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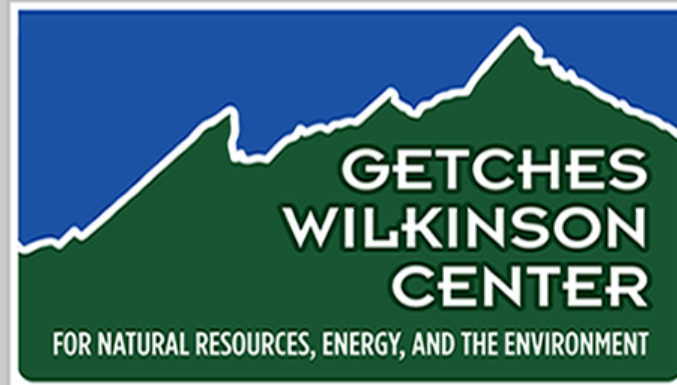
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RESOURCE LAW NOTES: THE NEWSLETTER OF THE NATURAL RESOURCES LAW CENTER, no. 2, Apr. 1984 (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).

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Resource Law Notes

The Newsletter of the Natural Resources Law Center
University of Colorado, Boulder • School of Law

Number 2, April 1984

Resources Center Schedules Two Summer Conferences

Two conferences are planned for the fifth annual summer program sponsored by the Natural Resources Law Center. The first, June 6-8, 1984, will focus on **The Federal Land Policy and Management Act (FLPMA)**. This important piece of legislation, passed by Congress in 1976 following many years of extensive study and debate, directs the activities of the nation's major land manager—the Bureau of Land Management. The FLPMA conference will bring together a distinguished group of experts to review the law itself, to consider the effectiveness with which it has been implemented, and to discuss the key issues which have arisen under its implementation.

PROGRAM

June 6, 1984

- 8:45 a.m. Charles F. Wilkinson, *The Public Land Laws and Introduction to FLPMA*
- 11:00 a.m. H. Paul Friesema & Paul J. Culhane, *The Bureau of Land Management Planning Process*
- 12:15 p.m. Robert F. Burford, *The Future of the Public Lands*
- 1:45 p.m. H. Robert Moore, *FLPMA from the Perspective of the Bureau of Land Management*
- 2:45 p.m. Thomas Glass, *Opportunities for Local Input in BLM Planning and Management*
- 4:00 p.m. Jon K. Mulford, *Land Sales and Exchanges*

June 7, 1984

- 8:45 a.m. Rebecca Love Kourlis, *Access to and Across Public Lands*
- 10:30 a.m. John D. Leshy, *Wilderness and the Public Lands*
- 2:00 p.m. William R. Marsh, *FLPMA as It Affects the Mining Industry*
- 3:45 p.m. George C. Coggins, *FLPMA and Grazing*

June 8, 1984

- 9:00 a.m. Richard L. Stroup, *Private Uses of the Public Lands—What is the Appropriate "Fair Market Value"?*
- 10:15 a.m. David H. Getches, *Land Withdrawals*
- 11:45 a.m. (speaker to be announced), *Congressional Oversight of the Public Lands*
- 1:45 p.m. Clyde O. Martz and John A. Carver, *Directions for the Future*

The second conference, June 11-13, 1984, continues the Center's series in the water area with the focus this year on

The Federal Impact on State Water Rights. In general, water rights are a matter of state law. However, the availability and development of water are affected by important federal rights, policies and programs. In this conference, an outstanding group of private practitioners, government representatives and academics consider this important topic.

PROGRAM

June 11, 1984

- 9:00 a.m. Ralph W. Johnson, *Introduction to Reserved Water Rights*
- 10:45 a.m. Louis F. Claiborne, *Quantification of Indian Rights—Current Developments*
- 12:00 noon Robert N. Broadbent, *Developments in Federal Water Policies and Programs*
- 1:30 p.m. Harry R. Sachse, *Quantification of Indian Rights: Problems of Proof*
- 3:00 p.m. Jon L. Kyl, *The Role of the State Courts in Adjudicating Indian Water Rights*
- 4:00 p.m. Joseph R. Membrino, *Negotiation as a Means of Quantifying Indian Water Rights*

June 12, 1984

- 9:00 a.m. James M. Bush, *Legislative Approaches to Quantification of Indian Water Rights*
- 10:15 a.m. Richard B. Collins, *The Transfer and Use of Reserved Water Rights Within the Framework of Indian Allotments*
- 1:15 p.m. Charles B. Roe, Jr., *The Future of Indian Water Rights Claims*
- 3:15 p.m. Hank Meshorer, *Instream Flows as Reserved Rights on Federal Reservations after U.S. v. New Mexico*
- 4:15 p.m. Paula C. Phillips, *Effects of the Clean Water Act on Water Availability and Development*

June 13, 1984

- 9:00 a.m. A. Dan Tarlock, *Wetlands Preservation and the Protection of Endangered Species as Limits on Water Development*
- 10:45 a.m. Robert J. Golten, Gregory J. Hobbs, Wendy C. Weiss and Margot Zallen, *Panel Discussion: Section 404 of the Clean Water Act and Section 7 of the Endangered Species Act—Potential Impacts on Water Supplies*
- 1:45 p.m. Arthur L. Littleworth, *Groundwater Control Programs Affecting Water Development*
- 3:15 p.m. Lawrence J. Wolfe, *FERC, PURPA, and the Federal Power Act*

The conference will be held at the University of Colorado School of Law in Boulder. The registration fee of \$475 for each conference includes attendance at all sessions, a note-

book containing detailed outlines of all presentations and related materials, lunches on two of the days, receptions on the first two afternoons, and a dinner the first evening for all participants and their spouses. For further information, please contact the Center at (303) 492-1286.

Center Seeks Candidates For Fellows Program

The Natural Resources Law Center is seeking applicants for its Fellows Program for the fall semester, which begins September 1984, and the spring semester, beginning January 1985. The Fellows Program seeks to bring persons from industry, government, universities, or the practice of law for a semester in residence at the School of Law.

Program emphasis is on natural resources law, but applicants with related, nonlegal backgrounds in areas such as economics, engineering, business, or the social sciences also are encouraged.

In addition to the opportunity to pursue research and writing on a topic of interest to the participant, fellows have an opportunity to interact with faculty and students in both formal and informal sessions.

For further information, contact Professor James Corbridge, University of Colorado School of Law, Campus Box 401, Boulder, Colorado 80309. Phone: (303) 492-6895, or the Natural Resources Law Center at (303) 492-1286.

Summer Conference to Study Effects of Acid Rain

Together with the Colorado Department of Health and a number of other organizations, the Natural Resources Law Center is co-sponsoring the Ninth Annual Water Workshop at Western State College in Gunnison, Colorado. The conference will be held July 23-25, 1984 and will explore the topic of acid deposition and its direct and indirect effects in the West.

The national debate on the effects of acid deposition and appropriate policy responses continues. The issues involved are complex and important. Significant damage related to acidification has occurred in ecologically sensitive areas in the United States and Canada. The best scientific evidence currently available suggests that much of this acidification can be attributed to the combustion of fossil fuels and, in particular, to the emissions of sulfur dioxide and nitrogen oxides. Because of the complexity in the acidification process, however, a major source of uncertainty is the degree to which reduction of these emissions in any given location will actually reduce acidification in the areas of special concern.

At least ten bills addressing acid deposition already have been introduced in Congress. In general, the approach has been to require substantial additional reductions of sulfur dioxide emissions from coal-fired electric power plants. Various allocation schemes for these emissions reductions have been proposed. The focus has been on the eastern United States and on those power plants with the highest emission rates for sulfur dioxide. Reductions are to be achieved over a specified period—usually ten years. In at least one bill, the use of "scrubbers" to achieve the reductions is mandated. The approach to paying the associated costs is another major source of variation among the bills. One approach causes the involved utilities and their custo-

mers to bear the total cost; an alternative proposal is that the costs be shared more broadly with assistance provided through a general tax on electricity.

The conference will include sessions on the current scientific evidence regarding the effects of acid deposition as well as the economic and political implications of regulation. Details regarding the program will be available soon.

Welles Joins Advisory Board

John G. Welles, Regional Administrator of Region 8 for the Environmental Protection Agency, has joined the Center's Advisory Board. Prior to taking his current position with EPA in 1983, Mr. Welles served as Vice President for Planning and Public Affairs at the Colorado School of Mines for more than eight years. During 1979 and 1980 he also headed the Colorado Front Range Project, a broad-ranging examination of the direction of economic growth in the 13 Front Range counties. Between 1956 and 1974 Mr. Welles directed the Industrial Economics Division of the Denver Research Institute. His educational background includes a degree in electrical engineering from Yale and an M.B.A. from the Wharton School of Finance. Mr. Welles has been very active in community and professional affairs. We are pleased to have Mr. Welles as a member of the Advisory Board.

Natural Resources Law

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Raphael Moses, Esq.

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Laurence Moss

Consultant on energy and environmental matters; former National President of the Sierra Club.

Robert Pasque, Esq.

Manager of Lands, Cities Service Corporation; has worked with Interstate Oil Compact Commission, Rocky Mountain Oil and Gas Western Oil and Gas Associations and the Independent Petroleum Association of America.

David Phillips, Esq.

Executive Director, Rocky Mountain Mineral Law Foundation; former counsel, Wolf Ridge Minerals Corp. and exploration geologist, Carter Oil Co. and Humble Oil and Refining; CU Law Alumnus.

Professor Robert E. Sievers

Director, Cooperative Institute for Research in Environmental

should not be redirected into development of recreation, which has a gentler impact on our environment and also supports an important economic industry in Colorado. We have been joined in one appeal by Gunnison County. In addition, the Natural Resources Defense Council has filed a companion appeal on some slightly different grounds, largely economic.

The final issue that I want to mention is the conflict between endangered species and water development, which illustrates the clash between uses for the same resource. It also is probably our most difficult federalism issue right now. It is a confrontation between one of the most powerful environmental laws and one of the most highly valued rights under the law of the western states, the law of prior appropriation.

Prior appropriation allows one who has or plans a beneficial use for water to divert that water and then to use the quantity diverted with a better right than anybody who establishes a later use. Water allocation is a traditional state prerogative and since water use may require a diversion dam or, at the very least, a depletion in the flow of the river, there is a possibility of competing with the habitat upon which fish depend.

The Endangered Species Act was passed in 1973 in response to public alarm over the extinction of species. Species are always dying out of course, but a natural extinction of species usually occurs with the evolution of some new species. The fate of species due to human-added pollutants such as DDT, PCB, kepone, mercury and so on was seen as a bellwether for what might happen to humans if we did not watch what we did with the environment. So the Act provided several special protections for certain species that were found to be endangered. It provided for no "taking," that is killing or otherwise interfering with the survival of species placed on a list of those that are endangered, and provided civil and criminal penalties for violations.

In addition, section 7 of the Endangered Species Act required consultation before any federal action could take place to determine whether an endangered species would be impacted or jeopardized. Section 7 says that each federal agency shall "in consultation with and with the assistance of the Secretary, ensure that any action authorized, funded or carried out by such agency, is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary to be critical."

On the list of endangered species are three species of fish: the humpback chub, the bonytail chub and the squawfish, all of which are now or once were in the Colorado River. Two of them are certainly still in Colorado; the bonytail is thought to be extinct.

Any new water user on the Colorado River or any of its tributaries, including the Yampa, the White, the San Juan, the Gunnison and so on, must go through a Section 7 consultation. The requirement applies to more than just federal projects. There is a federal handle on nearly every project to divert or store water. Any construction activity on the banks of a stream, in a stream bed, or in wetlands adjacent to a stream under Section 404 of the Clean Water Act requires a dredge and fill permit. Granting a dredge and fill permit is a federal activity. Thus a Section 7 consultation is necessary and, since the Fish and Wildlife Service now takes the position that depletions of water or placement of obstructions in the stream may endanger the continued existence of the species, a "jeopardy opinion" will issue. That means

that the water development project cannot go forward unless a "reasonable and prudent alternative" is found.

The law provides that if there is an alternative to stopping the project that will be reasonable and prudent in terms of protecting the species, then the project can proceed under that alternative scenario. The Fish and Wildlife Service, however, has constructed a single reasonable and prudent alternative—a draft conservation plan—in the case of these three endangered species of fish. That conservation plan has two aspects: payment of a depletion charge by the project proponent and minimum stream flow requirements. The payment is to fund more research because we really know very little about what is necessary in order to protect the survival of fish. Not knowing what to do to ensure survival, the Service proposes to have biologists do research.

The second aspect is minimum stream flows. It seems logical that fish cannot live without some minimum stream flow being available to them, but what that minimum stream flow is for these fish is entirely unknown. It is not known whether the proposed minimum stream flow would ensure their survival or bring about their recovery as a species, given other present conditions. But despairing any data, the Fish and Wildlife Service simply assumed that the fish must have been better off in the 1960s when there was more water in the stream and targeted the streamflows of that era. They do not know for sure whether there were more or fewer fish at that time.

Water users who are investing a lot of money in expanding municipal facilities, or dreaming about an oil shale project, or expanding an irrigation system, objected to the Fish and Wildlife Service approach. They said the Service was cavalierly telling them that they cannot go ahead with water diversions. The biologists dug in their heels and said the law permits them to do so. And they are right; the law does say that they have tremendous authority to protect endangered species.

The minimum stream flow requirements were untenable for a variety of reasons. The most important one is that they impacted unfairly on the latest applicants. That is, those who applied for Section 404 permits early would get permits because they came within the minimum stream flows. But as soon as the minimum stream flow was used up, the next applicant would be rejected or required to forgo a substantial portion of the decreed right in order to maintain minimum stream flow. The person who applied the latest and would be subject to the harshest requirements might be the user with the most senior water rights, and who banked on those senior water rights being good. The Section 404 permitting process turns the whole seniority system under our state prior appropriation law on its head. Furthermore, even those who got permits would have no assurance that they would not be subject to new requirements once the results of new research are available.

The lack of scientific data is a serious problem. Our Division of Wildlife has extensive studies of the endangered fish. The Fish and Wildlife Service did not fully consider many of them. It occurred to us that there is a possibility of some alternative solutions to endangered fish species protection. Such things as range, turbidity, and temperature were not adequately considered. Fish passage facilities have not been proposed as reasonable and prudent alternatives. Hatcheries for the fish are not adequately considered, although our Division of Wildlife has found that the fish can be propagated quite successfully in fish hatcheries. Instream flow purchases by the state Division of Wildlife, by such groups as the Nature Conservancy and by the Fish and Wildlife Service itself had

In a compromise secured by Colorado Congressman Wayne Aspinall in 1968, five major water projects were to be built in Colorado with federal funding simultaneously with the construction of the Central Arizona Project. Only two of these projects are being built. A third, the Animas-La Plata Project in southwestern Colorado, is the subject of a bill now before Congress. It is yet to be seen whether it will be funded in the traditional way—that is, 100% with federal funds to be paid back with project revenues from the sale of electricity generated at the dams over a 50 year period. There is a substantial likelihood that the federal government will not do so unless the state contributes a share of the project costs.

Faced with the prospects of limited future federal support at best, and the fact that, especially in the Upper Basin, we do not have the facilities to divert and convey the share of Colorado River water that is allocated to us to the places where it may be needed, the goal of development anticipated in the 1968 Colorado River Basin Project Act, which authorized the Central Arizona Project, was slipping away. And so Coloradans interested in water development decided we had to seek a new way to finance water.

We targeted power revenues from the Colorado River Storage Project. The Colorado River Storage Project generates power out of the Glen Canyon Dam and the other dams in the Upper Basin. It is a "cash register" because it generates 5 billion kilowatt hours a year of electricity and raises annual revenues now of about \$75 million. Those revenues are actually very low. The sales price for the power is about 9-12 mills per kilowatt hour. To put that in perspective, a coal-burning power plant produces electricity at 60-80 mills per kilowatt hour. Some newer sources are generating power at 100-300 mills per kilowatt hour. So this pittance that is being paid for electricity by the users from the Colorado River Storage Project signals to us that there are some economic rents there available for project construction and rehabilitation. We have proposed to change the rate structure that is now driven entirely by cost (only the cost of generating the power is reflected in the 9-12 mills). Funds would flow directly to the State of Colorado and other Upper Basin states. The

states would decide how best to allocate that money to project construction and rehabilitation. It would not necessarily go to any of the projects that are already authorized. Indeed, it may result in deauthorization of already authorized projects and we have made that known to many of those project proponents, not all of whom have greeted the proposal with enthusiasm. Nor have the power users. But we are dealing with those interests.

The second activity I want to mention is the Department's appeals of the United States Forest Service plans. The Forest Service is required by the National Forest Management Act and the Resources Planning Act to plan for the use of resources in the national forests over a 50 year period. There are 154 forests in the United States; each of them has to have a forest plan. Colorado is one of the first states to complete its plans. We think the plans are inadequate.

The plans for Colorado that have been released, and the drafts for the remaining forests, propose an increase in the actual timber cuts of 350%. If you know the forests in Colorado, you know that they are not big timber-producing forests. The trees take more than a century to reach maturity. We found the Forest Service's reasons for proposing to cut trees on a massive scale to be inadequate. The justifications given were to control pests and diseases, to regenerate aspen, and to develop watersheds in order to produce more water flow in the streams. We have found varying degrees of credibility in the rationalizations given. Interestingly, these rationalizations were not explained in earlier drafts; they were added later. All of this led us to question the bases for the plans because further timber cutting emphasis tends to detract from what we think is the primary use of forests in Colorado, and that is recreation.

The forest plans state that recreation in the forests produces far more income for the state than does timber. In fact the timber cuts themselves will be very costly. They will bring in about \$7 million in revenue from the sales. However, the federal government will spend \$21 million in order to cut roads and to scale and grade the timber for sale. Given the level of subsidy needed, we wonder if federal resources

The Natural Resources Law Center

The Natural Resources Law Center was established at the University of Colorado School of Law in the fall of 1981. Building on the strong academic base in natural resources already existing in the Law School and the University, the Center's purpose is to facilitate research, publication, and education related to natural resources law.

The wise development and use of our scarce natural resources involves many difficult choices. Demands for energy and mineral resources, for water, for timber, for recreation and for a high-quality environment often involve conflicting and competing objectives. It is the function of the legal system to provide a framework in which these objectives may be reconciled.

In the past 15 years there has been an outpouring of new legislation and regulation in the natural re-

sources area. Related litigation also has increased dramatically. As a result, there is a need for more focused attention on the many changes which are taking place in this field.

The Center seeks to improve the quality of our understanding of these issues through programs in three general areas: legal and interdisciplinary research and publication related to natural resources; educational programs on topics related to natural resources; and a distinguished visitor and visiting research fellows program.

For information about the Natural Resources Law Center and its programs, contact:

Lawrence J. MacDonnell, Director
Katherine Taylor, Executive Assistant
Fleming Law Building
Campus Box 401
Boulder, Colorado 80309
Telephone: (303) 492-1286

Significant Issues Discussed By Natural Resources Director

by David H. Getches



David H. Getches

David H. Getches is the Executive Director of the Colorado Department of Natural Resources. He is on leave from the University of Colorado School of Law where he has been on the faculty since 1978. Mr. Getches is a graduate of the University of Southern California School of Law. He has been in private practice in California and in Colorado. Mr. Getches was the founding director of the Native American Rights Fund, starting a pilot office for that program in California in 1970 and then locating in Boulder in 1971.

The following remarks are taken from a talk given by Mr. Getches at the C.U. Law School on February 28, 1984, under the auspices of the student Environmental Law Society.

* * *

The smorgasbord of issues that we have in the Department of Natural Resources is tantalizing to anyone interested in natural resources. They are typically characterized by

three tensions. One is the competition among resources for possible uses. Another is the resistance that any private property owner or holder of private rights has to government control of property, in this case natural resources. And the third area of tension is in federal-state relations. Federalism concerns run high. The state's relationship with the federal government is always a delicate one.

Let me list a dozen or so issues to give you an idea of the scope of the issues that the Department is dealing with and then focus on three that are occupying a lot of my attention right now.

We are working on a new groundwater law for Colorado. If you are familiar with the *Huston* case, you know that it left Colorado groundwater law in disarray, or maybe it acknowledged the disarray that already existed. Our Groundwater Legislation Committee is attacking the problem of trying to put together a well reasoned package of legislation that can be recommended to the legislature.

I am hoping to initiate soon a major program addressing water conservation. It is a neglected area of water law, particularly in the West where water seems so scarce.

Although oil shale is not being developed at the rapid pace that people feared or hoped, as the case may be, a few years ago, it is still with us. The Synfuels Corporation is about to pump close to 5 billion dollars into two oil shale projects in the State of Colorado in order to provide incentives for the development of technology. We are very concerned about how the contracts are being negotiated between the Synfuels Corporation and the two sets of companies that are developing the Union Oil project and the Cathedral Bluffs project. The State is not a party to those contract negotiations but we need to inform ourselves about what is going on and to assure that environmental, social and economic factors are being adequately considered.

We are dealing with wilderness legislation now. We have made our recommendations and they have been embraced within Senator Hart's bill. They would add 733,000 acres of wilderness to Colorado's wilderness system.

We are trying to come to grips with what can be done about the impacts of the MX development just across our border.

We have formulated some recommendations for designation of the Cache La Poudre River as Colorado's first wild and scenic river. The recommendations are being considered by Congressman Hank Brown, who plans to introduce legislation.

There are some projects in the Department that you probably have not heard about. We are about to initiate a satellite streamflow monitoring system that will put gauges at 84 locations throughout the state and transmit information every fifteen minutes concerning the flows in those rivers via satellite.

We are working on a program of insurance for mine subsidence.

Today I will discuss three additional issues that are taking a lot of our time these days. Each of them is representative in varying degrees of all three tensions that I mentioned earlier. These issues are: the conflict between the preservation of endangered fish species in the Colorado River and the development of water resources; the National Forest Service plans for the forests in Colorado that the State of Colorado is appealing administratively; and a new program for raising money for new water projects.

The water problem in Colorado is not, as most people believe, a problem of scarcity. There really is much more water in Colorado than we could ever conceive of using in the state. The problem is one of distribution of the portion that is not committed to other states.

Center Advisory Board

Sciences (CIRES) University of Colorado; Professor of Chemistry; former Senior Scientist at the Aerospace Research Labs, Wright-Patterson Air Force Base, Ohio.

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Professor and former Dean of University of Texas School of Law; former member, Legal Committee of the Interstate Oil Compact Commission; author, *Cases and Materials on Oil and Gas*.

Leo N. Smith, Esq.

Verity, Smith & Kearns, Tucson, mining law practice; Supplement author: **American Law of Mining**; CU Law Alumnus.

Professor A. Dan Tarlock

Professor of Law, Chicago/Kent Law School, Illinois Institute of Technology; author of **Selected Legal and Economic Aspects of Environmental Protection, Environmental Law & Policy, Water Resource Management, Land Use**

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Colorado House of Representatives, Committee on Agriculture, Livestock and Natural Resources; formerly on State Water Pollution Board; CU Law Alumna.

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not been considered. Instead, the conservation plan dictated that the burden was to fall on project applications, more heavily on the ones that applied later than the ones that applied earlier. And so we have suggested other alternatives be considered.

At first there was resistance from the Fish and Wildlife Service. Then battle lines started to be drawn. The Colorado Water Congress raised over \$200,000 to go to battle with the Fish and Wildlife Service. The Colorado Water Conservation Board authorized the Attorney General to prepare for litigation if any existing or authorized projects were affected. Senator Wallop of Wyoming sought to amend Section 404 of the Clean Water Act.

It became evident to us that an administrative solution was far more desirable than the direction in which we were heading, and we finally prevailed on the Fish and Wildlife Service to cooperate in such a solution. Last week the Deputy Assistant Secretary of Interior announced that they would accept our suggestion to convene an intergovernmental group including the three states involved, two districts of the Bureau of Reclamation, and the Fish and Wildlife Service itself. The group will seek means to reach a negotiated solu-

tion. One possibility is an alternative conservation plan that will protect the existence of the fish and at the same time allow for water development, avoiding the showdown that seemed inevitable. There is no assurance of success but we have high hopes this thorny problem can be resolved.

Fund Raising Effort Moves Closer to Goal

According to **Barbara Allar**, Director of Law School Development, more than 80 percent of the money necessary to meet the Wolf challenge grant has now been raised. Continued support from law firms, corporations, foundations and individuals resulting from the fund raising campaign being managed by **Clyde O. Martz** of Davis, Graham & Stubbs has brought the total amount of funds raised to over \$400,000. **Marvin Wolf**, a graduate of the C.U. Law School (1954), and owner and president of Wolf Energy Company, has offered a grant of \$250,000 to provide initial support for the Natural Resources Law Center if this amount can be matched two dollars for one from other sources.

Resource Law Notes
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