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Winter 1996

Resource Law Notes Newsletter, no. 36, winter issue, Jan. 1996

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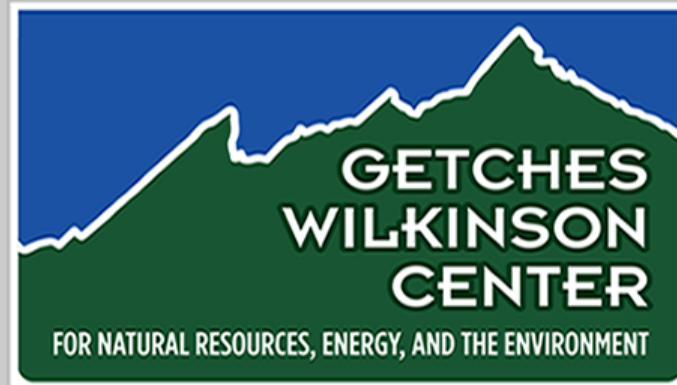
Citation Information

Resource Law Notes: The Newsletter of the Natural Resources Law Center, no. 36, winter issue, Jan. 1996 (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).



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RESOURCE LAW NOTES

Natural Resources Law Center ♦ School of Law ♦ University of Colorado at Boulder



Number 36

Winter Issue, January 1996

NRLC Spring Programs:

June Conference to Examine Biodiversity Protection and the Endangered Species Act

The Center's annual summer conference, June 10-12, will examine the legal framework for protection of biological diversity, the rationale for biodiversity protection and proposals to strengthen, weaken or otherwise modify the manner in which biodiversity is protected under federal and state laws.

Particular attention will be given to the Endangered Species Act, its application in regional and local contexts, and the consequences for the species at issue and local economies. The conference will also address state, tribal, local and private efforts to preserve biodiversity. Brochures will be mailed in the early spring. For more information, contact Kathy Taylor, (303) 492-1288.

Hot Topics: State Trust Land; Air Quality; and Surface/Mineral Estates

The Center will begin its spring Hot Topics in Natural Resources CLE lunch series on Monday, February 5, with a discussion of State Trust Land Management in Colorado. Historically, revenue production for public schools has been an overriding management objective for the State Board of Land Commissioners. Should broader public values, including recreation and open space, influence some management decisions? The panel — including State Land Commissioner **Maxine Stewart**; **John Evans**, Colorado Board of Education; **Mark Burget**, The Nature Conservancy; and **Reeves Brown**, Colorado Cattleman's Association — will explore the objectives of trust land management and whether recreational use or preservation is consistent with constitutional and statutory directives.

The Center has just completed a study related to the State Land Board. Please see story on page 7.

On Tuesday, March 12, Hot Topics will examine air quality and transportation on Colorado's Front Range. Who will take responsibility for the decisions and sacrifices which must be made to control the "brown cloud"? **Wade Buchanan**, Chairman, Regional Air Quality Council (RAQC), will moderate a panel including **David Pampu**, Deputy Executive Director, Denver Regional Council of Governments (DRCOG); **Christine Shaver**, Environmental Defense Fund attorney; and **Ken Hotard**, Senior Vice-President, Boulder Area Board of Realtors.

The third Hot Topic, Tuesday, April 23, will feature **Andrew Mergen**, the Center's 1996 El Paso Natural Gas Law Fellow. Many federally owned lands overlie privately owned oil and gas and mineral rights. Mergen will look at legal battles between federal interests and private owners of mineral estates which have resulted from increasing competition between agency multiple use directives and private interests.

Joint Program with Boulder County Bar, March 15, to Consider Permitting Issues

The Center's annual joint program with the Natural Resources and Environment Section of the Boulder County Bar Association will consider permitting by regulatory agencies associated with land and water use. The focus will be on agency flexibility to include changed or new conditions in permit renewals for environmental protection or other reasons different from those addressed by the parties originally.



Participants enjoy picnic in warm October weather at "Challenging Federal Ownership and Management: Public Lands and Public Benefits" conference, Oct. 11-13, 1995. Additional conference coverage is on page 2.

The program will include lunch and Continuing Legal Education credit. We will send brochures to people in the Denver-Boulder area in February; if you do not receive a flyer, please call Kathy Taylor for information.

HELP!

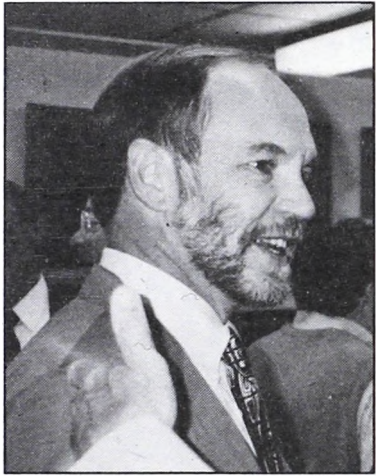
The Center's mailing list has grown, AND GROWN. While we're delighted to mail to anyone who's interested in our material, we do need to clean the list. There's a post card in this issue. Please take a minute to return it to confirm your interest so that we won't purge your name.

Challenging Federal Ownership and Management Conference

*Michael Gheleta,
NRLC Associate Director*

At the Center's annual fall public lands conference in October, 170 attendees heard from a diverse group of speakers and panelists with varying viewpoints on current issues concerning western public lands.

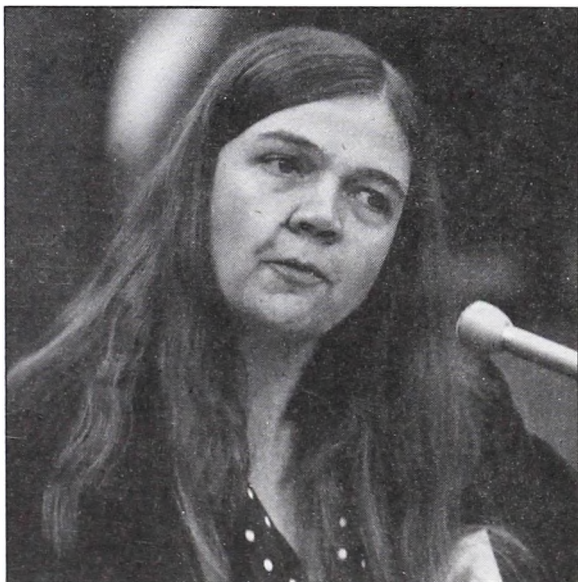
Montana State University economics professor **Terry Anderson** advocated privatization of up to 50 percent of federal



Prof. Terry Anderson

lands and "free market environmentalism." Former National Park Service Director **James Ridenour** suggested that a third of the nation's approximately 360 park sites could be removed from federal management and handed off to state, local, or even private management.

Other speakers, including several on a panel of public land users, opposed privatization. **Nadine Bailey**, vice-chair of Women in Timber in California, indicated



Prof. Patricia Limerick of the CU History Department gave background on the history of the public land debate.

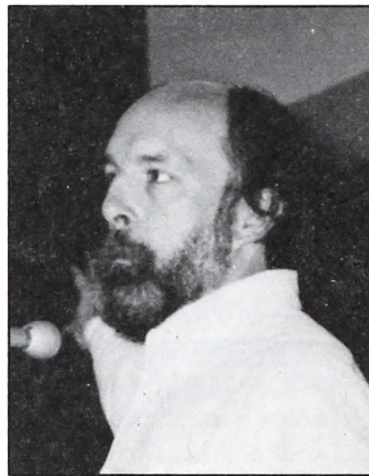


Prof. Charles Wilkinson

National Cattlemen's Association, expressed the view that it is not in our national interest to proceed with the wholesale sale of western public lands.

University of Colorado law professor **Charles Wilkinson** gave an address stressing the critical role that public lands play in our national heritage.

Other conference speakers called for improved agency management and cooperation



Randal O'Toole

that the logging industry could not afford to buy timber-producing public lands. **Ken Spann**, a cattle rancher and representative of the

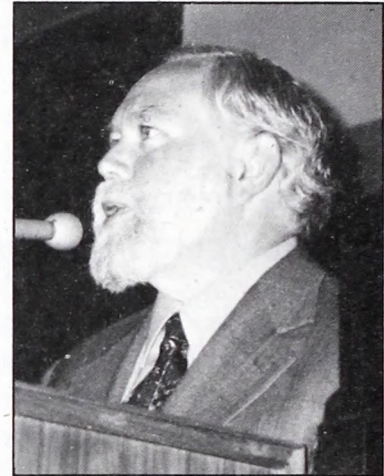
among those using public lands. **Randal O'Toole**, Director of the Thoreau Institute, stressed that new incentives could be created without transferring federal title, such as allowing managers to charge fair market value for resource use and funding management activities out of the receipts.

Joseph Sax, Counselor to Interior Secretary Bruce Babbitt, called for increased cooperation on a regional level between

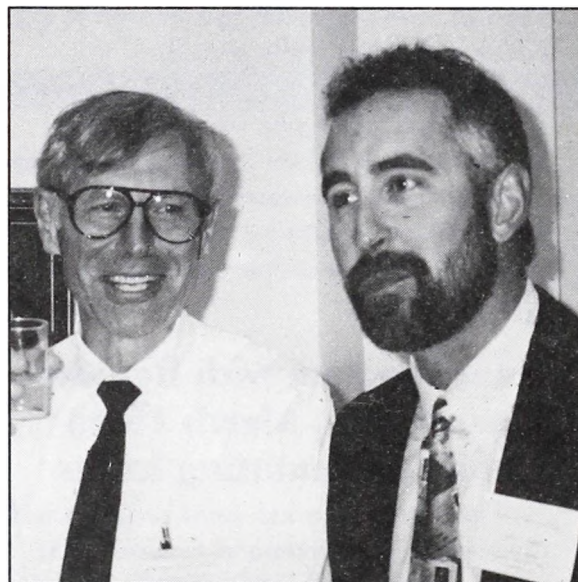
supporters of "natural uses" and those who feel economic uses of public lands should be maximized.

Finally, a number of speakers — including **Mary**

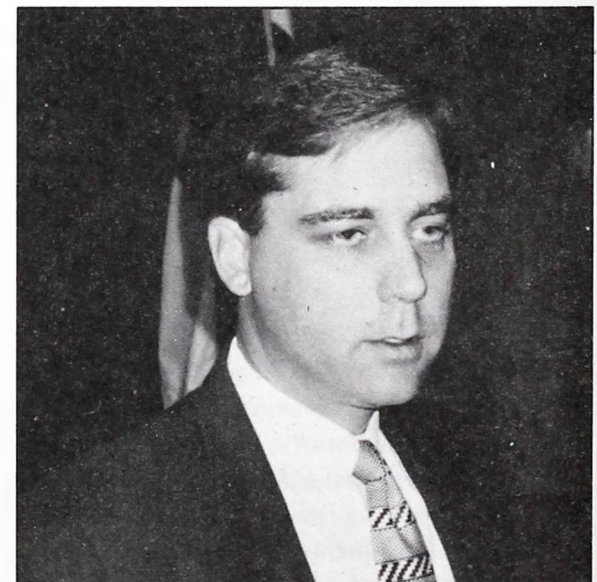
Chapman of the Delta-Montrose Partnership, **Mike Jackson** of the Quincy Library Group, and **Jack Shipley** of the Applegate Partnership — stressed the concept of sharing public land decision making, and related their experiences with several of the local collaborative watershed groups that have arisen in western communities to resolve resource problems.



Mike Jackson



Prof. Scott Lehmann, Philosophy, University of Connecticut, with John Baker, CU Law Alum now with the Alaska Attorney General's Office, at the Associates breakfast to which conference speakers and Center donors are invited.



Gregg Renkes, Staff Director of the Senate Energy and Natural Resources Committee and a CU Law Alum ('86), spoke representing Senator Frank Murkowski, Chairman of that Senate Committee.

Bureau of Reclamation Area Manager Workshops

Since February 1993, the Center has assisted the Bureau of Reclamation in organizing and presenting a series of quarterly workshops for approximately forty Area Managers within the Bureau. The workshops, held in various settings throughout the West, focus on changes in water law, policy and management affecting the managers' responsibilities. They are designed to provide a forum in which the area managers can discuss policy and issues with the Bureau of Reclamation Commissioner, gain training in manage-

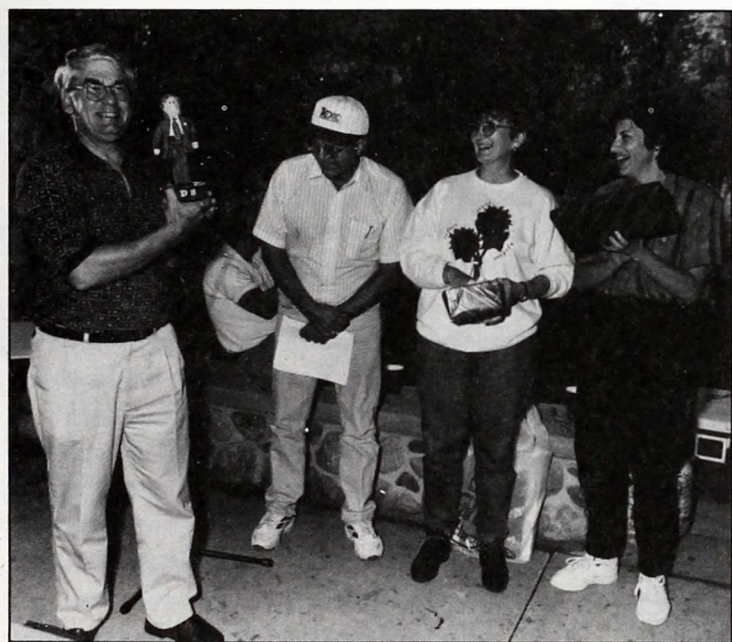
Bureau's customers are, area offices have replaced project offices. Decentralization allows many program decisions once made in Washington or Denver now to be made at regional and area office levels.

At each workshop, speakers representing diverse views, including both traditional as well as newer Bureau constituencies, are invited to participate in panel discussions on topics of regional significance.

For example, in December 1994, a Phoenix area workshop focused on Native American issues. Invited panelists included members of the Hualapai Tribe and Ak Chin Indian Community. At a workshop in Kearney, Nebraska in March 1995, panelists from Wyoming, Colorado and Nebraska along with other interests, discussed issues affecting water management in the Platte River Basin. This past June, a workshop in Portland considered issues in the Colum-

bia River Basin. Panelists representing diverse interests, including the power industry, irrigation water users, fisheries agencies and tribes, shared their concerns and perspectives on water management in the basin.

The Center's role includes planning the workshop program, preparing a workshop notebook with background materials for the participants, speaking at the program, and moderating the discussions, and preparing summaries afterward.



Reclamation employees Jerry Gregg (Snake River West Area Office), Pat Fishel (Upper Colorado Regional Office) and Carol DeAngelis (Grand Junction Area Office) take part in a "roast" of outgoing Commissioner Dan Beard (left).

ment and communication skills, and consider changes affecting Reclamation-managed water and how the changes relate to their responsibilities as area managers.

The workshops are one mechanism the Bureau adopted to implement former Commissioner Dan Beard's "Blueprint for Reform," a plan announced in 1993 for redesigning and decentralizing the agency, in response to fundamental changes occurring in the West. A major theme in the "Blueprint for Reform" is a shift from a Reclamation project focus to an area focus. The development of a new sense of who the Bureau's customers are is also a central part of the redesign. In addition to serving the traditional agricultural and power interests, the Bureau strives to meet the needs of urban water users, Indian tribes, and the environmental community.

Reorganization of the agency structure is the counterpart to these policy changes. With the broader view of who the

New Center Publications

The Watershed Source Book: Watershed-Based Solutions to Natural Resource Problems

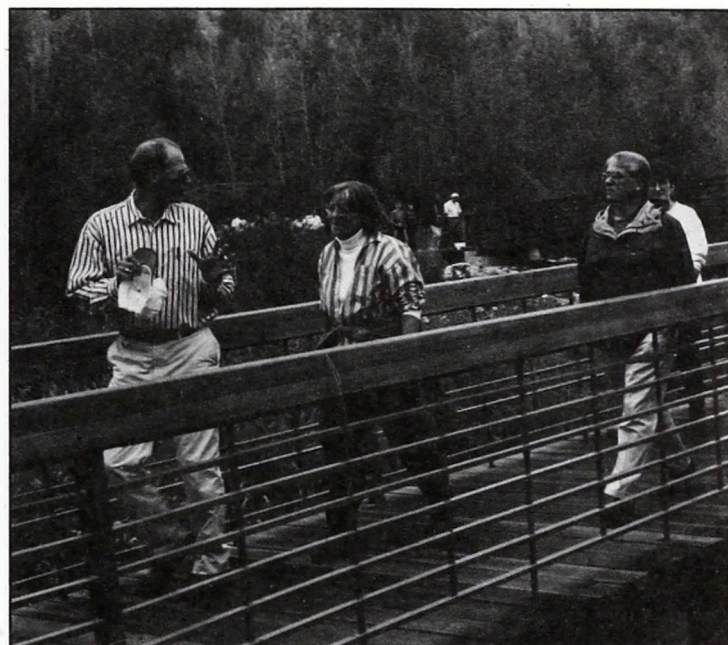
This sourcebook examines the watershed as a geographic and political unit for natural resources management. It is written for those first acquainting themselves with the concept of watershed management and those who are familiar with or involved in watershed management. The sourcebook begins by defining a watershed, and considering why it provides a logical unit for resource management. An overview section examines several characteristics of watershed-based efforts underway in the western states, including geographic traits, participants, catalysts or motivation, institutional arrangements, sources of funding, problems and issues, and accomplishments or activities. In part two,

summaries of 76 watershed-based management efforts are described. Maps indicating each effort's location are included, as well as a contact person for each effort.

Restoring the West's Waters: Opportunities for the Bureau of Reclamation (publication pending 1996).

This two-volume report examines opportunities to change the manner in which human demands on the limited water resources of the West are satisfied, in the context of Bureau of Reclamation water development.

Reclamation played a major role in transforming the rivers of the western United States into economically productive assets, building over 600 storage and diversion dams, and 16,000 miles of canals. Today Reclamation and the areas it serves face a different challenge: restoring a



Reclamation Area Manager Bruce Barrett guides Center Director Betsy Rieke, Commissioner Dan Beard and other workshop participants on a tour of the nature center at Rock Cliff Recreation Area in Jordanelle State Park.

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Deregulation of the Energy Industry

By: *Elisabeth Pendley*¹

Historically, the natural gas industry and the electric industry have been regulated by the Federal Energy Regulatory Commission (FERC). The price producers charged for their gas was regulated. The price interstate pipelines paid for the gas as well as the transportation rate they charged were regulated. Local distribution company rates were regulated by state commissions. The prices for the generation, transmission and distribution of electricity were regulated both at the federal and the local level.

In recent years, the energy industry moved away from regulation by FERC to (de)regulation by competition and market based prices. This process of regulating by deregulation began when producers were able to charge non regulated contract prices for the sale of gas and when interstate pipelines opened their pipelines to third party shippers.

FERC's natural gas restructuring rule, adopted in 1992 by Order No. 636, finalized the structural changes in the (de)regulation of the natural gas industry. By requiring pipelines (1) to separate (unbundle) their sales and transportation services, (2) to provide comparable transportation services for all gas supplies, (3) to offer access to pipeline storage and (4) to allow shippers both temporary or permanent capacity release, the evolution to competition in the natural gas industry was complete.

Practically speaking, FERC transformed pipelines exclusively into transporters of natural gas. In fact, Interstate Natural Gas Association of America's (INGAA) annual pipeline survey "documents the transition between the pre-636 era of bundled gas service and the unbundled post-636 world." The survey showed pipeline sales dwindling to 10% of all 1993 gas volumes delivered, with the decreases in pipeline sales "balanced by an increase in firm transportation, and to some extent, by the first released firm transportation flowing from the capacity release market." (Foster Report, June 30, 1994, at 27.)

The response to FERC's mandate to unbundle was dramatic. Pipeline companies unbundled sales from transportation services, and opened interstate transportation capacity and pipeline storage capacity to access by any qualified shipper.



Elisabeth Pendley

In order to be competitive, deregulated pipelines offered unique and competitive pipeline services. Current pipeline tariffs were revised to offer such services as hourly scheduling flexibility, paper pooling points and enhanced transportation rights.

The purchase of natural gas is centralized at market hubs by using electronic trading systems. Market hubs encouraged market based rates, new services and increased competition by increasing reliability and trading opportunities. Because market hubs embody the regulatory vision of competition, FERC has actively encouraged them. Dubbed "natural gas supermarkets" (Foster Report, July 28, 1994, at 19), market hubs will become the primary pricing points for the industry and may supplant utilities' formal monthly spot gas bidding programs.

When pipelines stepped out of the merchant role, local distribution companies (LDCs) accepted this new responsibility. Regulatory review shifted from FERC

to state commissions. Many of the deregulation issues faced at the federal level are now being repeated at the local level: unbundling and rebundling, prudent gas purchase practices, market affiliates, incentive rates and integrated resource planning.

Many of these issues currently faced by LDCs and state commissions were raised and resolved almost ten years ago in Canada when the Canadian natural gas industry was deregulated by lifting the controls on natural gas commodity prices, allowing market forces to determine prices and removing barriers between willing buyers and sellers.

Similar to our experience, Canadian agents, brokers and marketers were new players in the deregulated gas market — players who were dealing directly with the LDCs' customers. The new players had market knowledge and access to information and communication technology; they offered new services — storage, load balancing, information and control systems, and financial risk management. Canadian LDCs were concerned that the new players would capture other segments of their business — billing, customer service and appliance rental.

Finally, Canadian LDCs concluded that direct purchase did not threaten their business as long as supply security was not compromised. At that point, many Canadian LDCs embraced the new players by forming broker/aggregator subsidiaries. Instead of competing with the new players, they recognized new business opportunities. The Canadian natural gas deregulation experience illustrates that LDCs can benefit from embracing their competitors by increasing transportation load, offering new services and adopting market based rates.

Still to be resolved by state regulators and LDCs is the LDCs' continuing obligation to serve its customers (an obligation not held by marketers or aggregators). The unbundling of LDC services for non-core customers will allow non-core customers the economic benefits of market priced competition. Typically, the non-core customer takes sales service under a flexible rate schedule, has installed dual fuel equipment and takes interruptible or firm transportation service — the

¹ Ms. Pendley was the Center's El Paso Natural Gas Law Fellow spring 1995. A 1976 graduate of the University of Wyoming School of Law, she worked for 13 years in the Office of General Counsel, Federal Energy Regulatory Commission, in Washington, D.C. In Denver she was Assistant General Counsel at KN Energy, Inc., and is now in private law practice in Colorado. A fuller version of this article is available as a Center Occasional Paper. It will also be published in the University of Wyoming College of Law *Land and Water Law Review*, Vol. 31, #1, 1996.

continued on page 11

Treaty-Based Land Rights Within the United States

Christine A. Klein¹

Perhaps nothing is as sacred to a people as its land. The United States acquired its present territory by purchase and by conquest, sealed by various treaties with Native American tribes, Mexico, Great Britain, France, and Spain. Those treaties were solemn documents, using often an idealistic rhetoric of morality and honor. The realities of territorial expansion were not as lofty. As Chief Justice Rehnquist acknowledged, "That there was tragedy, deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied." (United States v. Sioux Nation of Indians, 448 U.S. 371, 437 (1980) (Rehnquist, J., dissenting)).

This article compares two aspects of that expansion, the acquisition of territory from Mexico and from Native American tribes. With respect to the former, at the conclusion of war between Mexico and the United States in 1848, Mexico ceded over 529,000 square miles of land to the United States under the Treaty of Guadalupe Hidalgo. That cession included the present states of California, Nevada, and Utah, and portions of Colorado, New Mexico, Arizona, and Wyoming.

Private property rights in the ceded territory were to remain intact, as if no change in sovereignty had occurred. Article VIII of the treaty pledged that such private rights would be "inviolably respected" and provided with "guaranties equally ample as if the same belonged to citizens of the United States."

Indian tribes, in turn, relinquished some two million square miles of property to the United States in exchange for smaller "reservations" and financial compensation. The treaties governing such land transactions, typically, promised to maintain Indian reservations as a homeland for the tribes' exclusive use and occupancy.

Comparative Conquests

Legal commentators tend to study conquests in isolation from one another. After the first American conquest — involving Indian lands — Chief Justice Marshall announced in *Cherokee Nation v. Georgia* that the relationship between the federal government and Indian tribes is unique (30 U.S. (5 Pet.) 1, 16 (1831)).



Christine A. Klein

The profession has taken that statement to heart, declining to consult Indian law as even a rough guide for the resolution of conflicts originating in subsequent conquests. Scholars in other fields, however, have begun to see value in a more comprehensive approach toward conquest. Historian Patricia Nelson Limerick, for example, calls for studies in "comparative conquests" to "help knit the fragmented history of the planet back together" (Patricia Nelson Limerick, *The Legacy of Conquest, The Unbroken Past of the American West* 26-28 (1987)).

From a legal perspective, much can be learned from a comparative study of the property guarantees contained in the Treaty of Guadalupe Hidalgo and in Indian treaties, and the extent to which the United States honored those promises. Both the Mexican and the Indian cessions involved a significant degree of coercion and therefore resemble conquests rather than ordinary land sales. Both added vast tracts of land to the United States' public domain. Both are chapters of the same story of American expansionism, documenting the nation's struggle to satisfy its moral and legal obligations to those who

were here first, despite a countervailing desire to expand ever-westward in the search for gold, adventure, and a better life.

Lawsuits arising under those treaties involve similar problems caused by the superimposition of the Anglo-American system of freely alienable property rights upon land-dependent cultures that rely upon communal land rights.

Perhaps most importantly, both conquests affected peoples who have maintained their cultural integrity and who still feel the sting of their land loss. (In southern Colorado and northern New Mexico, for example, rural Hispanic communities continue to fight for lands that they believe were taken from them wrongfully. See *Rael v. Taylor*, 876 P.2d 1210 (Colo. 1994); *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir. 1967).)

The juxtaposition of two sets of answers to a similar set of problems highlights the choices that were made by Supreme Court and Congress, showing the country at both its best and its worst. Armed with such knowledge, hopefully, the nation will live up to its highest potential in future treaty-based conflicts.

Treaty Implementation

Under domestic law, all treaty promises are not equal. Following is a brief discussion of legal theories under which the treaty-based property rights of Native Americans have been given an extra measure of protection not applicable to former Mexican territory. At the same time, though, that protection is imperfect such that Indian treaties and the Treaty of Guadalupe Hidalgo have been vulnerable to many of the same corrosive forces. Two examples are cited — the minimization of treaty guarantees by subsequent federal legislation and the loss of common lands.

The federal trust duty is a powerful force for the protection of Indian treaty rights. Under that duty, the federal government has assumed a special guardianship over Native American tribes, "charg[ing] itself with moral obligations of the highest responsibility and trust" and "[i]ts conduct ... should therefore be judged by the most exacting fiduciary standards" (*Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)).

In addition, courts have created special canons of construction under which ambiguous treaty or statutory provisions

¹ Visiting Associate Professor of Law, Detroit College of Law; LL.M., Columbia University, 1994; J.D., University of Colorado, 1987. The author was a Visiting Research Fellow at the Natural Resources Law Center for the academic year 1994-95. This article is a condensed version of a longer manuscript to be published by the *New Mexico Law Review*, Vol. 26 (1996), Indian Law Symposium.

affecting Native Americans should be interpreted in a manner favorable to tribal interests. Moreover, protective statutes such as the Trade and Intercourse Acts have safeguarded Indian territory by prohibiting its conveyance without prior federal approval. Finally, the creation of the Indian Claims Commission in 1946 has provided Native Americans with a means for redressing broken treaty promises.

Notwithstanding those special protections, both the Treaty of Guadalupe Hidalgo and treaties with Native American tribes were influenced by many of the same historical and political currents. The late-nineteenth and early-twentieth centuries were particularly troublesome times for the protection of treaty-based land rights. Despite the timeless rhetoric invoked by many treaties, the implementation of their promises has been frustrated in several ways.

First, Congress has minimized or superseded treaty pledges by later-enacted statutes. The property guarantees of the Treaty of Guadalupe Hidalgo were not regarded as "self-executing." As a result, Mexican property rights were not ratified by the treaty itself but had to await further action by Congress. That implementing legislation, in turn, required Mexican landowners to assume the expense and burden of proving the validity of their titles and to negotiate a maze of legal requirements implemented by a system and in a language that was foreign to them.

In California, the implementing legislation mandated that all titles derived from the Spanish or Mexican governments must be submitted for adjudication within two years to avoid abandonment. In the 1889 case of *Botiller v. Dominguez*, (130 U.S. 238 (1889)) the United States Supreme Court construed that legislation strictly, finding that even land titles recognized as perfect by the Mexican government — in addition to inchoate claims that required additional governmental action for their perfection — were subject to the act's two-year limitation period. Overall, by acreage approximately 27% of Mexican land claims in California were rejected. In the territory of New Mexico under even stricter implementing legislation, some 76% of Mexican land claims were rejected.

The treaty rights of Native Americans, too, have been diluted by federal legislation. It is now well established that Congress has plenary authority over tribal

affairs, including the power to abrogate Indian treaties. In the 1903 case of *Lone Wolf v. Hitchcock*, for example, the Court upheld Congress' "full administrative power ... over Indian tribal property," holding that Congress may appropriate Indian lands by statute, even where such appropriation violates a prior treaty. (187 U.S. 553, 568 (1903)).

Ironically, that plenary power has been justified as an adjunct to the federal trust duty. As explained by the Court, "[f]rom [the tribes'] very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." (*United States v. Kagama*, 118 U.S. 375, 384 (1886)).

From a legal perspective, much can be learned from a comparative study of the property guarantees contained in the Treaty of Guadalupe Hidalgo and in Indian treaties.

A second example of the minimization of treaty pledges concerns the appropriation of common lands into the United States' public domain. The General Allotment Act of 1887 assumed that tribal commons not assigned to individual Indians were "surplus" property available for sale to non-Indians. Under that legislation, the tribal land base was reduced from approximately 138 million acres to about 48 million acres.

Ten years later, *United States v. Sandoval* (167 U.S. 278 (1897)) laid the groundwork for a similar devastation of Hispanic property. That decision held that the common lands of Spanish and Mexican land grants became the property of the United States under the Treaty of Guadalupe Hidalgo, despite generations of reliance upon those lands by Hispanic

communities for water, pasture, wood, and hunting grounds.

Summary

In the Treaty of Guadalupe Hidalgo and in numerous Indian treaties, the United States promised to respect property rights of the conquered. To make such promises during the nation's idealistic youth or during its feverish expansion across a seemingly-unlimited continent is one thing; to keep them is quite another. A nation's character is tested severely by the arduous process of implementing treaty promises — a process measured in centuries, not years.

It is difficult to generalize accurately about such a lengthy process. Nevertheless, relevant cases and legislation support several broad observations. The Treaty of Guadalupe Hidalgo's simple promise to inviolably respect former Mexican property rights changed over time as Congress passed increasingly strict legislation to implement the treaty. Thus, that guarantee might mean one thing in California under the California Land Claims Settlement Act of 1851, and another in New Mexico under subsequent implementing legislation.

Similarly, the effect of treaty guarantees to Indian tribes varied over time, as Congress vacillated between policies favoring assimilation and policies promoting tribalism. It is tempting to assert that tribal property rights received greater protection than did Hispanic property rights, but that observation is riddled with exceptions. It is true that special legal theories and legislation protected Indian rights, including the federal trust duty, the canons of construction, the Trade and Intercourse statutes, and the legislation establishing the Indian Claims Commission. But, it is equally true that some Indian treaties were not ratified by Congress, even after the tribes had performed their part of the bargain; that the federal trust duty was also a source of plenary power over tribal affairs; that the canons of construction were applied sporadically; and that at times tribal property rights were lost to Hispanic claims under the Treaty of Guadalupe Hidalgo.

Treaties have no expiration date and their guarantees remain alive in the hearts of Hispanic and Native American communities. To this day, litigation over treaty-based land rights continues, providing an ongoing opportunity for the United States to give meaning and respect to the promises it made long ago.

Center Completes State Trust Lands Studies

*Teresa Rice*¹

This past year the Natural Resources Law Center completed two state studies on the laws, policies and practices of state trust land management. One study was carried out under a contract with the State of Washington and the other under a contract with the State of Colorado.

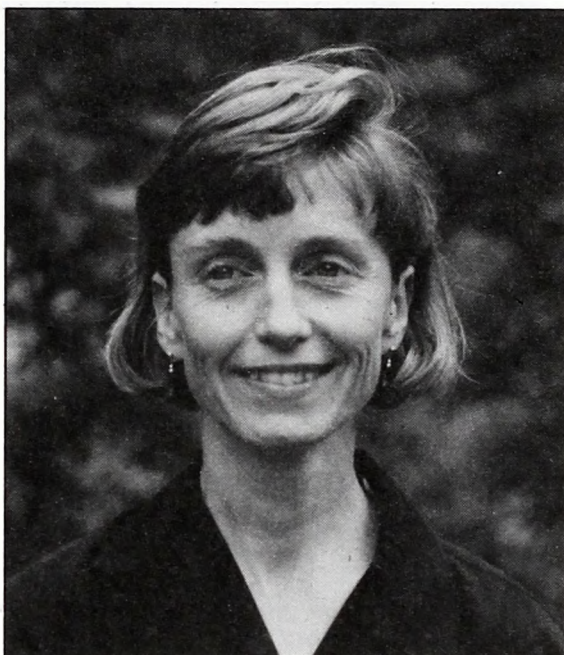
The Washington Study was prompted by concerns over state timber management in the wake of a spotted owl-related closure of virtually all federal timber lands in Washington. In Colorado, State Land Board activities involving land exchanges, acquisitions and development raised concerns among some members of the public.

At the heart of both studies is the potential value of trust lands for the support of public schools in an age of spending cuts, combined with an increasingly broad public view of the values of lands and natural resources. Colorado trust lands produce about \$25 million annually that directly benefits schools. Washington trust lands produce over \$250 million annually. At the same time, many people believe that at least some trust lands should be preserved as open space.

For example, a recently proposed land exchange would have traded out of state ownership a trust land parcel near the town of Manitou Springs, Colorado. The land had been leased from the State Land Board by the county park department for 15 years at a rate of about a \$1 per acre per year. When budget constraints led the county to seek a reduction of the annual lease rate, the State Land Board looked for alternative uses of the land that might generate more revenue for public schools.

A state representative opposed to the exchange was quoted as stating, "[t]his property is a part of the county that everyone always assumed would be open space," and a member of the local city council suggested that the State Land Board needs to consider other factors besides making money. Yet the State Land Board operates under a constitutional mandate to manage lands to produce revenue for public schools.

The land exchange was shelved in early 1995 when the State Land Board renewed the county's lease for five years on the condition that the county develop within one year a long-range ownership plan for the parcel. That plan might involve an



Teresa Rice

outright purchase or some sort of public-private partnership.

State trust lands are a unique form of public lands. The federal government granted the lands to the states upon their admission to the Union. For most western states, the express purpose of the school trust land grants was to support the "common schools." The language in these grants, combined with state constitutional and statutory provisions, has been found by the courts to impose an overriding obligation to manage trust lands for the production of revenue.

Today, the eleven western states own or manage over 45 million surface acres (where state owns land in fee), and even more mineral acres (where state owns only the sub-surface or mineral estate). Since the grants were made for specific sections within every township, most of this acreage is in scattered sections. The dispersal of the lands in many one-mile square sections has prompted those familiar with their appearance on maps to refer to state trust lands as the "blue rash."

The term trust lands means the lands must be managed for the beneficiaries of the trust. A trust is a relationship in which

one person, called the trustee, holds title to property which it must keep or use for the benefit of another, called the beneficiary. The relationship between the trustee and the beneficiary is called a fiduciary relationship, and requires the trustee to act with strict honesty and candor and solely in the best interests of the beneficiary.

For example, when the Oklahoma Legislature set below-market rents and created uneconomical re-leasing rights for the benefit of farmers and ranchers leasing state school lands, the Oklahoma Supreme Court held that the state had violated its trust duties under the state constitution. However, the nature of the trust created through state land grants is not identical to a private trust. Most significantly, state trust assets as a whole are to be managed in perpetuity.

In late 1994, the Washington State Board of Natural Resources asked a specially appointed committee to conduct an independent review of the policies and practices of the Board respecting lands managed in trust by the State Department of Natural Resources. The Center initiated its Washington review in February 1995 and completed its report in June 1995.

In March 1995, Governor Roy Romer, through the Colorado Department of Natural Resources and the Colorado State Land Board, asked an appointed Steering Committee to oversee a review by outside consultants of the policies and practices of the Colorado State Board of Land Commissioners. The review is Phase I of a study of the future management options for the State Land Board. The Center initiated its Colorado review in June 1995 and completed its report in October 1995.

The Center's Washington review concluded that the programs and practices of the Board of Natural Resources and the Department of Natural Resources generally are sound and are working well. The Center found that land management in the State of Washington has been substantially complicated in recent years by efforts to better address the habitat needs of endangered species, particularly the Northern Spotted Owl. Department of Natural Resources efforts to comply with requirements of the Endangered Species Act have temporarily reduced revenues generated on some state trust lands.

The Center's Colorado review found

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that the State Land Board has made efforts over the past decade to increase revenue production and to respond to growing public demands for recreational use of state trust lands. It has worked to increase agricultural lease rates. It has implemented a multiple use program that provides additional income from wildlife-related recreation leases that are negotiated for specific tracts of trust land with existing agricultural leases. It has sought to diversify its portfolio and to capture the increasing values of lands in the path of development. Operations have suffered, however, from the lack of a land management strategy and from the lack of clarity in both the processes and criteria under which State Land Board activities are carried out.

The report concluded, however, that the options for improving operations and management suggested by the report can be achieved without a constitutional change. The State Land Board has sufficient discretion to provide a variety of collateral public benefits within its mandate to achieve paramount benefits for public education. Following is a summary of a few of the trust land management issues reviewed in the Center's reports.

One of the important issues for Colorado, as suggested above with the open space example, is how the State Land Board might deal with sensitive trust lands while satisfying its trust obligation to produce revenue for the beneficiaries. Washington implemented a program to do just this, although its application in Colorado may be problematic. About 10 years ago, the Washington Department of Natural Resources was successful in working with the legislature to set up a program whereby the state sets aside environmentally sensitive or special trust lands for protection. As of early 1995, the state has spent about \$400 to \$500 million on this program; these funds are used by the Department of Natural Resources to buy replacement lands through the land bank process.

The Center's Colorado review found that State Land Board has wide discretion to protect its land and resources and withhold them from development, but it may not do so purely in response to public opinion or to serve the public welfare. For example, it is consistent with independent business and trust purposes to: (1) respond to anticipated public outcries that may cause high costs or impede successful development; (2) to take actions to ensure the long-term productivity and health of the land; and (3) cooperate with govern-

mental authorities concerning land use and related policies. Our study recommended that, within a comprehensive inventory of assets, the Board should identify parcels of land with significant features that may deserve special protection.

Another topic important to both Colorado and Washington is the ability to reposition the trust land base through sales, acquisitions and exchanges, particularly because many trust lands are scattered and thus difficult or inefficient to manage. Historically, money received for the disposal of trust lands went to the permanent fund for use by school beneficiaries and could not be used for acquiring other trust land as replacement property.

Depending on the return received from the permanent fund, it may not be prudent to sell land and deposit the proceeds into the permanent fund. In addition, Washington is required to maintain its forest land base. As a result, both Washington and Colorado have developed the practice of land exchanges to consolidate or better position their land holdings. However, even land exchanges are difficult to carry out, limiting their usefulness for repositioning some parcels.

Through 1977 statutory revisions, Washington established a land bank mechanism that allows the Department of Natural Resources, with Board approval, to purchase, sell or exchange trust property. Proceeds from such transactions are retained in the bank rather than going into the permanent fund; the proceeds are subsequently used to purchase replacement property. Legislation also set up a land bank technical advisory committee to provide guidance to the Board for transactions involving lands near urban areas.

Colorado has been using an escrow account mechanism to achieve a similar result. Proceeds from the sale of trust lands are placed in an escrow account rather than directed to the permanent fund. The money in escrow is eventually used to purchase suitable replacement property. Although an Attorney General's opinion found the practice lawful, doubts have been expressed about its legality.

Table 1. State Land Management in the Western States: Trust Land Surface Acres and Staff Size

State	Surface Acres Managed	Staff Size
Arizona	9,396,944	157
California	570,000	215
Colorado	2,917,677	26
Idaho	2,471,360	240
Montana	5,148,417	75
Nebraska	1,522,839	23
Nevada	2,976	9
New Mexico	8,750,000	135
North Dakota	715,259	19
Oklahoma	795,027	94
Oregon	774,000	58
South Dakota	808,000	8
Texas	811,463	639
Utah	3,731,111	43
Washington	2,936,830	600

Staffing is a multi-faceted issue for Colorado. Many people interviewed during the Colorado study recognized that the State Land Board operates with an extremely modest staff, considering the geographic extent of lands managed and the intensive attention needed to effectively carry out complex tasks such as commercial development. Indeed, the Colorado staff is the smallest of any state in proportion to the amount of surface land managed — 26 staff members and three commissioners for 2.9 million surface acres.

The Washington Department of Natural Resources, in contrast, manages 2.9 million acres of land with a staff of approximately 600, the largest staff among western states.

The disparity in staff size can be partly explained by the difference in the value of trust resources and revenues. Washington trust lands produce about \$275 million in annual revenue, ninety percent of this amount from timber. By statute, between 18 and 25 percent of annual revenues may be used for trust land administrative expenses, subject to legislative appropriation. Even at 18 percent, this amounts to nearly \$50 million for administration.

In contrast, in Fiscal Year 1995 which ended June 30, 1995, Colorado state trust lands generated \$23.6 million. Ten percent of this amount, or about \$2.36 million, is available for trust land adminis-

tration costs.

However, size alone is not the only staffing issue for Colorado. The Center's study found problems with the current allocation of existing staff positions as well as the qualifications required for these positions. Most of the staff is assigned to the activities of the State Land Board that produce the least income per staff hour. At the same time, changing functions of the State Land Board will require more people with business and real estate experience. The Center's report recommended a thorough review of the size, allocation, and qualifications of current State Land Board positions.

A counterpart to the staffing issue is the organizational structure of the state land boards; the appropriateness of the existing structure was an issue in both the Washington and Colorado studies. Two common structures for trust land boards or commissions are: a single elected commissioner with an advisory board, which is how Washington is organized (along with New Mexico, South Dakota, and Texas); and a full-time executive official with a part-time policy and/or advisory board made up of government officials or citizens (Arizona, California, Idaho, Montana, Oregon, Utah and Wyoming). Colorado is the only western state that has a board structure of three full-time commissioners.

The Center's studies suggested changes for both state land boards. For Colorado, we recommended that the structure of the State Land Board be examined with a view towards enhancing its focus on policy issues. For Washington, the Center considered possible structural changes in both Department and Board organization. We found that the Board, in general, operates more as an ultimate decision maker on major issues and is not actively involved in management. In several recommendations in the Washington report, the Center suggested changes that would move the Board even more in the direction of a corporate board of directors.

Other changes to the trust land programs of both states were also suggested. For Washington, the study recommended that the Board consider expanding the role of the Land Bank Technical Advisory Committee to provide advice more generally concerning land sales, exchanges and purchases. For Colorado, the Center's study recommended revisiting the issue of the legality of the current escrow system with possible legislation authorizing the practice. Moreover, we recognized that the State

Land Board has attempted to obtain legislation allowing the use of land banks similar to the Washington program, and suggested that further consideration be given to establishing this tool in Colorado.

The Center's Washington study made recommendations with regard to the Department of Natural Resources timber sales program. Next to the federal government, the Washington Department of Natural Resources is the largest holder of forest lands in the State with nearly three million acres of forest lands. For many years, sustainable harvest from these lands has been determined on an even-flow basis, which means that roughly the same volume will be sold each year. Because this approach has little regard for market demand, it may unduly inhibit the Department's ability to generate revenues on behalf of trust beneficiaries. For this reason the Center's study recommended that the Board review its policy of even-flow harvest to incorporate variable harvest levels considering market demand.

Today more than ever state land managers need to be aware of and responsive to a wider range of interests.

Our study also found that timber purchasers, who are given up to five years to harvest the timber, are able to hold onto the contracts until the market improves, thus engaging in futures speculation to the detriment of the trust. The Center's study recommended that the Department of Natural Resources consider revising present timber sales contract terms to either shorten the length of time before harvesting is required, and/or to index the price paid for timber sales to reflect market changes prior to harvest. The Washington Board has already undertaken an examination of their even-flow harvest policy and is expected to follow this with a review of their timber sales policy.

What seems clear from both of these studies is that today more than ever state land managers need to be aware of and responsive to a wider range of interests.

While they owe a distinct loyalty to the beneficiaries of the trust, prudent management also requires a sense of corporate responsibility and a clear understanding of and responsibility towards the many interests affected by their decisions.

Both reports are available to the general public. Copies of the Washington report may be obtained by contacting the Washington Department of Natural Resources, (360) 902-1000. Copies of the Executive Summary of the Colorado study, which lists all recommendations, is available from the Colorado State Land Board, 1313 Sherman Street, Denver, Colorado 80203, (303) 866-3454. Copies of the entire Colorado study are available by sending a check for \$7.50 to the Colorado State Land Board. Full copies are also available in some town libraries, including Greeley, Steamboat Springs, Colorado Springs, La Junta and Alamosa.

General References

Report to the Washington State Land Board of Natural Resources from the Independent Review Committee (June 22, 1995).

Report to the Colorado Department of Natural Resources and the State Board of Land Commissioners, Natural Resources Law Center, University of Colorado School of Law (October 1995).

Paul Gates, History of Public Land Law Development (1968).

Melinda Bruce and Teresa Rice, Controlling the Blue Rash: Issues and Trends in State Land Management, 29 Land & Water L. Rev. 1 (1994).



New Pubs, continued from page 3

functional level of ecological integrity to the West's rivers.

The Center's report provides an understanding of the types of environmental concerns affecting the rivers of the West, particularly related to the existence and operation of Bureau facilities, and explores the issues involved in making changes that could produce greater environmental benefits while meeting other demands.

Volume I presents overall project findings and the results from an investigation of 15 Bureau projects located around the West, identified as having changed in some manner because of environmental concerns.

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- 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.

Research Reports

- RR14 Restoring the West's Waters: Opportunities for the Bureau of Reclamation (publication pending 1996), Lawrence MacDonnell, \$25.
- RR13 *The Watershed Source Book: Watershed-Based Solutions to Natural Resource Problems* (publication pending), Elizabeth Ann Rieke, Teresa Rice, Wendy Rudnik, \$25.
- 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.

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.
- WL03 "Discussion Paper: The Changing Management Philosophies of the Public Lands," Bates, 1993. \$8.
- WL04 "Discussion Paper: Managing for Ecosystems on the Public Lands," Bates, 1993. \$8.
- WL05 "Discussion Paper: Public Lands Communities," Bates, 1993. \$8.
- WL06 "Discussion Paper: State and Local Public Lands," Rice, 1993. \$8.

Conference Materials

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

- CF19 "Challenging Federal Ownership and Management: Public Lands and Public Benefits," Oct. 11-13, 1995, **notebook** \$60, **audiotapes**, \$125
- CF18 "Sustainable Use of the West's Water," 3-day conf. June 12-14, 1995, **notebook** \$75, **audiotapes** \$150.
- 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.
- HT6-95A *Sweet Home No More? The Future for Habitat Protection under the Endangered Species Act*, Hot Topics in Natural Resources, 11/29/95, Audiotape and printed material, \$15.
- HT5-95 *Environmental Regulation of Oil & Gas Development on Tribal Lands: Who has the Authority? Hot Topics in Natural Resources*, 11/1/95, Audiotape and printed material, \$15.
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Western Water Policy Discussion Series Papers

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- OP33 "Comparison of Coalbed Methane Statutes in the Federal, Virginia and West Virginia Jurisdictions," Elizabeth McClanahan, 1994, \$5.
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- OP30 "Natural Resources Litigation: A Dialogue on Discovery Abuse and the New Federal Rules," Lohr and Gegenheimer, 1993. Paper only, \$5. Paper with audiotape (carries one hour CLE ethics credit) \$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.

Deregulation, continued from page 4

small commercial or industrial customer. If non-core customers are unbundled, there would be no need for state regulatory oversight of gas purchases as the competitively priced market will replace state regulation.

Eventually, the issue of unbundling core customers will be addressed and resolved by state regulators. Typically, the core customer is served under the LDC's firm sales service tariff, is heat sensitive, uses low volumes of natural gas and has no alternate fuels available — the small residential customer. The issue of unbundling at the LDC level is currently before the Wyoming Public Service Commission in an application filed by K N Energy, Inc. to set up a pilot program to provide choice among gas suppliers.

Enlightened by its experience deregulating the natural gas industry, FERC has now turned to the electric industry with the intent of bringing comparability, open access transmission, market based rates, unbundled services and direct access to electric power customers. Mindful of both physical and statutory differences between the natural gas and the electric power industries, FERC issued the electric Mega-Notice of Proposed Rulemaking (Mega-NOPR) which commits the Commission to deregulate the electric industry by relying on market driven factors.

The Mega-NOPR affects only the

transmission of power to wholesale customers (big industrial plants), not retail customers (residential homeowners). However, FERC expects that opening wholesale competition will force the unbundling of the electric industry at the local level and in time, lower the cost of electricity for all customers.

Indeed, retail wheeling — unbundling of electric power at the retail level — is already being considered by a number of state regulators and large electric customers. Unbundling of electric power at the local level will give rise to those issues which are also being faced by state commissions in the unbundling of the natural gas industry: competition, affiliate relationships, unbundled tariffs, market-based rates, stranded costs, incentive plans, integrated resource plans and demand side management, core and non-core customers and the obligation to serve.

Additionally, electric power industry unbundling issues are compounded by state/federal jurisdictional conflicts which must be resolved to allow competition at the local level and full implementation of direct access proposals. Once unbundling of the vertically integrated electric power industry occurs at the transmission level, it will be necessary to identify the line between state and federal jurisdiction over retail transmission.

Although FERC has the authority to determine just and reasonable rates for the transmission of electricity in interstate commerce and may order open access

transmission on a comparability-of-service basis, it is still prohibited from mandating retail wheeling and it does not have power to authorize the construction or expansion of transmission lines.

The federal/state issue embroiled in the competitive realignment of the electric power industry will be tempered by the "new federalism" led by the Republican Congress which intends to give more policy responsibility to the states. Power sales are increasingly accorded the rights of the open market; the electric power industry is operating under new transmission access regulations, and the FERC is acting as arbiter in debates over multi-million dollar wheeling transactions across state lines.

It is possible for FERC and state regulators to work out these jurisdictional issues. Certainly, FERC's disclaimer of authority over retail wheeling in its open access transmission notice was a step forward. Perhaps Congress or the courts will end this debate with legislation or a court decision delineating the boundaries of federal and state jurisdiction.

The deregulation of the energy industry marks a critical turning point in the history of the natural gas industry and the electric power industry. "Deregulation Of The Energy Industry," explores the impact that regulating by deregulation has on the natural gas industry and the application of this experience to the electric power industry.

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Resource Law Notes is the Center's free newsletter, published three times a year—fall, winter, and spring.

Calendar:

- ◆ **March 15:** Permitting by Regulatory Agencies, with Boulder County Bar
- ◆ **June 10–12:** Biodiversity Protection and the Endangered Species Act.

SPRING HOT TOPICS

Noon lunch programs at Holland and Hart, 555 17th St., 32nd Floor, Denver

- ◆ **Feb. 5:** State Trust Land Management in Colorado
- ◆ **March 12:** Air Quality and Transportation
- ◆ **April 23:** Federal-Private Split Mineral Estates

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Received on: 04-29-96