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Resource Law Notes: The Newsletter of the Natural
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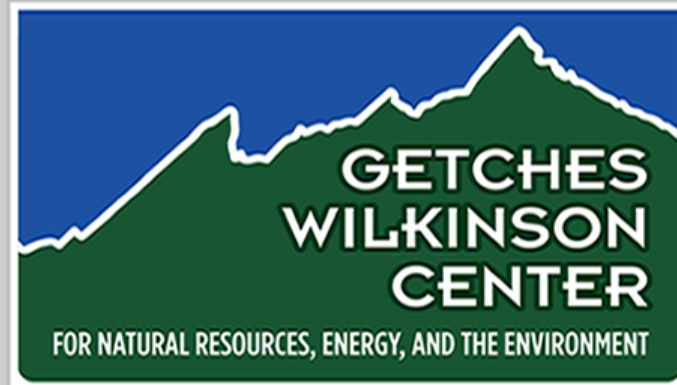
Resource Law Notes Newsletter, no. 38, fall issue,
Aug. 1996

University of Colorado Boulder. Natural Resources Law Center



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RESOURCE LAW NOTES, no. 38, fall issue, Aug. 1996
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RESOURCE LAW NOTES

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

Number 38

Fall Issue, August 1996

National Forest Management Act: 1976–1996

NFMA in a Changing Society: How Well Has It Worked in the Past 20 Years? Will It Work in the 21st Century?

September 16-18, 1996

See conference materials inside

Jack Ward Thomas, Chief of the USDA Forest Service, will be a featured speaker at the Center's annual public lands conference, commemorating the 20th anniversary of the National Forest Management Act. This year's conference is sponsored by Colorado State University, Oregon State University, Pinchot Institute for Conservation, and the Maxwell School of Citizenship and Public Affairs at Syracuse University.

When Congress passed NFMA in 1976, few would have imagined the enormity of the changes in the world — in technology, science and population — we have witnessed in the last 20 years. Has NFMA provided the vision and guidance needed to meet the challenges of our dynamic society?

Topics include:

- NFMA: Our Expectations and the Law
- NFMA in Context: Courts, Tribes, Agencies and Laws
- NFMA in a Dynamic Society
- Reflections from the 7th American Forest Congress
- Looking to the 21st Century: Is NFMA Adequate?

Other featured speakers include Charles F. Wilkinson, Moses Lasky Professor of Law at the University of Colorado School of Law, who will provide the keynote address; R. Max Peterson, who was USFS Chief from 1979 to 1987; and John McGuire, Chief during the passage of NFMA.

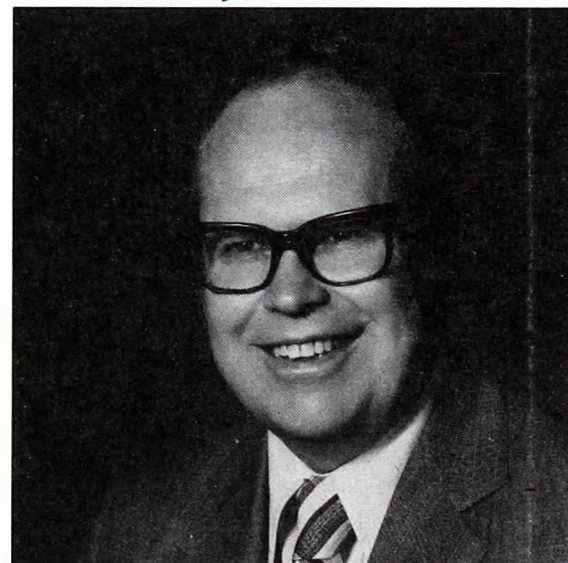
In order to have a diverse audience including not only attorneys, but also many representatives from the Forest



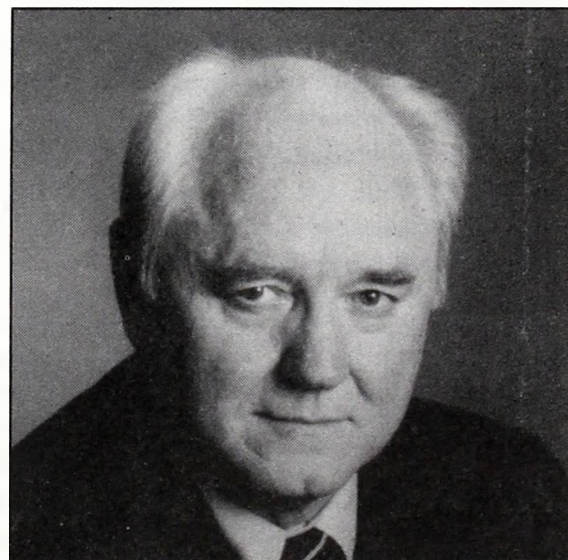
John R. McGuire, USFS Chief 1972–1979

Service, the timber industry, state, local and tribal governments, conservation groups and academics, the Center has lowered the registration fee from that charged for last year's fall public lands conference. In addition, some financial underwriting has allowed us to offer a certain number of scholarships. Discounts are already built in for government, public interest and academics. However, for those needing discounts greater than the published rates, we invite you to submit a letter requesting a scholarship, no later than August 16.

Please see the full conference brochure in the center of this issue, including full agenda, all general information, and registration form. If you have questions, you may contact the Conference Coordinator — Phone: (303) 492-1288; Fax: (303) 492-1297; e-mail: Katherine.Taylor@colorado.edu



R. Max Peterson, USFS Chief 1979–1987



*Jack Ward Thomas, Current USFS Chief
Photos courtesy Dave Steinke, US Forest Service*

June Biodiversity Protection Conference: Focus on Current Legislation, Policy

"The combining of science, process, tribal philosophy, musings and law provided a wonderful medley of voices that spoke at all levels to the participants. It matched the holistic and pro-active manner in which we are learning to think about our nation's wildlife and to compassionately reconcile this concern with other concerns of the nation."

This was the opinion of **Lindell Marsh**, California attorney and conference speaker, on the Center's annual June conference. This year the conference provoked particularly lively exchanges, in part because it addressed such a timely topic: pending congressional changes to the Endangered Species Act. Attendees put in long hours in an information-packed event with special sessions each evening.

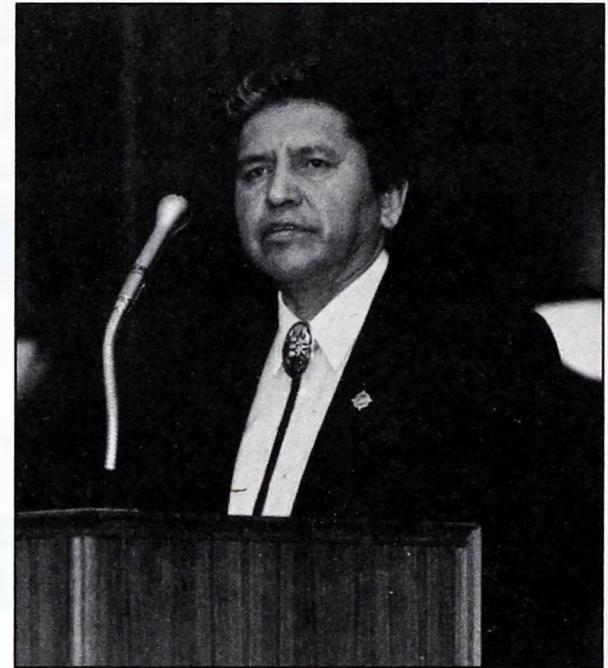
Sunday evening's keynote address on "The Scientific Underpinnings of Biodiversity Protection" was delivered by Oregon State University Professor **Jane Lubchenco**, President of the American Association for the Advancement of Science. The following night featured an inspirational talk entitled "The Spider Who Dreamed the World: A Meditation on Hierarchy, Humility and Biodiversity" by **Don Snow**, the editor of *Northern Lights Magazine*. These and other presentations produced a fascinating conference. **Robert Pelcyger**, a Boulder attorney and conference speaker, said:

"I didn't plan to stay after I spoke, but I got hooked. Unlike many conferences I've attended, this one had a theme and structure. It was especially valuable in bringing participants up-to-date in current developments in D.C. on ESA revisions."

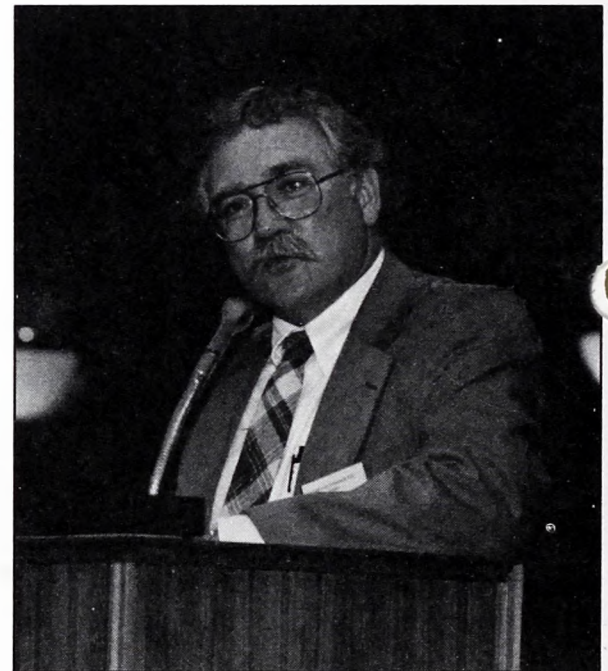
As a tool to update conference attendees, a draft of the most recently proposed legislation (the Saxton bill) was provided. Also, an address on current developments in Congress was delivered in a Tuesday evening session by **Sarah Bittleman**, Legislative Assistant on the Environment to Congressman Jim Saxton. Congressman Saxton's draft bill represents an attempt to incorporate the results of some consensus discussions among major environmental and industrial interests on key ESA issues. The controversy over the draft itself surfaced in the conference. [Currently, no ESA bill is expected to move this year.]

In sum, the conference provided a valuable opportunity for the exchange of ideas, opinions, and information. This theme was clearly articulated in the remarks of speaker **Chips Barry**, Water Manager for the City of Denver:

"The Biodiversity Conference played an important role in formulating the future of the Endangered Species Act. By choosing speakers from the broad center of the wide spectrum of views on the reauthorization of the ESA, the conference showed that there are possibilities for reasonable compromise on the contentious issues. More importantly, I think the conference showed that the center can be safely occupied without incessant vitriolic attack from the right and left."



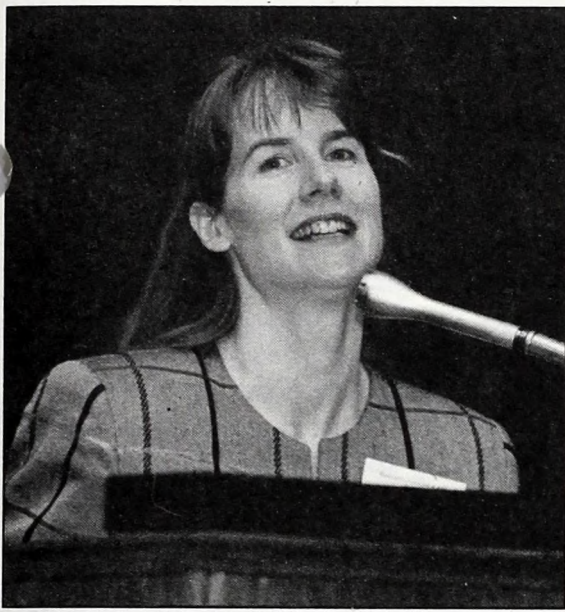
*Executive Director
Ted Strong of the
Columbia River
Inter-Tribal Fish
Commission provided a
tribal perspective on
the proposals for ESA
reform.*



*Denver Water
Manager Chips Barry
explained a resource
user's view of ESA
reform proposals.*



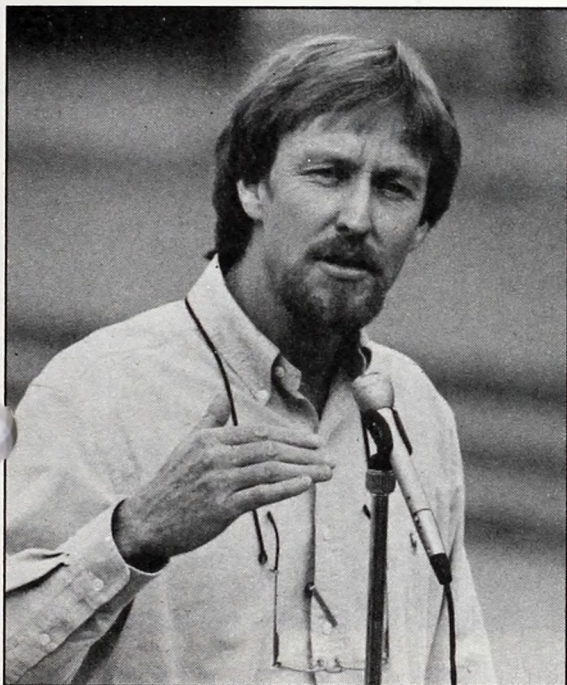
CU Law Professor Charles Wilkinson and DOI Assistant Secretary George Frampton discuss ESA issues after dinner.



Professor Mary Wood, University of Oregon School of Law, compared the Columbia and Upper Colorado Rivers Fish Recovery Programs.



Conference participants enjoyed lively discussion in the informal setting of the traditional Monday night picnic.



Don Snow, editor of Northern Lights Magazine, delivered an inspirational talk after Monday night's picnic supper.

Kenney and Mutz Welcomed as New Members of Center Staff

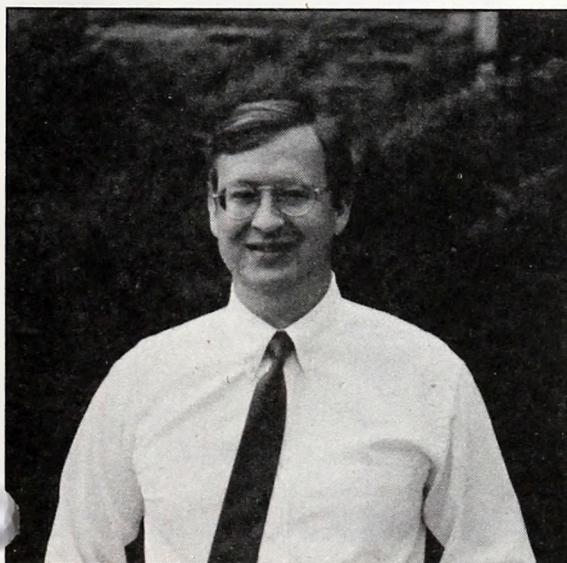
Douglas Kenney and **Kathryn Mutz** have recently been hired as Research Associates at the Center. Kenney is sure to bring a unique perspective to the Center because he is not a lawyer. He holds a Ph.D. in Renewable Natural Resource Studies from the University of Arizona, an M.S. in Natural Resource Policy and Administration from the University of Michigan, and a B.A. in Environmental, Population, and Organismic Biology from the University of Colorado. His graduate research included work on several interdisciplinary reports, including investigations of "Severe, Sustained Drought in the Southwestern United States" and "Institu-

tional Response to a Changing Water Policy Environment."

Kenney comes to NRLC from his own consulting practice. He has been very active recently in the Alabama-Coosa-Tallapoosa and Apalachicola-Chattahoochee-Flint (ACT/ACF) River Basins Comprehensive Study, a cooperative investigation overseen by the U.S. Army Corps of Engineers and the states of Alabama, Florida and Georgia. Kenney was retained to help these four "study partners" assess the adequacy of existing institutional arrangements for the governance and administration of the shared river system. With Kenney's oversight, new institutional arrangements are currently being sought to address concerns over long-term municipal water supplies, maintenance of navigation and hydro-power industries, economic development opportunities, and the sustainability of the Apalachicola Bay and other areas of high ecological and recreational value. He is the author of numerous publications addressing water resource management and administration. The Center is delighted to have someone of his expertise on board.

Kathryn Mutz, a native of Colorado, comes to the Center with a background in

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Doug Kenney, far left, and Kathryn Mutz, left.

New Members, cont.

both law and natural resources management. She received her J.D. from the University of Colorado, concentrating in natural resources and environmental law, and graduating with the Order of the Coif. She also holds an M.S. in Biology/Ecology from Utah State University, and a B.A. in Geography with honors from the University of Chicago. Following law school Mutz clerked for Judge Janice Davidson on the Colorado Court of Appeals. She also clerked for Davis, Graham and Stubbs, L.L.C. and K N Energy, Inc., and did legal research in

various capacities for EPA, NRLC, the Department of Justice, and the National Wildlife Federation. For the 12 years preceding law school, Mutz worked throughout the West for state and federal government and private industry on scientific and public policy issues related to natural resource development. As a biologist she specialized in wetlands, endangered species, and reclamation of disturbed lands. Most recently, her research has focused on government regulation of coal and placer mining, and oil and gas development. She has authored several publications ranging from government reports on rare plants and riparian

communities to a book chapter on state-federal interactions in coal mining program administration and an article on home rule city regulation of oil and gas development. The Center is pleased to have enlisted more outstanding home-grown talent.

Both Kenney and Mutz should be congratulated for having distinguished themselves in an extremely competitive applicant pool. The Center received over 160 resumes for the two positions. We are sure Kenney and Mutz will be invaluable additions to the Center's staff.

Students Enrich Center Research

Each year, the Center receives valuable support from a number of research assistants, usually law students in their second or third years. This summer we are fortunate to have four assistants, and we would like to introduce and thank them.

Sara Galley, who grew up in Oklahoma City, attended the University of Oklahoma as an undergraduate. During school, she worked as a computer programmer and system administrator in a Unix environment, and she maintains a strong interest in computers and the Internet. She received her B.S. in Civil Engineering (Environmental Option) in 1992, and spent three years working as an environmental engineer for Limno-Tech, Inc. in Ann Arbor, Michigan, where she specialized in Geographical Information System-based modeling applications. She has recently completed her first year of law school at the University of Colorado. She was elected Recycling Chair of the Environmental Law Society for the 1996-97 academic year, and was recently appointed to the newly-formed Greening of the Law School Committee.

David Gillilan, a native of Salt Lake City, received his B.A. from Swarthmore College in 1983. He then worked for the Army Corps of Engineers, Environmental Intern Program; Seafirst National Bank in Seattle; and for the City of Salt Lake in Utah. He worked on a variety of water resource issues while earning his M.S. from the Department of Hydrology at the University of Arizona in 1992. Before starting law school at CU in 1995, he worked as a Research Associate at the University of Arizona and Colorado State University. Between jobs he has spent months at a time traveling in the western

United States, Alaska, Europe, and China. He is co-author of a book addressing water resource issues at the U.S.-Mexico border, and is primary author of a book on instream flow protection issues and policies that will be published by Island Press in the spring of 1997.

Born and raised in New York, **Scott Miller** attended Vanderbilt University in Nashville, Tennessee. After spending his first school summer working at the law firm of White & Case in New York, he spent the next two summers as a Marine Mammal Observer on commercial fishing boats in Prince William Sound, Alaska. After graduating in 1992 with a B.S. in Biology, Scott researched desert island ecology in the Gulf of California. In 1992-

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NRLC Student Assistants Michelle Squyres and Julie Casida.



NLRC Research Assistants Sara Galley, David Gillilan, Scott Miller, and Luke Mulligan.

Environmental Law 25 Years Later: Weaving & Untangling the Web

David Sive, Holme Roberts & Owen Natural Resources Law Distinguished Visitor

April 9, 1996

Introduction by Professor David Getches

Thanks to the law firm of Holme Roberts & Owen and their sponsorship of our Distinguished Natural Resources Law Visitor program, we had the pleasure to hear David Sive speak about environmental law in April of this year. David Sive, of New York's Sive, Paget and Riesel, grew up in Brooklyn, New York. After graduating from Columbia Law School he was drawn into environmental litigation. Today, based on what he did over the years during his long, distinguished and continuing career, he is known as the father of environmental law.

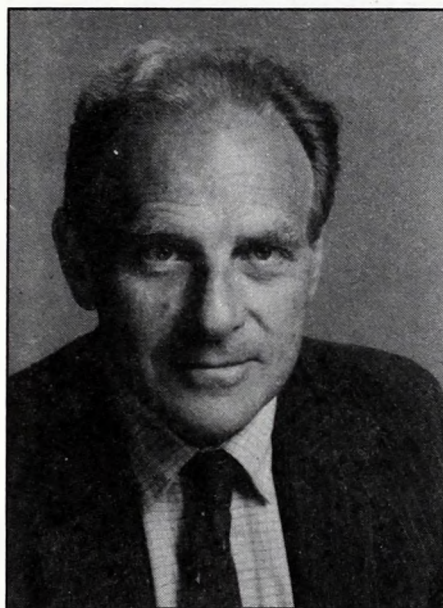
Many know David Sive as the lawyer who was a key to blocking the Consolidated Edison Project on Storm King Mountain along New York's Hudson River. He also stopped the construction of the Hudson River Expressway. All of this was before the passage of the great environmental laws that we are so familiar with today. He also founded the Natural Resources Defense Council. We are pleased to present the following edited excerpts of his speech.

To fulfill my mission tonight is difficult, because it enables [and requires] me to ramble over 30 years of history.

I, and most others, date the beginning of environmental law to the *Scenic Hudson* case. For 30 years I have been denying, and truthfully, that I was the main lawyer in the *Scenic Hudson* case. Although I was very active as a Board member and took part in later litigation, the main attorney in the *Scenic Hudson* case was Lloyd Garrison, of the Paul Weiss firm in New York. However, I did become closely identified with *Scenic Hudson*, and, out of its Board members, we created the NRDC (National Resources Defense Council).

The 1960's

The history of environmental law is necessarily coupled with the Environmental Movement. I always start with a few significant *cause célèbres*, one of which was



David Sive

the *Scenic Hudson* case. The *Scenic Hudson* case was a struggle to prevent a pumped storage power plant from going in at the utterly beautiful entrance to the Gorge of the Hudson River at Storm King Mountain. That controversy began in or about 1963, about the time of the publication of Rachel Carson's *Silent Spring*.

A few years later came other significant controversies. These included the controversy over Rocky Flats, which produced a law suit and a preliminary injunction, I think in 1970. The case was not reported, but it was important in the history of the early birth of the law.

A little later came the controversy over I-40, the Interstate which was to go through Memphis and Nashville. The so-called *Nashville I-40 Case*, which was to halt the building of the highway through the center of town, never reached a trial. The case was dismissed on the merits, but it was significant in expanding the standing first achieved in the *Scenic Hudson* case. [Editor's note: the doctrine of standing requires the plaintiff to have suffered a direct or actual injury in order to bring a suit in federal court.]

Nashville I-40 was significant for another reason which has been particularly important to me and my views on the

growth of the movement. One significant plaintiff trying to stop the road was a local NAACP group, and it demonstrated the relationship of civil rights law to the standing doctrines which came out of the *Scenic Hudson* case.

I will talk more later about what I call the "elitist" issue—the contention that environmental law was only for the white, upper-middle class—which is one of the most difficult problems in the growth of the environmental movement.

I think it was in 1969 that the Santa Barbara oil spill occasioned a tremendous reaction against the growth of energy and the use of oil for power. It did not result in any significant law suit, but just a little bit later came the controversy over the proposed building of a dye plant on the coast of South Carolina, opposite Hilton Head Isle. All of these significant controversies came together in the late 1960's.

*Every
environmentalist
became a kind of folk
hero, a would-be
"David" fighting a
"Goliath" who was
building the sinful
project.*

The 1970's

1970 was a truly explosive year. So much happened, including many things in which I participated, that I just wonder if I ever saw my children those days. They assure me that my time with them was

“quality time,” but I will never know because they are too polite to really be frank about it.

Environmental law received its first push, its first important step, with the National Environmental Policy Act, effective January 1, 1970. NEPA led to an explosion of litigation. This was an utterly fantastic, historical development because, as I have confirmed many times in conversations with Lynton Caldwell, supposedly the author of NEPA, litigation out of that act was never anticipated. NEPA came at a time of great activism, the establishment of standing, and environmentalism becoming a cult cause. Every environmentalist became a kind of folk hero, a would-be “David” fighting a “Goliath” who was building the sinful project.

The Friends of the Earth was born out of what I called the Civil War of '69 in the Sierra Club, and NRDC was also born. The EPA was established by President Nixon. The *Sierra Club vs. Morton* case, the fight over the protection of Mineral King Canyon in the Sierra Nevada Mountains, was in its early stages.

The Environmental Law Reporter began publication, and, very significantly, a large number of law schools began teaching environmental law as a separate subject. 1970 also witnessed the Clean Air Act, with the first citizen suit provision in Section 304. This citizen suit provision, of course, went into virtually every subsequent environmental statute.

To a large extent, early environmental law was also a branch of administrative law. The *Scenic Hudson* case, the *Mineral King Canyon* case, the *Hudson River Expressway* case, and the *Nashville I-40* cases, were all challenges to administrative actions brought by environmental advocates. Those advocates, like myself, were trying to broaden and deepen the judicial review of administrative action. And there was a fairly reserved reaction in the administrative law community.

But sometime in the 1970's, some restraints began to appear—which I think happens with almost any important political, social, or legal movement. One of the first interesting evidences of this was the *International Harvester Case*, where automobile companies challenged an early EPA regulation. The EPA Administrator at the time, Ruckelshaus, was trying to effect the forced development of technology to increase the number of miles in each gallon of gas. Automobile companies fought it, and lo and behold, the auto

companies were citing the cases expanding and deepening the judicial review that the environmental advocates had secured. The tables were re-turned, and the environmentalists began to argue, “Oh no, we have to give more credence to the agency, and review should be narrow,” and such.

That began an almost equal division between environmental advocates and the regulated community about how broad and deep judicial review should be, and it continues to this day. Each of the groups more or less contradicts itself. In some cases they want the review to be broad where they are challenging an action they do not like. But if they like it, as environmentalists like enforcement proceedings, they want the action to proceed very quickly, without judicial review.

The 1980's

The 1980's continued to develop what I referred to before—the very troubling problem of “elitism” and the beginnings of what might be called an abuse of environmental laws to serve purposes which people really did not have in mind when the laws were enacted. Among those

The problem of “elitism,” later called the environmental justice or environmental equity movement, has been one of the most challenging problems that environmental advocates face.

purposes were exclusion of minorities and the poor from better neighborhoods. This came to a very interesting climax in the *Nucleus of Chicago Homeowners* case.

At the same time, *Harper's Magazine*

began an anti-environmentalist campaign with a couple of stories including one about *Scenic Hudson*, pointing out that the people who lived on Storm King Mountain were rich plutocrats. *Harper's* claimed that they were selfish and that the people on Storm King Mountain did not want the power to go to Harlem and places where non-rich people were. But they forgot that *Scenic Hudson* was brought by a combination of proletarian hikers and backpackers, which I belonged to, along with the fairly wealthy homeowners.

The problem of “elitism,” later called the environmental justice or environmental equity movement, has been one of the most challenging problems that environmental advocates face. I believe, and I have said so for as many years as I have been involved in it, that environmentalism is a separate, political, social and legal movement. It incorporates people from the furthest right—the wealthiest people with perhaps the oldest money protecting little enclaves like parts of the Adirondack Mountains, the Hood Canal, or Mineral King Canyon—and every shade of political interest ranging all the way to Greenpeace and radicals like the Monkey Wrench Gang. They are all environmentalists.

I think people sometimes disregard an essential fact about the environmental movement: environmentalism has a very broad base of support. This misconception may have been partly because environmentalism was originally seen as a young person's movement. It caught on in the 1970's at the end of the Vietnam War—a new Cause. However strongly one may feel about issues of social justice like equality and civil rights, it is wrong to couple the two. You must have the broad coalition of environmentalists from left to right. This was proven just last year, when significant portions of the Republican's “Contract with America” were rolled back because of popular pressure.

The 1980's also saw what I call the end of the “Messianic Phase” of the environmental movement. The great messiah of the movement, of course, was David Brower. But there comes a time in any movement when issues call for the arts of lawyers and mediators, those who can bring people together and deal with competing interests. I call this the “Trade-Off Phase,” which is a more mature phase. You cannot solve today's major environmental problems by picking out

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**Natural Resources Law Center
University of Colorado School of Law**

September 16–18, 1996

Fleming Law Building
Boulder, Colorado

**The National Forest Management
Act in a Changing Society
1976–1996**

**How Well Has It Worked
in the Past 20 Years?
Will It Work in the
21st Century?**

NFMA: Our Expectations and the Law

NFMA in Context: Courts, Tribes,
Agencies and the Laws

NFMA in a Dynamic Society

Reflections from the
7th American Forest Congress

Looking to the 21st Century:
Is NFMA Adequate?

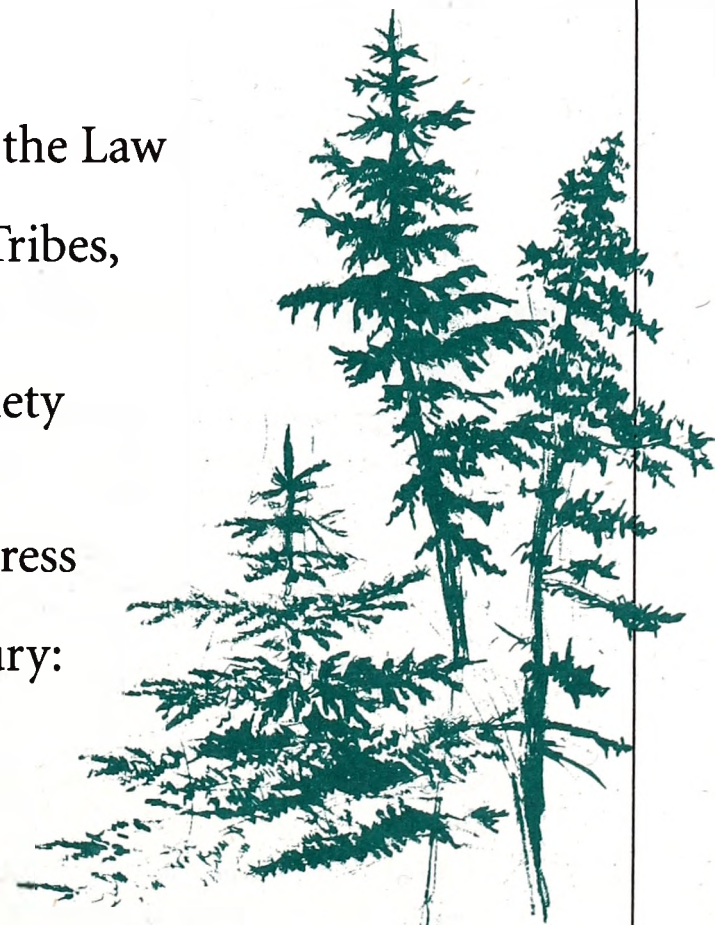
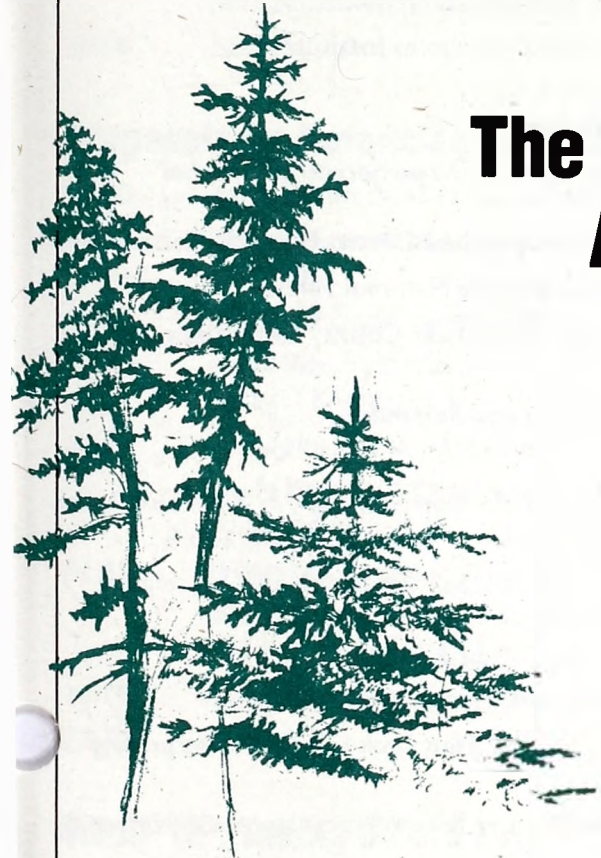
Co-sponsors:

Oregon State University

Colorado State University

Pinchot Institute for Conservation

Maxwell School of Citizenship and Public Affairs, Syracuse University



Monday, September 16, 1996

- 8:00 *Registration and Coffee*
- 8:30 *Welcome*
Betsy Rieke, Director, Natural Resources Law Center, University of Colorado School of Law
- 8:40 *Framework for Assessing NFMA— The Purpose of this Conference*
Margaret A. Shannon, Associate Professor, Maxwell School of Citizenship and Public Affairs, Syracuse University
K. Norman Johnson, Professor, College of Forest Resources, Oregon State University
- 9:00 *Keynote Address*
Charles F. Wilkinson, Moses Lasky Professor of Law, University of Colorado Law School
- 10:00 *Break*

SESSION I NFMA: Our Expectations and The Law

- 10:30 *Making Forest Policy in an Imperfect World*
James W. Giltmeier, Senior Associate, Pinchot Institute for Conservation; former staff to Senator Hubert H. Humphrey
- 11:00 *Stories from the Front Lines: How NFMA Developed — Key Players and Ideas*
Robert Wolf, former Director, Environment and Natural Resources Division, Congressional Research Service
- 11:30 *Writing the Regulations: Using Scientists to Link Law and Policy*
Art Cooper, Chair of the Committee of Scientists and Professor, North Carolina State University
- 12:00 *Questions, Discussion and Summary*
- 12:30 *Lunch*
- Luncheon Address: "Can You Live With That, Chief?" — Forging NFMA Through Congressional and Agency Give and Take
John McGuire, former Chief, U.S. Forest Service, 1972-1979 (in person or by phone)

SESSION II NFMA IN CONTEXT: Courts, Tribes, Agencies and Laws

- 2:00 *Framework for Understanding NFMA in a Legal Context*
David H. Getches, Raphael J. Moses Professor of Natural Resources Law, University of Colorado School of Law
- 2:15 *Tribal Interests and Concerns*
Robert Williams,* Professor of Law and American Indian Studies, University of Arizona School of Law
- 3:00 *Understanding the Interplay Among Many Laws: 1970 to 2000*
Perry Hagenstein, President, Institute for Forest Analysis, Planning and Policy
- 3:45 *Break*
- 4:15 *Participating in the Dialogue: 1976 to 1996*
Maggie Fox,* Public Lands and Water Specialist, Sierra Club
Steven Quarles, Crowell and Moring, Washington, D.C.
- 5:10 *Questions, Discussion and Summary*
- 5:30 *End of Afternoon Session*

Tuesday, September 17, 1996

SESSION III NFMA in a Dynamic Society

- 8:00 *Challenges to Achieving Sustainable Forests: Is NFMA Up to the Task?*
Jack Ward Thomas, Chief, U.S. Forest Service
- 9:00 *Break*
- 9:15 *What Should be the Goals for the National Forests? An Overview*
Margaret A. Shannon, Syracuse University
- 9:30 *Global Economics and Resource Trends*
Nels Johnson, World Resources Institute
- 10:00 *What We Hold Dear*
Dan Budd,* Rancher
- 10:30 *Rural Communities in an Urban Society and Global Economy*
Lynn Jungwirth,* Watershed Center, Hayfork, California
- 11:00 *Wildness and Beauty in the National Forests*
Andrea Lawrence, Mono Lake County Commissioner, California
- 11:30 *Questions, Discussion and Summary*
- 12:00 *Lunch*
- 12:30 Luncheon Address: *Reflections from the 7th American Forest Congress: A Future Vision of America's Public Lands*
Bill Bentley, Consultant, Salmon Brook and Associates, Grandby, Connecticut
- 2:00 *Can We Achieve these Goals? Introduction*
Margaret A. Shannon, Syracuse University
- 2:15 "But, What does a Forest Plan Look Like?" — *Interpreting the Regulations*
Orville Daniels,* former Forest Supervisor, Lolo National Forest
- 2:40 *Can Managers Adapt to New Relationships and New Roles under NFMA?*
Elizabeth Estill, Regional Forester, Rocky Mountain Region
Phil Janik, Regional Forester, Alaska
Susan Yonts Shepard, Staff Assistant to NFS Deputy Chief, U.S. Forest Service
- 3:15 *Break*
- 3:45 *Does NFMA Reflect Current Scientific Thinking?*
K. Norman Johnson, Professor, College of Forest Resources, Oregon State University
- 4:00 *NFMA and Ecosystem Management*
Richard L. Knight, Associate Professor of Fishery and Wildlife Biology, Colorado State University
- 4:20 *Bringing the Aquatic Sciences into the NFMA Framework: Will They Fit?*
James Sedell, Acting Program Manager, Pacific Northwest Research Station
- 4:40 *Forest Planning — Economics and Resource Uses*
John Sessions, Professor, Oregon State University
- 5:00 *Questions, Discussion and Summary*
- 5:25 *End of Afternoon Session*
- 7:30-9:00 Discussion groups will address key questions that have emerged during presentations and discussions up to this time.

Wednesday, September 18, 1996

SESSION IV LOOKING TO THE 21ST CENTURY: Is NFMA Adequate?

- 8:00 *Roundtable Discussion Groups: Reflect on Ideas and Prepare Summary*
Hanna Cortner, Director, Water Resources Research Center, University of Arizona
Betsy Rieke, Director, Natural Resources Law Center
- 9:15 *What We Can Learn From Past Reform Efforts*
Max Peterson, former Chief, U.S. Forest Service
- 10:00 *Break*

Proposals for Reforming Public Land Law

- 10:30 *Assessing the Need to Reform the Laws or Regulations*
Perry Hagenstein, Institute for Forest Analysis, Planning and Policy
- 10:45 *Proposals Under Consideration in Congress*
Mark Rey, Staff Member, Committee on Energy and Natural Resources, U.S. Senate
- 11:15 *Principles from the Western Governors' Association*
Paula Burgess,* Oregon Governor's Natural Resources Policy Advisor
- 11:45 *Proposed Changes in NFMA Regulation*
James R. Lyons, Under Secretary for Natural Resources and Environment, USDA
- 12:15 *Questions, Discussion and Summary*
- 12:30 *Lunch*

WRAP UP: Taking a Hard Look at NFMA's Past, Its Future, and Current Proposals for Change

- 1:45 Co-Moderators: **K. Norman Johnson** and **Margaret A. Shannon**
Frances Korten, Program Officer, Poverty and Resources Program, Ford Foundation
Charles F. Wilkinson, Moses Lasky Professor of Law, University of Colorado Law School
Other panelists to be announced
Questions, Discussion and Summary
- 3:30 *End of Conference*



Conference Enrollment Form

National Forest Management Act in a Changing Society

September 16-18, 1996

Name _____

Affiliation _____

Address _____

City _____ State _____ ZIP _____

Phone _____ Fax _____

Fees:	Regular	Govt. Rate	Acad. & Non-Profit
By Sept. 5	\$425	\$225	\$225
After Sept. 5	\$475	\$275	\$275

Parking Permit: \$15.

Limited scholarships are available.

Payment: \$ _____ Total amount

___ Check payable to University of Colorado

___ VISA ___ MasterCard # _____

Exp. Date _____ Signature _____

Please return this form and payment to:

Natural Resources Law Center
University of Colorado School of Law
Campus Box 401
Boulder, CO 80309-0401

Date rec'd _____
Paid _____
Due _____
Ackn _____

Note: Registrants get notebook as part of their fee. Tapes of the conference are available for an additional fee. If you wish to order the materials apart from the conference, please indicate below:

Notebook (for non-attendees) and Tape Order Form

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September 16-18, 1996 • University of Colorado School of Law • Boulder, Colorado



When Congress passed the National Forest Management Act (NFMA) in 1976, few would have imagined the enormity of the changes in the world — in technology, science and population — we have witnessed in the last 20 years. Has NFMA provided the vision and guidance needed to meet the challenges of our dynamic society? Will NFMA work in the 21st century?

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Cost of registration is \$425 if received by September 5, and \$475 thereafter. For registrants employed by any level of government — federal, state, tribal, or local — the fee is \$225 (\$275 after Sept. 5). For academics or not-for-profit groups the fee is \$225 (\$275 after Sept. 5).

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Discounts and Scholarships: To ensure broad attendance of those concerned about issues affecting the National Forests, we hope to offer scholarships. We cannot guarantee additional discounts to the categories above, but if those fees will prevent your attendance, we invite letters explaining your circumstances and your reasons for wanting to attend. Scholarship requests need to be received by August 16.

Refunds and Substitutions: Refunds, less \$25, will be available through Friday, September 6. Cancellations received Sept. 9-13 will receive a refund, less \$50. There can be no refunds after the conference begins.

Location: Sessions will be held in the Fleming Law Building, University of Colorado, Boulder. Parking permits cost \$15. **If you need parking, please let us know when you register.**

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Airporter (303-444-0808) and the Supercoach (1-800-499-1951), to bring you to Boulder. There is also RTD bus service to Boulder.

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Public Lands Reform: A Reluctant Leap into the Abyss

Michael I. Jeffery, Q.C.

Introduction

This article arises from my research into the current problems associated with the administration of public lands in both the United States and Canada, and focuses on some key issues which are the subject of heated debate on both sides of the border. These include the ongoing "disposition/retention" debate; subsidy and concession reform; and the need to involve the public in a more meaningful dialogue with respect to management and allocation decisions.

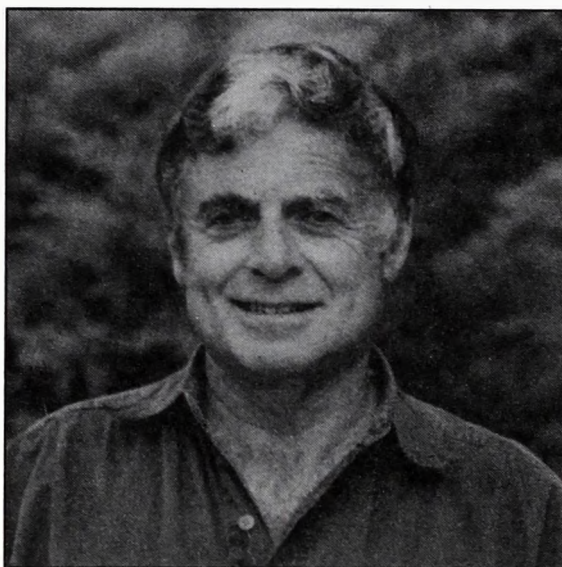
My research paper under the same title endeavors to explore these issues and the historical evolution of the federal public domain in both countries in some depth and to provide a rationale for moving beyond the status quo in the years ahead.

As a Canadian with extensive experience in the field of international environmental law from the perspective of an academic, adjudicator and practicing attorney, I was nevertheless surprised at the degree of commonality between the U.S. and Canada. Westerners of both countries share an intrinsic fear and mistrust of federal administrative agency decision-makers based in Ottawa or Washington who are often viewed as posing a significant threat to the culture and way of life of those who are dependent upon the public lands.

At The Crossroads — Disposition or Retention?

Disposition of the federal public lands is a subject which evokes the strongest emotions on both sides of the issue and on both sides of the border. The mere mention of the sale of any portion of the public lands invokes a call to arms of those of us who fear the worst: "My God! They want to sell Yellowstone or Banff National Park and strip us all of our national heritage."

The gut response to this unwanted invasion of our deeply-held sensibilities,



Michael Jeffery

fueled in part by an intrinsic distrust of government, is to defend the whole by adamantly refusing to countenance disposition of any part of the public domain whatsoever. On the other hand, it is too simplistic to ignore the fact that all public lands do not have the same economic, ecological, or spiritual value. Some lands may be capable of contributing to our national heritage under a form of ownership and stewardship which does not require title to remain vested in government in trust for the public.

It should be emphasized at the outset that most objective proponents of disposition are not advocating the disposal of those lands which are ecologically significant or comprise national parks, fish and wildlife preserves, national monuments or the like. The most fundamental and important step obviously relates to the decision on which lands, if any, should be sold and what mechanism or planning process should be put in place.

Those in favor of disposal of at least some portion of the federal domain support their position with arguments such as using land sales as a means of reducing the federal deficit, private ownership as a means to increase efficient management, and retention of the perceived benefits of public ownership through the use of appropriate restrictions and conditions.

Advocates for the retention of lands

now in the public domain maintain that disposition of public lands judged "marginal" and therefore worth little would have a minimal impact on deficit reduction. In addition they reject the notion that land sales could be carried out in a manner that is free of influence and guaranteed to maximize the return to the federal government. The crux of the retentionist argument is that the current multiple-use operating style of federal land management agencies serves a variety of non-economic purposes, such as ecosystem protection and the preservation of western culture, that outweigh any economic inefficiencies. Governments are in a better position to implement sustainable development or biodiversity policies than is the private corporate sector because of the fundamental necessity for the private sector to focus on maximizing profits. This is all the more relevant in a global economy where investment is largely controlled by institutional investors influenced by the corporation's "bottom line."

Subsidies — The Public Lands Dilemma

The issue of subsidies permeates the public lands debate with respect to almost all categories of land and a broad spectrum of activities carried on by the private sector and the public at large. The ranchers using western rangelands and the timber companies operating on national forest lands are but two examples in a long list of users who have benefitted from outdated policies.

Nowhere is the subsidy issue more important and more personal to the average citizen than in our national parks. This example illustrates the difficulty of making any dramatic change in the existing economic infrastructure underlying the subsidization of widely-used public resources.

The national park systems of both Canada and the U.S. have historically operated on a subsidized basis with a stated policy objective of keeping user fees low and thus promoting or facilitating public access. The policy, however, becomes much more difficult to justify where necessary budgetary cutbacks materially

Michael Jeffery, Q.C., a Canadian attorney and Adjunct Professor of International Environmental Law, was the Natural Resources Law Center's 1995-96 Visiting Research Fellow. He formerly chaired the Environmental Assessment Board of Ontario.

contribute to the deterioration of the resource held under a public trust mandate. Something has to give to place the national park system on a more sound economic footing. Proposals suggesting increases in user fees and revenues generated by park concessions merit serious consideration.

Where Do We Go From Here: The Status Quo or Meaningful Reform?

As with most matters which consume the human spirit, the issues at the heart of the public lands debate are invariably complex and the solutions equally difficult. Although public lands reform has been at the forefront of the western states' agenda for many years, little progress has been achieved.

Like the peaks and valleys of the lands themselves the arguments for and against the status quo have raged back and forth with the proponents of a particular position prepared to defend their beliefs with a passion reserved for those special concerns which underlie the very core of our being. To a non-westerner this intensity of feeling is something both new and exciting and yet, when confronted with the majesty of the land, its people and wildlife, it is entirely understandable.

From time to time various groups of major stakeholders have taken center stage and pressed hard for policy and legislative changes favoring their particular interests. For decades, miners and ranchers had the ear of the policy-makers and both the laws and agency management decisions were reflective of this political reality. However, recent years have brought changes in lifestyle among the general population which have propelled environmentalists, conservationists and recreationists into the ascendancy. Support for multiple use of federal lands has never been stronger.

The following is a modest list of suggestions to move us beyond the status quo in the years ahead. They represent this author's view of what is urgently needed to improve the current situation and, more importantly, what may be politically achievable at the present time.

Comprehensive Inventory of Public Lands

The starting point, in my view, is to conduct a comprehensive inventory of all federal lands and place them in categories based on "public value." Appropriate

criteria for this classification system would be developed by an interdisciplinary national task force which includes not only acknowledged experts but also representation from each of the public stakeholder groups.

The top categories of the proposed classification system would contain those lands which few would disagree have public value, such as national parks and monuments and environmentally sensitive areas, and which therefore would and should remain intact in federal ownership in trust for the benefit of the public and future generations. Further down the scale would be lands which have significant or some public value, which would also remain essentially intact in federal ownership. In the bottom category would be the marginal public lands which the task force considers are of little or no public value.

Classification of the public lands does not in any way imply that those lands designated as marginal are automatically available for disposition. Rather, it will afford the government and the public a more rational basis upon which to base the disposition or retention discussion.

Federal Subsidy Reform

It is relatively obvious to even the most vociferous of those in favor of maintaining the status quo that the subsidies provided for a broad range of activities should be critically examined and in appropriate cases reduced or eliminated. Attention should be paid to important social and cultural factors, in addition to economic considerations, in order to prevent results which are not in the long-term public

interest. However, one must be cognizant of the initial rationale for introducing the subsidy in the first place. If the rationale upon which the subsidy was predicated no longer exists, then this factor must also be taken into account.

Particular attention should be given to the way in which concessions are presently allocated and measures taken to significantly increase the revenue flowing back to the public resources because the underlying rationale for heavily subsidizing tourist facilities many decades ago has all but disappeared.

Designated Allocation of Revenue

Closely aligned with subsidy reform is the need to ensure that revenue derived from increased user fees is used for the specific public resource and not diverted to other government purposes. Studies have shown that the public will support modest increases in entrance fees to the national parks if, and only if, the increased revenue is used specifically for the administration and maintenance of the parks themselves.

Public support for increased recreational user fees is critically important and it is becoming increasingly apparent that the consumer of today is simply not prepared to see the government's "take" increased without benefit to a designated public resource.

Increased Public Involvement in Land Management Decisions

An appropriate balance must be sought in the context of multiple use and



Arches National Park, Utah



Western rangelands in Utah

ecosystem management approaches. It is exceedingly difficult for the public to accept land management policies which do not permit a wide range of activities on the public lands. As recreational pursuits continue to play a major role in society, the potential for conflict among stakeholders will increase.

At the same time, it is not only the users of the lands which must be taken into account but also the capacity of those

lands to support the ecosystems so necessary for our continued survival and which are at the very heart of any legacy to be passed on to future generations. It is absolutely essential that management decisions take into account the requirements of a particular ecosystem if the goals of sustainability are to have any realistic hope of being achieved.

However, the public's ability to reach any kind of informed consensus on how

the public lands should be managed is dependent upon the nature and quality of the dialogue surrounding the decision-making process. Many of the techniques employed in the area of alternative dispute resolution would lend themselves well to some of these disputes.

To leave the public out of the decision-making loop is to invite confrontation, and those land managers who have chosen to do so have often found themselves tied up in endless litigation and/or susceptible to intense political lobbying. Good land management decisions must also be based on good scientific input, free of biases and pressures, and the scientific community must be an integral part of the dialogue.

Concluding Thoughts

The time for meaningful reform is at hand. Development pressures will not decrease in the decades ahead. The task of protecting and preserving the remains of delicate ecosystems and finite resources will become increasingly more difficult as we put off to another day making the hard political decisions. The acknowledged benefits of biodiversity, cultural diversity, and the treasured legacy we owe to ourselves and those who follow us will be significantly impaired or lost forever if we fail to act now! ... It is indeed time to take a reluctant leap into the abyss.

Sive, cont.

good guys and bad guys. I liken this to the civil rights movement: in its early stages when people were at the lunch counter in Tuscaloosa, there was absolutely no question what was moral, what was right, and what was just. Later, with the advent of affirmative action and other relatively subtle efforts to address injustices, there were a number of questions about if and to what degree actions should be taken.

The 1990's

I think we have seen some very interesting developments in the environmental movement since the Republican sweep to power in 1994. The Contract With America, at least several aspects of it, was anti-environmental, and the desire and the hope was to substantially weaken or repeal most of the environment laws either by stealth or by direct measures. That changed in the later part of 1995, when the major environmental groups

began to turn the tables in Congress by securing the objections of a number of Republicans, among others, to the sweeping away of the environmental laws. The turn-about of the tremendous radical Republican attack on environmental laws has come in large part because some Republicans taught other Republicans that environmentalism is something which the vast majority of people want, and they do not want to weaken environmental law.

So where does that leave us now? Here I can just go for three minutes into prophecy. And if my prophecies are wrong, I will be back in New York and all of you will have forgotten me in any event, so I can go on with prophecies. I suppose a good deal depends on who wins the election in this year. What some people share is a desire to reform environmental regulations by making them less complex and less burdensome. They all talk about a multi-media statute—a statute that will govern the air, the water, and toxic wastes all at once so that a company who perhaps

behaves very well in meeting its air quality obligations can receive special consideration under water quality control laws. I do not have any real view about that, but I can not see how there can be a majority to get a single statute that is so complex passed. Nonetheless, there is a significant drive toward reform, including some drive for regulatory reform. Gazing further to the future, I do not see any significant abbreviation of standing in the courts. There is no political force for any major amendment of NEPA or of any of the states' "little NEPA's." Whatever reform there is, there will not be a massive assault on the environmental laws, whoever wins the election.

That is as much as I want to do, I think, in political prophecy. I will perhaps come to the end by just thanking you for bringing me to Boulder where I taught in 1976 and where I put on an Environmental Litigation Course each June.

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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.

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Public Land Policy Discussion

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Occasional Papers Series

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Western Lands Reports

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Research Reports

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- RR13 The Watershed Source Book: Watershed-Based Solutions to Natural Resource Problems (1996), 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, 1994, \$18.
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- RR10 "Instream Flow Protection in the West," revised edition, Lawrence J. MacDonnell & Teresa Rice, editors. 1993. \$25.
- RR08 "Facilitating Voluntary Transfers of Bureau of Reclamation-Supplied Water," Lawrence J. MacDonnell and others, Vol. I, 132 pgs. (\$12) & Vol. II, 346 pgs. (\$18), or both volumes for \$25, 1991.
- RR06 "The Water Transfer Process as a Management Option for Meeting Changing Water Demands," Lawrence J. MacDonnell and others, Vol. I, 70 pgs. (\$12) & Vol. II, 391 pgs. (\$18), or both volumes for \$25, 1990.

Conference Materials

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

- CF20 "Biodiversity Protection: Implementation and Reform of the Endangered Species Act," June 8-12, 1996, **notebook** \$75, **audiotapes**, \$150
- 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.
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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.

Students, continued from page 4

93, he researched dolphins and whales in the Eastern Tropical Pacific. Working with the Environmental Defense Fund and the Sierra Club Legal Defense Fund, Scott has researched Western water and endangered species issues. After completing his first year of law school at the University of Colorado, Scott has spent much of his time at NRLC this summer analyzing federal and state environmental laws.

Luke Mulligan was born in Brooklyn, New York, and raised on Long Island. He received his B.A. in psychology from Swarthmore College and is a 1997 candidate for Juris Doctor at C.U. He is an Associate Editor for the University of Colorado Law Review. Since coming to law school, he has worked for former NRLC Director Larry MacDonnell at Sustainability Initiatives and at Colorado Rivers Alliance. Before law school, he was an Intern at The Whale Conservation Institute, a legal assistant at a Philadelphia law firm, a professional cook at restaurants from Boston to Jackson Hole, a construction worker, a waiter, and a bartender. Luke's work at the Center this summer has focused on National Forest planning, collaborative decision making, and the Federal Advisory Committee Act. In his free time, Luke likes to mountain bike, backcountry ski, and play the guitar.

Public Land Policy Discussion Series Papers

The Center has now published five Public Land Policy Discussion Series Papers, prepared by scholars from a number of disciplines at the University of Colorado. These papers arise from the work of the Center's interdisciplinary Western Lands Sustainability Advisory Group. They are available to the public and may be ordered as indicated on the list of recent publications on the facing page. The series includes the following:

- "Conservation Biology and U.S. Forest Service Views of Ecosystem Management and What They Imply About Policies Needed to Achieve Sustainability of Biodiversity," by David W. Crumpacker, Professor of Environmental, Population and Organismic Biology, University of Colorado
- "Sustainability and Beyond," by Dale Jamieson, Professor of Philosophy, University of Colorado
- "Public Land: How Much is Enough?" by Dale A. Oesterle, Professor of Law, University of Colorado
- "People as Part of Ecosystems: The Case of Rangeland Reform," by William E. Riebsame, Associate Professor of Geography, University of Colorado
- "Issues Raised by Economic Definitions of Sustainability," by Richard W. Wahl, Research Associate, Environment and Behavior Program, Institute of Behavioral Science, University of Colorado

The research assistants have been occupied with a wide variety of Center projects, involving watersheds, forestry, community-based groups, and several other topics. Several of them were also instrumental in producing this newsletter and the enclosed brochure.

The Center also receives considerable

valuable assistance from our undergraduate student workers, **Julie Casida** and **Michelle Squyres**, who handle publications, reception, and general office work.

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Calendar:

- September 16-18: NFMA in a Changing Society: How Well Has It Worked in the Past 20 Years? Will It Work in the 21st Century?
- Fall 1996: Hot Topics in Natural Resources series, dates to be announced.

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The Natural Resources Law Center

This publication is a product of the Natural Resources Law Center, a research and public education program at the University of Colorado School of Law. The Center's primary goal is to promote a sustainable society through improved public understanding of environmental and natural resources issues.

Interpretations, recommendations, or conclusions in this Natural Resources Law Center publication are solely those of the authors and should not be attributed to the Center, the University of Colorado, the State of Colorado, or any of the organizations that support Natural Resources Law Center research.

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