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Resource Law Notes: The Newsletter of the Natural
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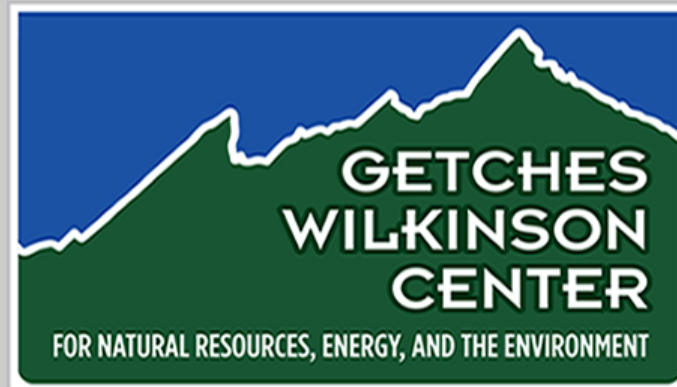
Getches-Wilkinson Center Newsletters

Resource Law Notes Newsletter, no. 43, spring
issue, Mar. 1998

University of Colorado Boulder. Natural Resources Law Center



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RESOURCE LAW NOTES, no. 43, spring issue, Mar. 1998
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RESOURCE LAW NOTES

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



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Number 43

Spring Issue, March 1998

June Conference on Outdoor Recreation: June 8-10

A major role of the Natural Resources Law Center is to identify new trends that are reshaping natural resources law and policy in the West, and to investigate and communicate the implications that these trends portend for communities, industries, and environmental resources. One tool used by the Center to fulfill this role is the annual June conference. Over time, the theme of the Center's conferences has gradually been expanded from the original focus on western water, long recognized as

of Colorado School of Law, Boulder, from June 8-10.

For several decades, the subject of natural resources has been punctuated by a series of conflicts among development and preservation interests, with researchers focusing on the way these fundamental debates influence the evolution of law and policy in specific substantive areas such as water, forestry, rangeland, minerals and energy resources, and wildlife. Typically overlooked in these investigations has been the impact on public resources of outdoor recreation, generally assumed to be an ancillary and benign element of natural resource management. This assumption, always tenuous, is now clearly erroneous. For example, the Department of Agriculture, home to the U.S. Forest Service, estimates that by the year 2000, outdoor recreation in the National Forests will annually contribute \$100 billion to the gross domestic product, compared to just \$3.5 billion for timber activities. Additionally, the agency reports that more than two-thirds of all Americans participate in

**A full conference
announcement is
enclosed.**

some form of outdoor recreation, making the outdoor recreation/tourism industry among the top three employers in 34 states. Similarly impressive statistics are emerging from the National Recreation Lakes Study Commission, which estimates that outdoor recreation contributes approximately \$350 billion annually to the gross domestic product, accounting for over 10 percent of all consumer spending. Over half of this total derives from visits to federally managed areas, including the 1,796 federal reservoirs attracting 1.8 billion visits annually and resulting in a \$44 billion economic impact.

On many federal and non-federal public lands and waterways, recreation has

continued on page 2

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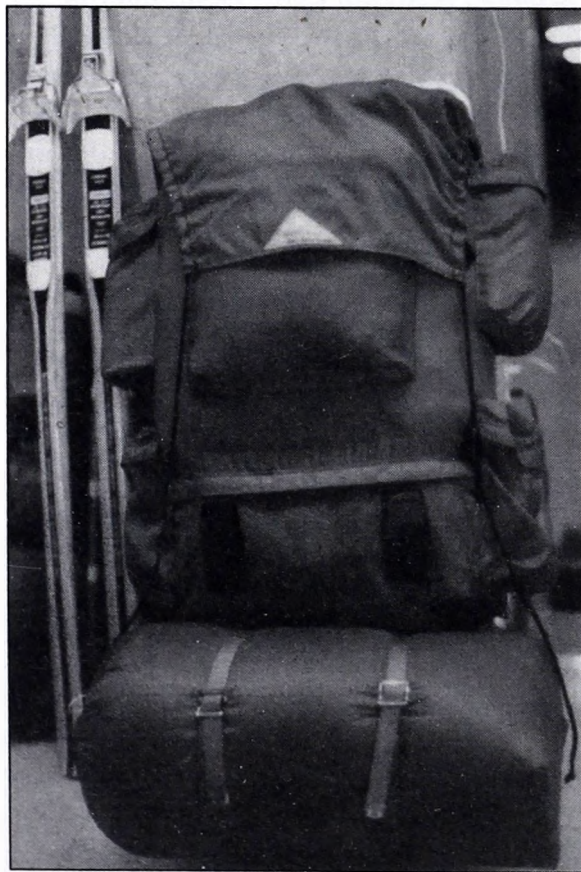
the region's most controversial resource, to include issues of public land management and cross-cutting themes such as sustainability, transboundary resource management, and mechanisms of natural resource governance and administration. This year, the Center is again charting new ground by providing a long overdue examination of what is becoming the major use of public land and water resources in the modern West: outdoor recreation. *Outdoor Recreation: Promise and Peril in the New West* will be held at the University



Outdoor Recreation, *cont.*

become an overwhelming presence, leading in some cases to negative environmental and socioeconomic impacts such as habitat disruptions, traffic and congestion, sprawl, pollution, and economic dislocations. In other cases, outdoor recreation has encouraged the development of strong, clean industries and economies, sparking a revitalization of communities formerly tied to declining natural resource activities. Thus, while the impact and magnitude of outdoor recreation varies considerably from place to place, the implications for resource agencies are consistent and clear: outdoor recreation is an extremely important use of public lands and waterways, and as such, demands careful and focused management.

As described in detail in the enclosed brochure, the conference will explore several components of the "promise and peril" of the ongoing outdoor recreation explosion. The conference will begin on the morning of June 8 with a series of introductory presentations designed to place the outdoor recreation movement in a useful historical and socioeconomic context. This material will be followed in the afternoon session by a discussion of environmental impacts of outdoor recreation, recognizing that the diversity and magnitude of impacts is as broad as the industry itself. This discussion will be followed on the second day with a review of major issues in outdoor recreation financing, including concerns over subsi-



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dies, user fees, and the merits of market-driven natural resource management programs. The afternoon session shifts the focus to user group conflicts, and the identification of major trends and lessons that may be useful in mitigating the disputes associated with increasing recreational pressures on land and water resources. The final day of the conference will feature a discussion of agency response to these new demands, and will include a review of proposed recreation legislation in the 105th Congress. A final panel will summarize key findings and outline future agendas, providing all attendees with a firm foundation for addressing what will likely be the major natural resource issue of the next decade and beyond.

For additional information about the substantive nature of the conference, please review the enclosed brochure or contact Doug Kenney at the Natural Resources Law Center (303-492-1296; Douglas.Kenney@Colorado.Edu). For additional information about registration and conference logistics, please contact the administrative staff at (303) 492-1272, (303) 492-1288, (303) 492-1297 [fax], or NRLC@Colorado.edu.

Good Bye and Good Luck

A valuable member of the Center's staff, Office Manager Perle Bochert, has received a better offer and is leaving the Center. Perle's new occupation will be full-time grandmother, a position she has held on a part-time basis for 16 years. Prior to starting in this new position, she plans to attend Colorado Rockies spring training in Tucson—although her chances of making the opening day roster appear remote. All of us at the Center will miss Perle, but are pleased that she is moving on to more rewarding work. Perle has been with the Center for only a year, but has over twenty years of university service, primarily in the departments of Psychology and Mathematics.

1998 El Paso Energy Corporation Law Fellow

The Center again hopes to continue its fellowship program in 1998-99 with the assistance of the El Paso Energy Foundation. Since 1988, the El Paso Natural Gas Foundation has annually sponsored a fellowship for research in oil and gas, energy, minerals, or related public lands law. If the Center's pending grant application is approved, we will be able to offer our next fellow a \$25,000 stipend and research support from the Law School. In past years, the emphasis of the El Paso Fellowship has been on legal research, but applicants from other related disciplines, such as economics, engineering, or the social sciences, are also considered. While in residence, the Fellow participates in activities of the Law School and the Center, and has opportunities to exchange ideas with faculty and students in both formal and informal sessions. The Fellow is expected to produce written work suitable for publication in a professional journal.

Those wishing to apply should contact Kathryn Mutz at (303) 492-1287 or kathryn.mutz@colorado.edu. If the fellowship is funded, applicants will be asked to send a resume and a letter detailing their research and publication plans as well as up to three letters of reference by August 31, 1998. To obtain a brochure containing more detailed information about the El Paso Energy Corporation Law Fellowship, contact the Center at (303) 492-1272 or NRLC@Colorado.Edu.

Center Continues Work for the CALFED Bay-Delta Program

As first reported in the winter issue of *Resource Law Notes*, the Center continues to provide technical assistance to the CALFED Bay-Delta Program (CALFED) based in Sacramento, California. CALFED is a cooperative effort of federal and state natural resource agencies and stakeholders concerned with the management of water and related resources in the Bay-Delta region of California, which includes the San Francisco Bay and the lands producing freshwater inflows to the Bay through the confluence of the Sacramento and San Joaquin Rivers in the Central Valley delta. The CALFED Program is potentially among the most ambitious environmental restoration and water management efforts in human history, and consequently is being closely watched by representatives of each of the state's three traditional rivals in water politics: the agricultural, urban, and environmental sectors. Agricultural interests depend on the region's land and water resources to support extremely productive Central Valley farms, served primarily by the federal Central Valley Project. Urban interests in both the San Francisco and Los Angeles regions are also highly dependent upon the waters of the Delta, much of which is exported south from central California through the State Water Project. The interests of environmental activists primarily focus on issues of water quality and fish and wildlife habitat in the Delta and Bay.

CALFED evolved from informal negotiations between state and federal natural resource agencies in 1993-94. The state agencies were already organized through the Governor's Water Policy Council, and had initiated a long-term planning effort with respect to the Bay-Delta. In the spring of 1993, the state asked key federal agencies to join that effort but they refused to do so until the state made a clear commitment to adopt adequate water quality standards for the Bay-Delta—an issue that had remained unresolved for well over a decade. In mid 1993, key federal natural resource agencies formed an ad hoc consortium known as Club Fed to bring a more integrated focus to federal management activities in the Bay-Delta. Of particular concern was the substantive and

jurisdictional dispute among the U.S. Environmental Protection Agency and the State Water Resources Control Board concerning the development of water quality standards in the Bay. The declining status of certain regional fisheries was an additional cause of concern, as was the growing uncertainty of the quality and quantity of urban water supplies in both the north and south. Efforts to reform operation of the Central Valley Project to achieve environmental objectives, in part

The CALFED Program is potentially among the most ambitious environmental restoration and water management efforts in human history, and consequently is being closely watched by representatives of each of the state's three traditional rivals in water politics: the agricultural, urban, and environmental sectors.

accomplished in the Central Valley Project Improvement Act of 1992, added further complexity and uncertainty to the resource management regime.

While the efforts of Club Fed to better coordinate federal activities in these subject areas were useful in bringing a more

integrated focus to management activities, finding comprehensive solutions also required the active involvement of key state agencies. In the summer of 1994, the state and federal agencies signed an agreement in which the state agreed to develop adequate water quality standards and the federal government committed to join the state in a new comprehensive planning effort for the Bay-Delta. Thus, CALFED was born. Under this framework and led in part by Assistant Secretary of the Interior Elizabeth (Betsy) Rieke—the current Director of the Natural Resources Law Center—a landmark agreement in California water politics was soon reached: the so-called Bay-Delta Accord of December 15, 1994.

The key substantive elements of the Accord include a resolution to the water quality standard-setting dispute and establishment of protective measures for ESA-listed fish species, both of which require additional freshwater inflows into the Bay. Additional inflows into the Bay equate to reductions in diversions by water users. Equally important, however, is the implicit recognition in the Accord by federal and state resource managers, with the support of the state's many stakeholder groups, that lasting solutions to the region's many water-related problems can be found only in more integrated resource management and in renewed public investments in long-term water management and environmental restoration planning. The CALFED Bay-Delta Program is the vehicle being utilized to develop the needed plans and programs that, over the next 20 years, are expected to radically transform—and hopefully, improve—the management and use of the region's natural resources.

Ongoing CALFED planning efforts are designed to simultaneously address four categories of management concerns: ecosystem quality, water quality, water supply vulnerability, and system vulnerability (including flood control). This comprehensive scope is being addressed through three phases. Phases 1 and 2 are planning efforts, with Phase 1 featuring a preliminary review of problems and solution

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Instream Flow Protection: Seeking A Balance in Western Water Use

David M. Gillilan and Thomas C. Brown. Island Press, 1997. 417 pages. ISBN 1-55963-524-X.

Reviewed by Teresa A. Rice¹

What do fish and hydropower have in common? Both depend on instream flows and both may suffer if flows are depleted. Unlike many uses of water in the western U.S. requiring that water be diverted from the stream, these "in-place" types of uses can thrive only if streams are not subject to unlimited diversions and depletions. Historically, there was enough water in most streams in the West to satisfy both instream and offstream demands. As more types of uses compete for water, however, resources and uses dependent on water being left "in place" are threatened.

Gillilan and Brown send a strong message that contemporary western water use, including the protection of instream flows, requires a thoughtful balancing involving scientific, economic, and political considerations.

Historian Donald Worster tells us the hardest challenge for the West is finding a relationship with aridity and water that will support sustainable communities (Donald Worster, *Under Western Skies* (1992)). I believe Worster would find hope in *Instream Flow Protection: Seeking A Balance in Western Water Use*. Gillilan

and Brown send a strong message that contemporary western water use, including the protection of instream flows, requires a thoughtful balancing involving scientific, economic, and political considerations. By collecting in one place the current thinking on science, law, and policy, the book provides the tools needed to find that balance. Recognizing the complexity of the issues, the authors offer no easy solutions, nor do they advocate tipping the scales in favor of instream protection.

Addressing instream flow protection in any comprehensive manner began nearly a decade ago with NRLC's 1989 publication of *Instream Flow Protection in the West*. At that time it was heralded as the only comprehensive treatment of western instream water resources protection, including both scientific and legal approaches. When this publication completely sold out, it was updated and the revised edition published in 1993.

Gillilan and Brown take us to the next level in improving our understanding of an important and evolving topic: examining the need for and options for ensuring the sustainability of resources dependent on water in-place. Their book continues the tradition of combining both the science and the law. Beyond this, it looks critically at federal and state programs intended to protect or restore instream flows, and federal law and programs that indirectly affect stream flows, such as flood control. On the technical side, the book examines how much water is needed for various resources, and critiques methods of quantification. It undertakes an assessment of balancing the need for instream flow protection with the need to divert water for a variety of purposes. Finally, it tackles a growing issue in the instream flow debate: conflicts between competing instream flow uses. The following paragraphs provide a more detailed look at each section of the book.

Important questions about the need for instream flows and instream flow protection today are dissected in the first four chapters of the book. Following an overview of the book in Chapter 1, the authors in Chapter 2 examine historical patterns of water uses and values in the West, with their focus on diversionary uses. Legal systems at the state and federal level supporting this pattern are described, as well as the problems that eventually developed, including, for example, claims for excessive amounts of water. As with other areas of law, water law changes in response to shifts in public values and physical conditions, and the authors describe the demographic changes in the West that have led to and accompanied shifting preferences for how water is used.

In Chapter 3, the authors turn to a more technical examination of the quantity and timing of instream flows needed for commercial (hydropower and navigation), recreational, and environmental uses of water. The latter includes a thorough discussion of channel maintenance flows—flows needed for the effective functioning of a stream channel. While flow needs can differ for each type of use, the authors caution against viewing each resource in isolation. For example, in discussing water for fisheries, they recognize the need to consider the entire aquatic ecosystem and the relationships among its components. Along the same line, the authors address conflicts between different instream uses of water, and, for example, warn that use of instream flows for fisheries must be preceded by determinations as to which species are going to be protected and at what level. Chapter 3 also describes common methods used to quantify various resource needs.

Moving from technical to more practical issues, Chapter 4 further addresses the question of how much water should be left instream. Similar to the allocation of any scarce resource, it considers both efficiency and equity factors. The authors explain

¹Adjunct Professor, University of Colorado Honors Program, and University of Colorado School of Law; formerly Associate Director and Senior Attorney, Natural Resources Law Center.

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**Natural Resources Law Center
University of Colorado School of Law
Nineteenth Annual Summer Conference
June 8-10, 1998**

**Outdoor Recreation:
Promise and Peril in the New West**

Major questions to be addressed include:

- ◆ Can the West realize the promise of this economic juggernaut without incurring a new class of environmental and socioeconomic impacts?
- ◆ How can resource managers and recreationists better address user group conflicts?
- ◆ What is the appropriate role of market tools and the private sector in financing outdoor recreation on public lands and waterways?
- ◆ Are new legislative and administrative reforms needed to fill the policy vacuum?
- ◆ How does the outdoor recreation explosion influence broader trends in natural resources management?



Co-sponsored by the Colorado Bureau of Land Management

Outdoor Recreation: Promise and Peril in the New West

MONDAY, JUNE 8

8:30–9:45 *Registration* (note that the late start of the conference is designed to allow some participants to travel early on Monday morning, if desired, rather than Sunday).

9:45 *Welcoming Remarks*
Harold Bruff, Dean, University of Colorado School of Law
Elizabeth Ann Rieke, Director, Natural Resources Law Center

SESSION 1: INTRODUCTION TO THE WEST'S MAJOR NATURAL RESOURCE USE

10:00 *Outdoor Recreation in the United States: The Quiet Explosion*
Curt Meine, Action Plan Coordinator, International Crane Foundation

10:40 *The Policy Vacuum Surrounding Outdoor Recreation Management*
Richard Knight, Professor of Fishery and Wildlife Biology, Colorado State University

11:20 *Legal Issues in Outdoor Recreation: Trends in Litigation*
Ted Zukoski, Director of Western Ecosystems, Land and Water Fund of the Rockies

12:00 Lunch (provided on site)

SESSION 2: OUTDOOR RECREATION AND ENVIRONMENTAL PRESERVATION

1:15 *Environmental Impacts: The Dark Side of Outdoor Recreation?*
Scott Miller, Coordinator, Partners for Wildlife Program, U.S. Fish and Wildlife Service

2:00 *Recreation as an Ally to Environmental Protection*
Gary Sprung, Communications Director, International Mountain Bike Association; Board Member, High Country Citizens Alliance; and Town Council, Crested Butte, Colorado

2:45 Break

3:15 *Recreational Impacts on Native American Religious and Cultural Sites*
Suzan Shown Harjo, Executive Director, The Morning Star Institute

4:00 *The Dilemma of County and Municipal Open Space Programs: The Case of Jefferson County, Colorado*
Ron Holliday, Jefferson County Administrator

4:45 *Question and Answer Period for Session 2 Speakers*

5:15 End of Afternoon Session.
Reception on West Lawn.

TUESDAY, JUNE 9

8:00 Coffee

SESSION 3: ISSUES OF ECONOMICS AND FINANCING

8:30 *Market Solutions to Public Recreation Finance: The Texas State Parks Example*
Donald Leal, Senior Associate, Political Economy Research Center

9:15 *The User Fee Approach to Hunting and Fishing Finance: The "Teaming With Wildlife" Proposal*
R. Max Peterson, Executive VP, International Association of Fish and Wildlife Agencies

9:50 *Response: Drawbacks to the "Teaming with Wildlife" Proposal*
David Secunda, Executive Director, Outdoor Recreation Coalition of America

10:00 Break

10:30 *The Limitations of a Market-Based Outdoor Recreation Policy: Reasons for Caution*
Scott Silver, Executive Director, Wild Wilderness

11:15 *Tourism, Recreation, and the Fate of Local Communities: A Mixed Bag*
Hal K. Rothman, Professor of History, University of Nevada at Las Vegas

12:00 *Question and Answer Period for all Session 3 Speakers*

12:20 Lunch (on your own)

SESSION 4: CONFLICT MANAGEMENT IN OUTDOOR RECREATION

1:45 *Conflicts Among User Groups: An Overview of Major Issues and Opportunities*
Mark Brunson, Associate Professor of Forest Resources, Utah State University

2:30 *Lessons from the Yellowstone Experience*
Michael V. Finley, Superintendent, Yellowstone National Park

3:15 Break

3:45 *Panel Discussion: Field-Level Conflict Management in Outdoor Recreation*
Jim Webb, Forest Supervisor, Rio Grande National Forest, U.S. Forest Service
Arden Anderson, Recreation Specialist, Gunnison Resource Area, Bureau of Land Management
Ev Elmendorf, Executive Director, Vail Pass Task Force, White River National Forest
Moderator: William Riebsame, Professor of Geography, University of Colorado

5:15 End of Afternoon Session

6:00 Flagstaff Mountain Bar-B-Que

WEDNESDAY, JUNE 10

8:00 Coffee

**SESSION 5: THE AGENCY RESPONSE TO
OUTDOOR RECREATION PRESSURES**

- 8:30 *Outdoor Recreation and Water Development: The
National Recreation Lakes Study*
Bruce Brown, Deputy Director, National
Recreation Lakes Study
- 9:15 *Outdoor Recreation Management by the U.S. Forest
Service*
James R. Lyons, Under Secretary, Natural
Resources and Environment, United States
Department of Agriculture
- 10:00 Break
- 10:30 *Recreation Management by the Bureau of Land
Management: A Local Perspective*
Ann Morgan, Director, Colorado Bureau of Land
Management
- 11:15 *One State's Response to Outdoor Recreation Pressures*
Laurie Mathews, Director, Colorado State Parks
- 12:00 *Question and Answer Period for Session 5 Speakers*
- 12:30 Lunch (provided on site)

SESSION 6: THE ROAD AHEAD

- 1:30 *Activity in the 105th Congress*
Speaker to be determined based on legislative
calendar
- 2:15 *Concluding Panel: Defining the Future Outdoor
Recreation Agenda*
Comprised of a selection of earlier conference
speakers and special guests
Moderator: William Riebsame, Professor of
Geography, University of Colorado
- 3:30 End of conference

Conference Enrollment Form

**Outdoor Recreation:
Promise and Peril in the New West**

June 8-10, 1998

Name _____

Affiliation _____

Address _____

City _____ State _____ ZIP _____

Phone _____ Fax _____

Fees:	Regular	Govt., Acad. & Non-Profit
By May 18	\$525	\$260
After May 18	\$575	\$300

**NOTE: Limited scholarships are available. See the back
of this page for details.**

Parking Permit: \$15.

Cookout Tuesday:

_____ Self (free)	\$ _____
_____ Adult guests @ \$16 (\$20 after 5/18)	\$ _____ 0
_____ Child @ \$10 (\$13 after 5/18)	\$ _____

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 _____

Notebook (for non-attendees) and Tape Order Form

Note: Registrants get a 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 here:

Notebook of speakers' outlines and materials _____ x \$75 = \$ _____

Audio tapes: three days _____ x \$150 = \$ _____

Sales tax (within Colorado) 7.26% = \$ _____

Postage/handling = \$ 5.00

Total purchase = \$ _____

_____ Check payable to University of Colorado

_____ VISA _____ MasterCard

Card # _____

Exp. Date _____ Signature _____

Print Name _____

Outdoor Recreation: Promise and Peril in the New West

June 8-10, 1998 • University of Colorado School of Law • Boulder, Colorado

One of the most significant trends in the realm of natural resources is the rapid escalation of outdoor recreation pressures on western lands managed by federal, state, tribal, and local governments. Recent studies suggest that over two-thirds of all Americans participate in some form of outdoor recreation, contributing approximately \$350 billion annually to the gross domestic product and accounting for over 10 percent of all consumer spending. Many parties, including national leaders of the U.S. Forest Service, are actively embracing and encouraging this trend, arguing that outdoor recreation promises future western economies and land/water-use practices that are more economically viable and environmentally benign than traditional extractive activities. A growing number of voices, however, caution that the economic juggernaut of outdoor recreation is being founded upon a new class of environmental impacts, subsidies, and user group conflicts.

Achieving the promise of a recreation-oriented future while managing the potential perils is one of the fundamental challenges facing the communities of the New West, but is an area where policy-makers, resource managers, interest groups, and the academic community have, until very recently, been notably quiet. This void will be addressed through this three-day conference, featuring a diverse and nationally known mix of outdoor recreation experts from federal, state, and local governments, the academic community, and the private sector.

General Information

Registration Fees, Scholarships, and Refunds

The total cost of the event is \$525 if received by May 18, and \$575 thereafter. For registrants employed by any level of government—federal, state, tribal, or local—and for academics or not-for-profit groups, the fee is \$260 (\$300 after May 18). To register, return the attached form to the Center, or register by phone (303-492-1272) or Fax (303-492-1297), charging the fee to VISA or MasterCard. Sponsorships are currently being sought from resource agencies and other parties in order to allow the Center to offer partial registration scholarships to participants unable to afford the full registration fees. Interested parties should contact the Center to inquire about the availability of scholarships. Refunds, less \$25, will be available to registrants canceling prior to May 18. Registrants canceling between May 19 and June 5 will be provided refunds less \$50. No refunds are available after June 5.

Event Location

All sessions will be held in the Fleming Law Building on the University of Colorado campus in Boulder. Parties who require parking are encouraged to purchase a 3-day parking permit at a cost of \$15.

Transportation and Lodging

All speakers and conference registrants receive a packet of information describing transportation and lodging options. Boulder is served by Denver International Airport, approximately 45 miles from campus. Shuttle service to Boulder is available. Blocks of rooms have been reserved at several local hotels, including the University Club on campus, and in the dormitories located adjacent to the Law School.

Continuing Legal Education

20 hours of general CLE credits have been applied for with Colorado's Board of Continuing Legal and Judicial Education.

Notebook and Tapes

All registrants receive the conference notebook. Other interested parties can purchase notebooks after the event for \$75, or can obtain audio tapes of the conference for \$150, plus handling and tax as applicable.

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Bay-Delta Program, *cont.*

strategies, while current Phase 2 activities feature the refinement of alternatives along with a programmatic environmental impact statement (EIS). The draft EIS has recently been released, with a final EIS expected by December. Phase 3 is program implementation, an activity expected to take at least two decades and several billion dollars—much of which has already been committed through federal programs and California Proposition 204. It is expected that the “preferred alternative,” to be specified in the final EIS, will call for a wide variety of new management initiatives, including possibly the construction of an “isolated conveyance facility” to better transport water around and through the Delta region.

Implementation of the CALFED Program promises to be a formidable challenge, requiring a variety of institutional innovations. The Natural Resources Law Center has been asked to investigate some of these challenges, specifically focusing on tentative proposals by stakeholders to establish one or more new organizations to implement the Program. The establishment of an ecosystem restoration implementation organization is one idea currently under debate, as is a related suggestion to potentially establish a permanent version of the CALFED body, since the existing CALFED entity is scheduled to terminate soon after the completion of Phase 2 planning activities. These ideas are highly controversial, in large part a reflection of the increasingly contentious nature of the overall CALFED Program. Ensuring that the needs of all major interests are adequately reflected in the preferred alternative and in the implementation strategy is the current challenge facing the Program. The Center is working to address a small sub-set of these issues by focusing the attention of stakeholders and resource managers on the merits of different organizational strategies for Program implementation.

For more information about the Program, contact CALFED at 916-657-2666 or visit their web site at <http://calfed.ca.gov>. For a more detailed discussion of the origins of the Bay-Delta Accord, the Center offers Rieke's *The Bay Delta Accord: A Stride Toward Sustainability* for \$4 (plus \$4 postage and handling).

Instream Flow, *cont.*

how economic principles can work, generally, in promoting the efficient allocation of scarce resources to produce maximum social benefits. They then consider whether, due to the peculiar nature of water and instream versus offstream uses, special measures may or may not be needed to achieve maximum social benefits. In support of the need for special measures, the authors suggest that one reason normal market mechanisms may not work to support instream flows is that benefits are enjoyed by many who are not directly involved in an instream flows transaction, a phenomenon dubbed by

Through examples, the authors develop some helpful rules of thumb for assessing the interaction of instream flow protection measures and other water uses.

some economists as a “positive externality.” For example, if The Nature Conservancy were to purchase an irrigation water right in Arizona and convert it to an instream flow right to protect a specific reach of river, the water might be available to junior appropriators once it has passed the protected reach.

Chapters 5 and 6 move into an examination of contemporary state approaches to the issues involved in instream flow protection. Most Western states have confronted similar issues when developing a strategy for protecting or restoring instream flows: should they establish minimum flow levels administratively or legislatively, or should they instead recognize instream flow water rights? How will instream flow protection be balanced with future demands on the resource? What method will be used to quantify minimum flow levels or instream rights?

In Chapter 5, the authors address the threshold issue of the role of different branches of state government. Although legislatures have been active in this area in many states, administrative programs and

even court decisions have contributed to the rules in place today. Chapter 5 explains the foundation for each state program, which is sometimes related to state water law. For example, with no new legislation, Arizona's instream flow program was launched in the early 1980s upon the filing of a private application for instream flow water rights. The Department of Water Resources, applying the same criteria it did to other applications, granted the permits. Approval was possible in part because of dicta in an earlier court decision implying that a diversion was not required under Arizona water law to establish a water right (*McLellan v. Iantzen* 547 P.2d 454 [Ariz. App. 1976]). The chapter also examines who may participate in instream flow protection, presenting in an easy to follow table how each western state addresses this issue.

In Chapter 6, the authors examine specific approaches for protecting instream flows. Setting aside or reserving a specific flow is one such approach, and is generally done by administrative or legislative action. Washington, for example, authorizes water administrators to establish “base flows” for all the state's perennial streams. Once base flows are established following formal rulemaking procedures, administrators may close a stream to new appropriations or subject new diversions to the minimum flow. The details of each state's variation on these approaches are provided, allowing for meaningful comparison within each approach. Creatively, the authors have included the option of water transfers as a tool that can be used in some states to protect or enhance instream flows.

Recognizing that instream flow protection may engender a defensive posture from other water users, Chapter 7 takes on an important issue: What is the impact of instream flow protection measures on existing and future water users? While placement of this chapter between the discussion of state programs and the examination of federal programs seems a bit awkward, upon closer review, its location makes sense. The discussion deals specifically with the impact of protection strategies undertaken by western states, and so has little to do with the later chapters on federal programs and approaches. The chapter considers the practical effect on other water uses from a river when states establish minimum flows or recognize instream flow water rights in that river. It also examines various scenarios resulting

continued on page 10

Instream Flow, cont.

from two types of transfers: (1) transfers of an existing offstream use to an instream use; and (2) transfers of offstream water rights that may affect instream water rights. Through examples, the authors develop some helpful rules of thumb for assessing the interaction of instream flow protection measures and other water uses. Through this chapter, unjustified fears should be calmed and more realistic effects understood. For example, anyone contemplating purchasing a water right junior or even senior to an instream flow right should be able to review this chapter and get a sense of the limitations and benefits they might expect in exercising or changing the acquired water right.

“The methods that have stimulated the most conflict are those that have the potential to increase stream flows by imposing restrictions on unwilling parties.”

In Chapters 8–10, the authors move into the complex realm of the federal role in instream flow protection. They recognize that, as you move from state protection programs to federal programs, not only do you continue to excite fear in water users, but now add state concerns about sovereignty over water matters. While describing in detail the strong federal role today in instream flow protection, this underlying tension between federal and state authorities is an underlying theme. Chapter 8 looks at the legal foundations for the federal role in managing and allocating water resources. It includes a discussion of both proprietary water rights and administrative authority, such as land management activities. In Chapter 9, the authors consider the impact of federal water development projects on the timing and amount of instream flows. The authors note that the manner in which federal facilities are managed can have a significant impact on flow patterns and resources dependent on instream flows.

In the area of hydropower generation, Chapter 9 sets out operating rules and criteria for the major federal facilities, as well as federal oversight of private facilities. The authors examine potential changes to hydropower operations that may improve flow regimes for some resources, including the remarkable March 1996 high flows released from Glen Canyon Dam. Continuing the theme of state-federal authority, Chapter 9 also discusses the current case law on the relative roles of Federal Energy Regulatory Commission and the states in establishing minimum or instream flows. This tension of state versus federal authority to establish instream flows is again taken up in Chapter 10, where the authors bring in the Clean Water Act and other federal environmental laws and programs that directly or indirectly affect instream flows.

In their concluding chapter, the authors summarize methods used to protect instream flows, pull together some themes that permeate the preceding chapters, and offer their views on how to achieve a reasonable balance between instream and offstream uses. After reviewing the methods described in the book, they acknowledge the controversy surrounding virtually all of these methods. They then seek to get to the heart of most objections, concluding that “the methods that have stimulated the most conflict are those that have the potential to increase stream flows by imposing restrictions on unwilling parties.” Beyond this, some have objected to instream flow programs because they may limit future diversions and therefore impact economic activities. For these and several other common objections, the authors in Chapter 11 lay out a wide range of thoughtful considerations. The complexity of the issues is revealed, and no easy solutions offered. Rather, through raising and dissecting common concerns, the authors provide for us all the first steps toward using our collective ingenuity in finding a “worthy balance in the use of our water resources.”

Register Now for the Remaining Spring Hot Topics Programs

Two “Hot Topics” programs remain on the spring schedule. The first of these programs is scheduled for Wednesday, April 29, and will feature Eric Kuhn, Secretary and General Manager of the Colorado River Water Conservation District, and Robert Wigington of The Nature Conservancy. Kuhn and Wigington will discuss the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin, focusing on the programmatic biologic opinion for water depletions above the 15-mile reach of the Colorado River in the Grand Valley. By April, the most recent round of negotiations on this programmatic opinion should either be close to producing an agreement or breaking down. Dan Luecke, Director of the Rocky Mountain Regional Office of the Environmental Defense Fund and a Natural Resources Law Center Advisory Board member, will moderate the discussion.

The final spring Hot Topics event will occur on Wednesday, May 27, and will feature the work of the Center’s current El Paso Energy Corporation Law Fellow: Joyce Colson. Colson is investigating the differences of opinion between oil and gas producers and the Minerals Management Service (MMS) concerning federal royalty valuation procedures. In addition to critiquing the current valuation system, Colson will discuss the MMS’s recent proposals to change the methodology for royalty payments, recent litigation by states on this issue, and her suggestions for reform.

For more information on the substantive nature of these events, contact Kathryn Mutz at (303) 492-1287 or kathryn.mutz@colorado.edu. For registration information, contact the Center at (303) 492-1272 or NRLC@Colorado.Edu.

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Spring Hot Topics:

- April 29: Upper Colorado River Fish Recovery Program
- May 27: Federal Royalty Valuation Summer Conference:
- June 8-10: Outdoor Recreation: Promise and Peril in the New West

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The Natural Resources Law Center

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