal agencies will continue to articulate and insist on some national standards and goals, but also should enable and propose frameworks and processes that recognize the underlying values that are important to society. This requires collaboration with those who represent a range of interests and perspectives. Agencies must be willing to let down their traditional jurisdictional barriers, and reach out to include state and tribal governments, and a variety of communities of interest, official and unofficial. The process must be one that can tailor policy to the ecological realities of the land and to the values of people who have a stake and are affected by how it is used.

This kind of federal role and responsibility will vastly increase the chances of making wise and enduring federal resource decisions — decisions that our grandchildren will view with no regrets. It will also help to ensure that the new West will be characterized by the permanence of its natural and cultural uniqueness and its economically viable communities.



Wendy Rudnik, '94 CU Law Alumna, is working on the Center Staff this spring assisting with a research project funded by the Ford Foundation. Her job is to direct and organize the research, writing, and structure of a source book on watershed management efforts in the Western United States. We are most pleased to have her assistance.

Recent Publications

Recent Publications and Materials of the Natural Resources Law Center

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Books:

- BK06 *Controlling Water Use: The Unfinished Business of Water Quality Protection*, David H. Getches, Lawrence J. MacDonnell, Teresa A. Rice, 1991, \$22.
- BK04 *Proceedings of the Sino-American Conference on Environmental Law, Beijing, 1987, 1989*, \$12.
- BK03 *Water and the American West: Essays in Honor of Raphael J. Moses*, David H. Getches, ed. 1988, \$15.
- BK02 *Tradition, Innovation & Conflict: Perspectives on Colorado Water Law*, MacDonnell, ed. 1987, \$12.

Two Center books have been published by and are available from Island Press, Dept. RLN (1-800-828-1302). (Please do not order from the Center):

Searching Out the Headwaters: Change and Rediscovery in Western Water Policy, Sarah F. Bates, David H. Getches, Lawrence J. MacDonnell, and Charles F. Wilkinson, 1993.

Natural Resources Policy and Law: Trends and Directions, ed. by Lawrence J. MacDonnell and Sarah F. Bates, 1993.

Research Reports

- RR12 "Water Banking in the West," Lawrence MacDonnell, Charles Howe, Kathleen Miller, Teresa Rice and Sarah Bates, '94, \$15.
- RR11 "Agricultural to Urban Water Transfers in Colorado: An Assessment of the Issues and Options," Teresa Rice and Lawrence MacDonnell. 82 pgs. 1993. \$10.
- RR10 "Instream Flow Protection in the West," revised edition, Lawrence J. MacDonnell & Teresa Rice, editors. 1993. \$22.
- RR09 "Recreation Use Limits and Allocation on the Lower Deschutes," Sarah Bates, 76 pgs. 1991. \$8.
- RR08 "Facilitating Voluntary Transfers of Bureau of Reclamation-Supplied Water," Lawrence J. MacDonnell and others, Vol. I, 132 pgs. (\$10) & Vol. II, 346 pgs. (\$15), or both volumes for \$22, 1991.
- RR07 "Wetlands Protection and Water Rights," MacDonnell, Nelson & Bloomquist, a Report to EPA Region VIII, 1990, 50 pgs. \$8.

- RR06 "The Water Transfer Process as a Management Option for Meeting Changing Water Demands," Lawrence J. MacDonnell and others, Vol. I, 70 pgs. (\$10) & Vol. II, 391 pgs. (\$15), or both volumes for \$22, 1990.

Policy Papers

- PP01 "America's Water: A New Era of Sustainability. Report of the Long's Peak Working Group on National Water Policy," Dec. 1992. 12 pgs. \$10.

Western Lands Reports

- WL01 "The Western Public Lands: An Introduction," Bates, 1992. \$8.
- WL02 "Discussion Paper: The Changing Economics of the Public Lands," MacDonnell, 1993. \$8.
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Conference Materials - Notebooks and Audiotapes

These materials are certified for Home Study CLE credit by the Colorado Board of Continuing Legal and Judicial Education.

- CF17 "Who Governs the Public Lands?" 3-day conf. Sept. 1994, notebook \$50; audiotapes \$120.
- CF16 "Regulatory Takings and Resources: What are the Constitutional Limits?" 3-day conf. June 1994, notebook \$75; audiotapes \$150.
- CF15 "A New Era for the Western Public Lands," 3-day conf. Sept. 1993, audiotapes \$100; videotapes \$200. For Symposium Issue, contact Univ. of Colorado *Law Review*, (303) 492-6145.
- CF14 *Water Organizations in a Changing West*, 3-day conf. notebook, June, 1993, \$75; audiotapes \$150
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◆ April 27: Watershed Problem Solving: The Platte Basin

ANNUAL CONFERENCES:

◆ June 12-14: Sustainable Use of the West's Waters

◆ October 11-13: Western Public Lands Conference

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