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Resource Law Notes: The Newsletter of the
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Newsletters

Spring 1999

Resource Law Notes Newsletter, no. 46, spring issue, 1999

University of Colorado Boulder. Natural Resources Law Center

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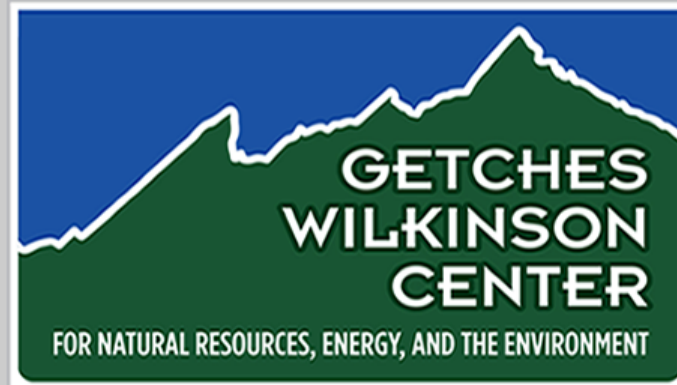
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RESOURCE LAW NOTES, no. 46, spring issue, 1999
(Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).

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RESOURCE LAW NOTES

Natural Resources Law Center

School of Law

University of Colorado at Boulder



Number 46

Spring Issue, 1999

STRATEGIES IN WESTERN WATER LAW AND POLICY: COURTS, COERCION AND COLLABORATION

Preparations for the Center's 20th summer conference are nearly complete. The event, scheduled for June 8-11, will examine the principal problem-solving strategies in western water law and policy: courts, coercion and collaboration. In addressing this broad range of strategies, the program will focus on national, west-wide and Colorado-specific issues. A copy of the full agenda and registration materials are included in this issue of *Resource Law Notes*.

Tuesday Evening

Conference activities will commence with a free public program cosponsored by the Center of the American West, examining the Western Water Policy Review Advisory Commission's controversial report *Water in the West: Challenge for the Next Century*. Secretary of the Interior Bruce Babbitt has agreed, subject to confirmation, to be the featured speaker at this forum.

Highlights of the Conference

The three-day conference agenda is packed with a diverse group of national experts on western water issues. Conference sessions will include:

- ◆ An introduction to major developments in western water law in the 1990s by **Professor David Getches**;
- ◆ **Patricia Beneke**, Assistant Secretary of the Interior for Water and Science, speaking on western water and the environment;
- ◆ Three perspectives on Colorado water courts by **Justice Gregory Hobbs, Jr.**, **Judge Jonathan Hays**, and **Melinda Kassen** of Trout Unlimited;
- ◆ A full morning of speakers addressing the Snake River Basin Adjudication, moderated by **Professor Charles Wilkinson**;

◆ Three perspectives on the Clean Water Act with **Sylvia Baca**, Acting Assistant Secretary of the Interior for Land and Minerals Management, **Oliver Houck** of Tulane University, and **Roberta Savage** of the Association of State and Interstate Water Pollution Control Administrators; and

◆ Negotiation, litigation and adjudication of Indian water rights with **David Hayes**, Counselor to the Secretary of the Interior, **Peter Monson**, Department of Justice, and **Reid Chambers** of Sonosky, Chambers, Sachse and Endreson.

Collaboration in Western Water

The special sessions on Friday, June 11th will be available for separate registration. This day will focus on collaborative processes in western water issues. **Larry MacDonnell** will set the tone of the day with a critical look at collaborative approaches to conservation. Larry will be followed by a look at state watershed planning in Texas, an environmental community view of collaborative processes by **Dan Luecke** of the Environmental Defense Fund, and a look at Native Americans and collaborative efforts by **Ted Strong** of the Columbia River Intertribal Fish Commission. Friday afternoon's session will put collaboration into context with several presentations on efforts, both promising and problematic, in the Platte River Watershed. Attorney General **Ken Salazar** and **Felicity Hannay** of the Colorado Attorney General's Office will begin the afternoon by introducing the conflicts being navigated on the Platte River. **Governor Michael Leavitt** of Utah has been invited to be the Center's honored guest for Friday's keynote address.

Registration

The full registration cost is \$515 (\$250 for government, academic and non-profits) before May 14 (\$565 and \$290 after May 14). Registration for Friday only is available for \$75 (\$85 after May 14). See pages 3-4 of the

conference brochure for details on registration. The Bureau of Reclamation has provided funds to support need-based scholarships for attendance at the conference and other cosponsors are being solicited. For information on obtaining a full or partial reduction of fees, please contact the Center.

Center Director in Sight

The Center is very pleased to announce that the Search Committee has selected a new Center director and that Gary C. Bryner has accepted the position subject to approval by the Regents. Since 1982, Gary has been at Brigham Young University, where he has been serving as Director of the Public Policy Program since 1991.



Gary's academic background is ideally suited to the increasingly interdisciplinary activities of the Center. In addition to holding a law degree from BYU, he also possesses a Ph.D. in Government from Cornell University and a B.A. and M.S. in Economics from the University of Utah. This interdisciplinary training is evident in many of Gary's publications, including his work in the areas of air pollution and global environmental issues, and his more thematic works examining the interplay of science, law, markets, administrative behavior, and regulatory policy.

Gary is well known to the Center, having served as the Center's El Paso Energy Corporation Law Fellow in the Spring of 1997, during which he studied issues of mineral development in federal protected areas. Gary has also been involved in various ways with several other research

New Director continued on page 2

Comings and Goings

Drew Drawn to Psyche

The Center bids a fond adieu to **Anne Drew**, an individual of unique characteristics and unmistakable panache, who has graced the Center for seven years. Anne recently transferred to the Psychology Department.



"But then they danced down the street like dingedodies, and I shambled after as I've been doing all my life after people who interest me, because the only people for me are the mad ones, the ones who are mad to live, mad to talk, mad to be saved, desirous of everything at the same time, the ones who never yawn or say a commonplace thing, but burn, burn, burn like fabulous yellow roman candles exploding like spiders across the stars and in the middle you see the blue centerlight pop and everybody goes 'Awww!'"

On the Road [1957] Jack Kerouac

"Anne makes a mark in an office — her dogged determination to solve a problem, lightening speed, and marvelously twisted sense of humor are an amalgam of traits you won't forget."

Betsy Rieke, NRLC Director 1995-98

Heidi Hall Hails from Hawaii

Spawned in the Pacific Northwest, I soon Smigrated to the sunny clime of Hawaii to get my BA in English, sip mai tais, and dry out from Washington's perennial rain. It was there I met my husband, and we decided to move to California for job opportunities. I worked mainly as a typesetter while my husband began his electrical/mechanical engineering career. While reading the *San Jose Mercury News* one day, we saw an ad for an engineering job in Hawaii and quickly gave Federal Express some business. My husband was hired, and we moved back to the land of steel string guitars and ukuleles...and B-52 cockroaches. There we were involved in the socio-political struggle of the native Hawaiians to preserve their ancient cultural sites and customs, and we joined their constant battle over natural resources management.

Having strong editorial skills and anxious to put my English degree to work, I soon entered the field of technical writing and merrily documented computer hardware, software and telecommunications. After many years, my husband decided to switch to a telecommunications career in Colorado, where it surprisingly is sunny a good portion of the time and the job market is much better. I will be using my English degree, editorial skills and computer skills on the wide range of Center projects. In our free time, we change diapers and take small trips to explore the grand countryside around us.

Towns in Town

The Center is pleased to welcome our newest Board member, **Ms. Eleanor (Ellie) S. Towns, J.D.** Ellie, based in Albuquerque, is the Regional Forester of USFS Region 3, which encompasses 11 National Forests in Arizona, New Mexico, and northern Texas. Among the National Forests in Region 3 are the Gila, in which there are significant grazing and local control issues; the Kaibab and Coconino, both of which border Grand Canyon National Park; and the Coronado, home of the "sky islands", the isolated and biologically diverse high mountain ranges along the Mexican border.

Ellie holds degrees from the University of Illinois and the University of New Mexico and obtained her J.D. from the University of Denver. She joined the Forest Service in 1978 and has recently served as Director of Lands in the Washington DC office and as Rocky Mountain Regional Director of Lands, Soils, Water and Minerals in Denver. The Center got to know Ellie during her work with the Congressional Water Rights Task Force.



We are delighted to add a person with her breadth of background and experience to the Board. Her knowledge of public lands and water issues will be invaluable to our work!

Welcome, Ellie!

CENTER DIRECTOR IN SIGHT (continued)

New Director continued from page 1

institutions, including the Brookings Institution, the National Academy of Public Administration, and the Natural Resources Defense Council. In these and many other positions, Gary has not only distinguished himself as a gifted scholar and teacher, but as a thoughtful and responsible colleague. These personal qualities were of particular interest to the Search Committee, who sought a candidate capable of building upon the Center's tradition of honest and balanced research, broadly-focused

collaborations, and service to diverse constituencies.

Due to previous commitments to Brigham Young University, Gary and his family will not complete their relocation to Boulder until August. Until then, Kathryn Mutz will continue as interim director.

As the transitional process enters its final stages, the Center wishes to extend thanks to the many parties who have provided assistance during this interim period, including the Center's Advisory Board, the

Law School Faculty and Dean, members of the Search Committee, cooperating foundations, and the many other friends of the Center. Special recognition and thanks are extended to Kevin Reitz, chair of the Search Committee. This process has again demonstrated that the strength of the Center lies in its vast network of friends and collaborators, an asset that was highly useful in attracting an impressive group of applicants.

ANALYSIS OF INSTITUTIONAL INNOVATION IN THE NATURAL RESOURCES AND ENVIRONMENTAL REALM: THE EMERGENCE OF ALTERNATIVE PROBLEM-SOLVING STRATEGIES IN THE AMERICAN WEST

By Douglas S. Kenney and William B. Lord

The executive summary of this report is featured below. The report in its entirety is available from the Natural Resources Law Center as a Research Report (RR-21) for \$10.00. The report was prepared in part with funding from the Ford Foundation and the William and Flora Hewlett Foundation.

Executive Summary

It is now widely acknowledged that the solutions to many, if not most, natural resource and environmental problems do not lie solely in the natural sciences or engineering, but entail modifying institutional arrangements that determine how individuals and organizations interact with the natural environment. To fully understand the workings of natural resource institutions requires an understanding of the many human and nonhuman components associated with given situations and the manner in which these components interact to facilitate or impede the achievement of management objectives. This is a formidable intellectual challenge, spawning a variety of distinct terms, assumptions, and methodological tools found in disciplines such as law, economics, political science, public administration, and many related social sciences.

In order to more effectively meet the challenge of institutional analysis, new techniques and concepts are needed to evaluate alternative institutional arrangements in a more consistent, comprehensive and rigorous manner than is typically observed. Tools are particularly

This report reflects a growing desire among many parties in the natural resources community to bring a greater level of scientific scrutiny to the description, analysis and, ultimately, the design of institutional arrangements.

needed to better predict the functioning of evolving and prospective institutions, and to address what is becoming an alarming trend in the natural resources literature: to endorse or denounce various institutional problem-solving strategies based on dogma rather than intellectually sound analysis. In this country and era, "advocacy research" of this type is most typically associated with the so-called alternative problem-solving

strategies emphasizing collaboration, negotiation and/or market processes, efforts which can be distinguished from many of the more "traditional" institutional problem-solving strategies, particularly regulation and litigation, by their emphasis on voluntary action and "positive" (i.e., the carrot rather than the stick) incentives. Alternative problem-solving strategies currently enjoy broad political support in the West and elsewhere, as evidenced by recent

New techniques and concepts are needed to evaluate alternative institutional arrangements in a more consistent, comprehensive and rigorous manner.

policy statements of the Western Governors' Association, the National Performance Review, the Environmental Protection Agency, the Western Water Policy Review Advisory Commission, and dozens of other public and private entities.

This report is a preliminary step toward identifying appropriate conceptual and methodological tools for institutional analysis in the natural resources and environmental realm. The era of alternative problem-solving provides a stimulus and a context for this endeavor.

Tools for Institutional Description and Analysis

Basic Concepts

The approach to institutional analysis featured in this report is largely derived from the institutional analysis and development (IAD) framework developed through the work of Elinor Ostrom and colleagues at Indiana University's Workshop in Political Theory and Policy Analysis. At the heart of the conceptual framework is the notion of institutions as a set of rules that specify who is involved in resource management and use, what roles they can play, what actions they can (and cannot) take, what subject matters they can (or are

expected to) deal with, the information and resources they can draw upon in performing their roles, the ways in which they can make individual and collective decisions, and the benefits (and costs) they can expect to receive. Institutional rules, together with actors and the environment, comprise an action situation, the appropriate unit of institutional analysis. In this report, a variety of concepts and terms useful in the analysis of natural resource and environmental action situations are organized within the IAD framework, then applied to case studies to compare various problem types and solution strategies.

The various components of natural resource action situations interact to form different classes of resource problems. For purposes of institutional analysis, it is useful to distinguish among four problem types. The first is depletion problems, which describe situations in which the rate of consumption of a given resource is perceived to be too high (e.g., overgrazing, groundwater declines). Depletion problems are frequently associated with so-called *open access* and *common pool resource* (CPR) situations, circumstances in which institutional rules poorly control access to resources and/or levels of use. The second, and closely related, problem type is *underinvestment* problems, in which the anticipated future availability of a given resource is smaller than desired, presumably due to inadequate investments in resource management. This phenomenon is most typical of so-called *public good* situations, which involve resources that, once provided to one party, are automatically available to all (e.g., clean air, biodiversity). In such situations, ensuring that all potential beneficiaries pay for the possible benefits can be a difficult challenge. The third and most ubiquitous problem type discussed herein is *maldistribution* problems, situations in which the existing distribution of a given resource is insufficient to satisfy the needs of all potential users (e.g., water scarcity). A special subset of maldistribution

Executive Summary Continued on page 4

situations are *externality* problems, which occur when resource use by one type of user diminishes its availability (or quality) for other user types (e.g., most pollution situations). Institutional rules that allocate rights and/or costs and benefits poorly—either in terms of equity or efficiency—can contribute to these problem types.

This typology of problems derives heavily from the economics literature, which is primarily concerned with those institutional rules describing the direct interaction of actors and resources. This level of the institutional rules is known as the *operational choice* level. Two additional (higher) levels also exist: the *collective choice* and *constitutional choice* levels. In the evaluation of problem-solving strategies, the *collective choice* level rules demand particular attention, as these rules describe the group (i.e., “collective”) processes available for modifying the *operational choice* level rules, and thus, for solving the four problem types identified. These *collective choice* processes include such familiar mechanisms as agency rule-making, litigation, market exchanges, and bargaining and collaboration. In utilizing these tools, managing conflict is a primary concern. *Value conflicts* arise when participants share fundamentally different value structures; *interest conflicts* describe situations when the overall goals of participants are not in question, but the allocation of costs and benefits is of primary concern; and *cognitive conflicts* involve situations in which inadequate knowledge or understanding slows progress. The selection of appropriate problem-solving strategies is largely dependent upon considering the opportunities and constraints provided by the *operational choice* level and *collective choice* level rules.

Lessons from the Case Studies

Three case studies are presented to demonstrate the utility of the institutional analysis concepts described herein, and to identify a few different ways in which the tenets of *alternative problem-solving* have found expression in modern natural resource and environment conflicts.

The first case examines problems associated with groundwater overdrafting in the South Platte Basin of Colorado. In that region, the failure of Colorado law to adequately manage groundwater usage resulted, for a time, in a situation in which

senior surface water rights holders were vulnerable to reduced flows due to water table declines attributable to unregulated groundwater pumping. This essentially created a spatial and temporal *externality* situation, in which the water demands of junior groundwater appropriators were elevated above those of senior surface rights holders. Groundwater overdrafting also created *depletion problems* affecting groundwater pumpers. While scientific uncertainty about the surface water/groundwater connection slowed efforts to address these highly related problems, legislative action eventually established a framework of rules under which technical expertise and a new collaborative group—

It is now widely acknowledged that the solutions to many, if not most, natural resource and environmental problems do not lie solely in the natural sciences or engineering, but entail modifying institutional arrangements that determine how individuals and organizations interact with the natural environment.

Groundwater Appropriators of the South Platte (GASP)—have produced a solution heavily reliant on cooperative action, negotiation, and market incentives, all nested within a framework of private property rights and regulatory oversight.

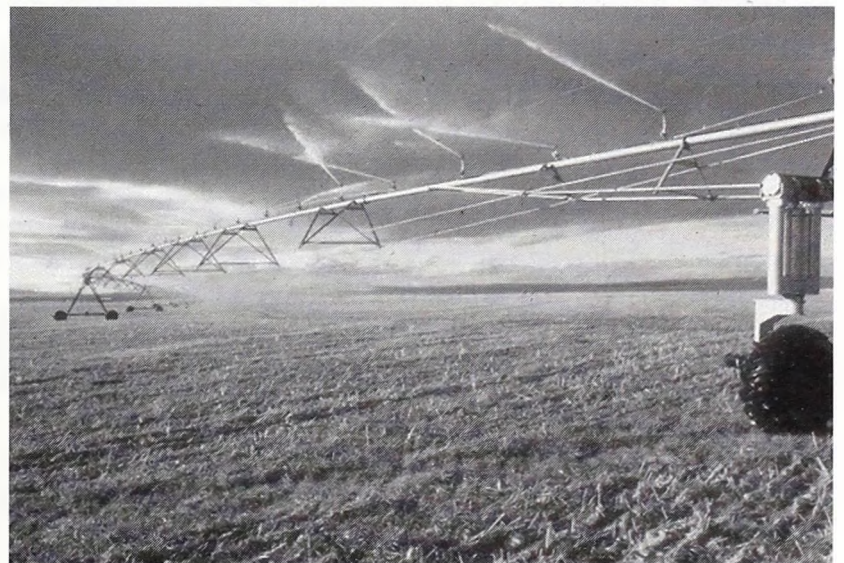
The second case study addresses issues of forest management in the Applegate region of Oregon. The Applegate region is utilized to provide a specific context for an issue that is widespread in the West: determining appropriate timber harvesting levels. In this case, the *depletion problem* takes on a special character as a high-profile endangered species controversy is injected into the debate, highlighting *underinvestment* and *externality* problems characteristic of the modern environmental movement. While enactment of the Northwest Forest Plan of 1994 is the culminating event in the institutional history provided, it is the role and presence of collaborative groups in the region that is of particular interest, as many natural resource scholars see the Applegate region as an important laboratory in *alternative problem-solving*—a perception

that is only partially accurate. As shown by the case study, it is the relationship between the *alternative problem-solving strategies* and the traditional means of conflict resolution that is of particular analytical interest.

The most complex of the three cases involves environmental restoration in the Truckee-Carson River Basins. In that region, the distribution (or *maldistribution*) of a limited water resource has created a host of problems, including *underinvestment* problems associated with endangered species and migratory waterfowl. The interplay of water allocation regimes and species protection is a problem found throughout the West; the Truckee-Carson case provides one specific context for analyzing a set of issues that is discouragingly universal to the region. In order to focus on the most illuminating aspects of this situation, the case study primarily focuses on events surrounding the Truckee-Carson Pyramid Lake Water Rights Settlement Act of 1990, but places this event in a nearly 100 year context beginning with the initial development of the region under the auspices of the prior appropriation doctrine and the Reclamation Act. Prior to this time period, an *open access situation* presumably existed—just as it did for water resources in the South Platte before enactment of the prior appropriation doctrine and for forests in the Applegate region prior to establishment of national forest reserves. Major post-Settlement Act strategies employed for environmental restoration prominently involve *alternative problem-solving* techniques, including water marketing and collaborative watershed management.

The case studies presented provide some insights into the nature of *alternative problem-solving* and, more specifically, the type of institutional environment within which this class of solution strategies can best flourish. Two factors appear to be most salient in creating an environment conducive to success: (1) the prior resolution of fundamental *value conflicts*, and (2) the existence of adequate problem-solving incentives. In the Applegate and Truckee-Carson cases—as well as dozens of similar cases throughout the West—the passage of the Endangered Species Act, and its enforcement by the courts, was the essential action needed to resolve the *value conflict*,

NATURAL RESOURCES LAW CENTER
UNIVERSITY OF COLORADO SCHOOL OF LAW
**STRATEGIES IN WESTERN WATER LAW AND POLICY:
COURTS, COERCION AND COLLABORATION**



Twentieth Summer Conference
June 8 - 11, 1999
Fleming Law Building ♦ Boulder, Colorado

In Cooperation With:
U.S. Bureau of Reclamation
General Service Foundation
The William and Flora Hewlett Foundation

TUESDAY, JUNE 8, 1999

6:30-9:30pm Conference Pre-registration

A FREE PUBLIC FORUM:

CO-SPONSORED BY THE CENTER OF THE AMERICAN WEST

7:00pm **Western Water Policy Review Advisory**

Commission: An Agenda for Action

Secretary of the Interior Bruce Babbitt

(subject to confirmation)

WEDNESDAY, JUNE 9, 1999

8:30-9:30 Continental Breakfast and Registration

9:30-9:45 Welcome and Logistics

*Harold H. Bruff, Dean, University of Colorado,
School of Law*

*Kathryn Mutz, Interim Director,
Natural Resources Law Center*

SESSION 1:

THE NINETIES: MAJOR DEVELOPMENTS IN WESTERN WATER LAW

Moderator: Gary Bryner, Natural Resources Law Center

9:45-10:30 **The Nineties: Major Developments In Western
Water Law**

*David Getches, Raphael J. Moses Professor of
Natural Resources Law*

10:30-11:30 **Western Water and the Environment**

*Patricia Beneke, Assistant Secretary of the Interior
for Water and Science*

11:30-11:45 Discussion

11:45-1:00 Buffet Lunch Provided

SESSION 2:

CONTENTION IN THE COURTS

**Moderator: Kathryn Mutz, Interim Director, Natural Resources
Law Center**

1:00-1:30 **Colorado Water Courts: Where Are They?**

Judge Jonathan Hays, Division 1 Water Court

1:30-2:00 **Colorado Water Courts: Are They Changing?**

Justice Gregory Hobbs, Jr., Colorado Supreme Court

2:00-2:30 **Colorado Water Courts: Should They Change?**

Melinda Kassen, Trout Unlimited

2:30-2:45 Discussion

2:45-3:15 Break

3:15-4:00 **Basin-Wide Adjudications in the West: What
Works, What Doesn't?**

Ramsey Kropf, Patrick & Stowell

4:00-4:45 **From the Tribes' Perspective: A Critique**

*Reid Chambers, Sonosky, Chambers, Sachse and
Endreson*

4:45-5:00 Discussion

EVENING EVENT:

6:15 Buses leave Law School

6:30-8:00 Barbecue on Flagstaff Mountain

8:00-8:45 **Readings on Flagstaff**

William deBuys, New Mexico

THURSDAY, JUNE 10, 1999

8:00-8:30 Coffee/Tea

SESSION 3:

SNAKE RIVER BASIN ADJUDICATION: A WINDOW ON THE FUTURE OF WESTERN WATER LAW

Moderator: Charles Wilkinson, Moses Lasky Professor of Law

8:30-9:00 **Reflections on the Snake River**

Charles Wilkinson, Moses Lasky Professor of Law

9:00-9:45 **Federal Water Rights**

*Michael Gheleta, General Litigation Section,
Environment and Natural Resources Division,
Department of Justice*

9:45-10:30 **Indian Water Rights**

*Peter Monson, Assistant Chief, Indian Resources
Section, Environment and Natural Resources
Division, Department of Justice*

10:30-11:00 Break

11:00-11:45 **Idaho Issues**

Jeffrey Fereday, Givens, Pursley & Huntley, LLP

11:45-12:00 Discussion

12:00-1:00 Lunch on Your Own

SESSION 4:

CHANGING FACE OF COMMAND-AND-CONTROL

**Moderator: James Corbridge, Jr., Professor, University of
Colorado School of Law**

1:00-1:30 **The Clean Water Act: Clean Water Action Plan**

*Sylvia Baca, Acting Assistant Secretary of the
Interior for Land and Minerals Management*

1:30-2:00 **The Clean Water Act: TMDL Implementation
Under the Clean Water Act**

*Oliver Houck, Director of the Environmental Law
Program, Tulane University*

2:00-2:30 **The Clean Water Act: States' Perspectives**

*Roberta Savage, Executive Director, National
Association of State and Interstate Water Pollution
Control Administrators*

2:30-3:00 Discussion

3:00-3:30 Break

SESSION 5:

A NEW BREED OF FEDERAL BUREAUCRACY

**Moderator: James Corbridge, Jr., Professor, University of
Colorado School of Law**

3:30-4:15 **The ESA: Oil and Water?**

Joseph Sax, Boalt Law School, University of California

4:15-5:00 **Federal Facilitation of Water Rights Negotiations
in the West**

*David Hayes, Counselor to the Secretary and Chair of
the Working Group on Indian Water Settlements,
Department of the Interior*

EVENING EVENT:

5:00-6:30 Reception on the West Lawn

Sponsored by Hydrosphere Resource Consultants

COLLABORATION IN WESTERN WATER

FRIDAY, JUNE 11, 1999

7:30-8:15 Coffee/Tea
Registration

SESSION 6:

COLLABORATION: VALUE AND LIMITS

Moderator: Douglas Kenney, Natural Resources Law Center

8:15-8:30 Welcome and Introduction
Douglas Kenney, Natural Resources Law Center

8:30-9:15 **Collaborative Approaches to Conservation: A Critical Look**
Larry MacDonnell, Stewardship Initiatives

9:15-9:45 **State Watershed Planning: Texas SB1**
John Folk-Williams, Public Decision Network

9:45-10:15 Break

10:15-10:45 **The Environmental Community in Collaborative Processes**
Daniel Luecke, Regional Director, Environmental Defense Fund

10:45-11:15 **Native Americans and Collaborative Efforts**
Ted Strong, Columbia River Intertribal Fish Commission

11:15-11:30 Discussion

11:30-12:15 Buffet Lunch Provided

12:15-1:15 **Collaboration in the Making of Natural Resource Policy in the West**
Michael Leavitt, Governor of Utah (invited)

CONFERENCE CO-SPONSORS

In addition to major funding from the US Bureau of Reclamation, General Service Foundation; and the William and Flora Hewlett Foundation, this Conference is funded in part by:

Center of the American West



Hydrosphere Resource Consultants



Modrall, Sperling, Roehl, Harris & Sisk, P.A.

SESSION 7:

THE PLATTE RIVER WATERSHED: COLLABORATION IN CONTEXT

Moderator: David Getches, Raphael J. Moses Professor of Natural Resources Law

1:15-1:45 **A Laboratory for Collaboration: Where, Why and Why Not?**
Ken Salazar, Attorney General, Colorado, with Felicity Hannay, Deputy Attorney General, Natural Resources and Environment Section

1:45-2:15 **Platte River Endangered Species Partnership: Collaboration or Coercion in Disguise?**
Dale Strickland, Executive Director, Platte River Endangered Species Partnership

2:15-3:15 **Nebraska v. Wyoming: The End of Collaboration?**
Wendy Weiss, First Assistant Attorney General, Federal and Interstate Water Unit, Colorado
Tom Davidson, Deputy Attorney General, Wyoming
Ann Bleed, State Hydrologist, Nebraska

3:15-3:45 Break

3:45-4:15 **Collaboration Among Municipal Water Providers: Meeting Metro Water Demand**
Lee Rozaklis, Hydrosphere Resource Consultants

4:15-4:45 **A Western Slope Perspective: Endangered Species and Municipal Water**
David Hallford, General Counsel, Colorado River Water Conservation District

4:45-5:15 Discussion and Closing Remarks

CONFERENCE ENROLLMENT FORM NOTEBOOK AND CD-ROM DISK ORDER FORM

Name _____
Affiliation _____
Address _____
City _____ State _____ Zip _____
Phone _____ Fax _____
e-mail: _____

Fees	Regular Rate	Gov't/Academic & Nonprofit	Friday Only	Parking (Days)
By May 14	\$515	\$250	\$75	\$15 (3)
After May 14	\$565	\$290	\$85	\$5 (1)
Cookout Wednesday (must sign up):				
	Self (\$10)			\$ _____
	Adult guests @ \$10			\$ _____
Extra notebook of speakers' outlines and materials			\$75	\$ _____
CD-ROM Disk			\$10	\$ _____
Tax (within Colorado) on notebooks or CD			7.26%	\$ _____
Postage/handling on notebooks or CD			\$5	\$ _____
			Total amount	\$ _____

Method of Payment:

Check enclosed payable to University of Colorado _____
VISA/MC# _____
Exp. Date _____ Signature _____
Purchase Order No. _____

How did you hear about this event? _____

Return this form and payment to: Natural Resources Law Center • University of Colorado School of Law • Campus Box 401 • Boulder, CO 80309-0401 • 303/492-1272 • FAX 303/492-1297 • e-mail: NRLC@spot.Colorado.edu

June 8-11, 1999

STRATEGIES IN WESTERN WATER LAW AND POLICY: COURTS, COERCION AND COLLABORATION

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

GENERAL INFORMATION:

Registration Fees: Please register early. The total cost of the event is \$515 if received by May 14, and \$565 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 \$250 (\$290 after May 14). Registration for Friday, June 11 is available for \$75 (\$85 after May 14). To register, return the attached form and payment to the Center or register by phone (303/492-1272) or Fax (303/492-1297), charging the fee to Visa or MasterCard.

Discounts and Scholarships: The Center will offer a number of 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.

Location: Sessions will be held in the Fleming Law Building, University of Colorado, Boulder. Parking permits are available for \$5 per day.

Continuing Legal Education: 24 hours of general CLE credits have been requested from Colorado's Board of Continuing Legal and Judicial Education. CLE credit for other states may also be available.

Transportation: Boulder is served by Denver International Airport in Denver, 45 miles away from campus. The Boulder Airporter (303/444-0808) leaves hourly from DIA 8:00 a.m. to 11:00 p.m. on level 5 (across from the Hertz counter). No reservations are necessary except for returns from hotels to DIA. Cost of the Airporter is \$18 to \$22 one way. RTD ("AB") buses leave DIA hourly at 20 past the hour. Exact change fare is \$8 one way/\$13 round trip.

Conference Notebooks and CD-ROM Disks: Conference participants will receive conference notebooks as part of their registration package. Following the conference, notebooks will be sold for \$75 each, and \$10 for a notebook on CD-ROM, plus handling and tax if applicant lives in Colorado.

Refunds and Substitutions: Conference fee refunds, less \$25, will be available through Friday, May 28. Cancellations received May 29 through June 8 will receive a refund, less \$50. There can be no fee refunds after the conference begins. Participant substitutions are allowed at no cost.

Hotel/Dorm Accommodations: Blocks of rooms have been reserved for registrants at several hotels. *Please make your reservation directly by May 10, 1999*, as all reservations made after this date are subject to availability. *Mention the NRLC June Conference* to take advantage of special rates. A deposit or credit card number is required to hold a reservation.

In order to make attendance of the conference more affordable, the Center will attempt to match individuals in double accommodations at Kittredge Dorm and the University Club. A double at Kittredge will be about \$23 per person per night. Please call Donna at 303/492-1288 for details.

Boulder Broker Inn - 555 30th St., Boulder, CO 80303; Phones: (303/444-3330); Toll-Free: (1/800/338-5407); Rates: \$83/night for single or double occupancy.

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Kittredge Dorm - located near the law school on the Boulder campus; Phone: 303/492-5151; e-mail: lodging@housing.colorado.edu; Reservations must be made by May 31, 1999; Rates: 3-night rate (including tax): single - \$146.16; double \$77.05.

Regal Harvest House - 1345 28th Street, Boulder, CO 80302; Phones: 303/443-3850; Toll-Free (1/800/545-6285); Rates: \$99 for single or double occupancy.

University Club - located on the Boulder campus at 972 Broadway, Boulder, CO 80309-0120; Phone: 303/492-6509; Rates: single occupancy starts at \$49/night, \$64/night for double.

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Center Initiates Environmental Justice (EJ) Program

The Center has recently initiated an Environmental Justice (EJ) program with funding from the Ford Foundation. The purpose of creating an EJ program is threefold.

Because of the Center's traditional focus on natural resources, rather than more traditional "environmental" issues, the primary focus of the EJ program will be equity issues in a natural resources context.

First, the Center is interested in exploring the contours of what is, and is not, reasonably subsumed within the umbrella term "Environmental Justice."

Second, the Center is interested in expanding the scope of its research to address issues of racism and equity as they relate to the use or misuse of the natural and human environment and to disseminate this research to a broad audience.

Finally, the Center views this project as an excellent way to create more cooperation and coordination among the faculty and students at the University of Colorado School of Law, in addition to outside organizations such as the Center for the American West, the US Environmental Protection Agency, and other research centers.

The goal of this project is to begin a process which will ultimately produce a thoughtful and insightful scholarly publication that can move the dialogue forward on this issue in a productive manner.

The Center will invite a variety of speakers on issues that are beyond the traditional foundations of Environmental Justice.

The recent impressive history of the EJ movement has focused on issues related to siting of toxic waste facilities in communities of color and other related pollution issues. The scholarship in this field is highly sophisticated, with research focusing both on the distributive outcomes of environmental decision-making and on the underlying social institutions that help to produce a disproportionately negative

impact in communities of color. The Center will try to further a meaningful understanding of the foundations of EJ in the pollution context by bringing in experts from this area. But beyond this, the Center will build on this foundation to ask if and how the empirical and normative conclusions in the pollution context apply to other, less explored, issues of equity.

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The program will consist of three parts: (1) a colloquium series, (2) a book or journal issue of collected essays, and (3) a conference. The colloquium series begins this spring with visits from two well respected experts on EJ in the urban pollution context.

Friday, April 2nd, 1999, Sheila Foster, Associate Professor at Rutgers Law School, will visit CU Law to present a faculty colloquium and to meet with law students. Professor Foster has published in the areas of discrimination, critical race theory, and environmental justice. Professor Foster received her B.A. with honors from the University of Michigan and her J.D. from Boalt Hall School of Law at the University of California, Berkeley. She teaches Torts, Racism and American Law, and Environmental Justice at Rutgers-Camden.

Friday, April 16th, 1999 at 4pm Luke Cole will present a public lecture on EJ in the Lindsley Memorial Courtroom at the Fleming Law Building on the University of Colorado south campus. Mr. Cole is general counsel to California Rural Legal Assistance Foundation's Center on Race, Poverty & the Environment in San Francisco. He represents low-income communities and workers throughout California and nationwide who are fighting environmental hazards, stressing the need

for community-based, community-led organizing and litigation. Mr. Cole's visit will be in conjunction with the National Lawyers Guild Southwest Regional Conference in Boulder on April 16th and 17th, 1999 (A full schedule of the NLG Conference can be found at <www.colorado.edu/Law/NLG/index.html>). Mr. Cole's talk is open to the public and will be followed by a reception in the Moorhead-Rutledge Lounge at the Fleming Law Building.

As the year progresses, the Center will invite a variety of speakers on issues that are beyond the traditional foundations of EJ. These non-traditional EJ issues might include: Native Americans issues (siting of toxic facilities, intra-tribal inequities, conflicts with recreationists on sacred sites, and natural resources development issues), Spanish and Mexican land grant issues (water rights, timber resources, etc.), participatory/process oriented issues (NEPA and other forms of public participation in resource management), and others.

Wednesday, May 26th at 7pm Keith Basso, Professor of Anthropology at the University of New Mexico, will discuss "Contrasting Senses of Place in Northern Arizona" at Old Main Chapel on the University of Colorado campus. Basso has published multiple ethnographies and other volumes on the Western Apache, and in particular he focuses on the understanding and formation of the individual and community sense of place. This presentation is being sponsored by the Center of the American West.

The goal is to develop a dialogue through the colloquium series that will result in a book of collected essays. Each essay principal author, and as many of the coauthors as is practical, will be asked to return to the Law School in early 2000 for a national conference. The conference will provide an opportunity to present draft manuscripts in a public forum and to receive comments and criticism from other authors and the University community. If you have any questions or comments about the EJ program, please contact Sean McAllister at (303)492-1287.



paving the way for *alternative problem-solving strategies*. This is more than a little ironic given that many of the proponents of *alternative problem-solving* see these strategies as the preferred alternative to the regulation/litigation model embodied by the Endangered Species Act and similar value-oriented legislation.

The salience of the second factor, incentives, in each of the mechanisms lumped under the heading of *alternative problem-solving strategies* derives from the fact that each is highly dependent upon achieving

Increasingly, a diverse coalition of policy-makers and advocates are encouraging the use of alternative problem-solving approaches to address natural resource and environmental problems.

agreement among all key participants. In various ways, each of the case studies illustrates the importance of incentives in modifying behavior. In the South Platte case, a fear of losing water rights was a key behavioral consideration, while in the Applegate and Truckee-Carson cases, the costs of environmental regulation were a strong stimulus for reform.

In addition to these incentives imposed by problem-solvers, the problems themselves feature important incentive structures, perhaps best described using the concept of *symmetry*. In *symmetrical* situations, such as *depletion* and *underinvestment* problems, all parties have

at least a partial incentive to resolve problems; whereas in *asymmetrical* situations, such as *maldistribution* and *externality* problems, some parties are benefitted by the status quo. It is expected that *alternative problem-solving strategies* will not emerge in the *asymmetrical* situations unless additional incentives (either positive or negative) are provided, but may independently emerge in the *symmetrical* situations. This is the pattern shown by the case studies.

Concluding Thoughts

This report reflects a growing desire among many parties in the natural resources community to bring a greater level of scientific scrutiny to the description, analysis and, ultimately, the design of institutional arrangements. The conceptual framework described herein, while far from perfect, is an initial step in that direction. However, while not minimizing the potential contribution of institutional analysis to improved resource management, it must be acknowledged that even the most informed and academically rigorous processes of institutional design will not be sufficient to craft arrangements stable over long time periods—especially at the *operational choice* level. Many of the factors prompting natural resource and environmental problems—such as growing demands on resources, technological innovations, changing social values, and the consequences of past rule-making exercises—are not easily controlled, and to the extent that their ramifications can be

managed, this activity must be viewed as an ongoing challenge, much as we accept government to be a permanent fixture of modern civilization.

Increasingly, a diverse coalition of policy-makers and advocates are encouraging the use of *alternative problem-solving approaches* to address natural resource and environmental problems. There is reason to be optimistic about these approaches emphasizing voluntary, incentive-based decision-making, often occurring in

The conceptual framework described herein, while far from perfect, is an initial step in that direction.

collaborative or market settings. In many geographic and substantive areas, these approaches are making a positive contribution to management regimes, providing problem-solvers with a bigger and better toolbox. The enthusiasm for *alternative problem-solving strategies*, however, is somewhat disconcerting. The three case studies reviewed in this report were sufficient to illustrate two major limitations on the use of these tools: first, when significant *value conflicts* are unresolved; and secondly, in situations primarily featuring problems with *asymmetrical* incentive structures. Further analyses will likely identify additional insights into the proper, and improper, application of these approaches. The discipline of institutional analysis is the proper setting for these investigations, utilizing concepts and methodologies drawn from a wide variety of academic pursuits.

HOT TOPICS FOR SPRING

In the first luncheon of the series held on March 30th, **Rick Kahn** of the Colorado Division of Wildlife, and **William Perry Pendley**, President and Chief Legal Officer of the Mountain States Legal Foundation, reviewed some of the legal and policy issues associated with reintroduction of the lynx and other animals, including the wolverine, various fish species, and the boreal toad.



Friday, April 16, 1999

OWNERSHIP OF COALBED METHANE

Does the coalbed methane extracted from hard-rock coal on the lands of the Southern Utes belong to the tribe, which has long had recognized rights to the coal? For many years, the answer has been “no,” but recent events paint a very different picture. How will this emerging redefinition of coalbed methane ownership affect natural gas development in the San Juans? What, if any, are the national implications? These difficult questions will be addressed by attorney **Elizabeth McClanahan** of Penn, Stuart & Eskridge (Virginia). Elizabeth spent the spring of 1994 investigating this topic for the Center as its El Paso Energy Corporation Law Fellow

Tuesday, May 4, 1999

MINING LEGACY

An estimated five hundred thousand abandoned mines scar the western landscape, producing acidic drainage and raising issues with scientific, philosophic, and public policy dimensions. Determining appropriate technical and cost-based standards for remediation of the environmental and public health impacts is a difficult challenge, requiring a thoughtful union of science, technology, and economics, married with ethical, political, historical, and cultural values. **Professor Robert Frodeman**, the Center’s current El Paso Energy Corporation Law Fellow, will summarize his extensive research on this subject, focusing primarily on cases from the San Juan Mountains.

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Books:

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- BK04 *Proceedings of the Sino-American Conference on Environmental Law*, (Aug. 16-18, 1987) Beijing, People's Republic of China, \$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*, Lawrence J. MacDonnell, ed., 1987, \$12.

Western States Policy Discussion Papers:

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- RR20 "Innovations in Forestry: Stewardship," 1998, 10 copies free, additional copies at 5 for \$1, including postage.
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Campus Box 401

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