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University of Colorado Boulder. Natural Resources Law Center

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Resource Law Notes

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

Number 9, August 1986

National Parks Conference Scheduled

The National Resources Law Center will present a conference on national parks from September 14-16, 1986. The conference is entitled **External Development Affecting the National Parks: Preserving "The Best Idea We Ever Had."** It will be held at the Aspen Lodge, adjacent to Rocky Mountain National Park near Estes Park, Colorado.

It was Wallace Stegner who called the national parks "the best idea we ever had." The continuing increases in usage attest to their popularity. National parks are created to preserve areas of special scenic and cultural value for enjoyment and use. Managing the parks in a manner that protects the important values and purposes for which they were created presents important and difficult problems of law and policy (see the related article in this newsletter issue by David Mastbaum).

The conference focuses on the conflicts which arise when activities outside park boundaries significantly impair the values for which the park was created. An expert group of speakers will look at current problems involving external threats to national parks, examine legal issues associated with protecting park resources, consider institutional and jurisdictional problems, and discuss possible approaches for improving park protection.

PROGRAM

Sunday, September 14, 1986

7:30 p.m.	*Keynote Address*
8:30-10:00	Panel: *Art, Literature, and the National Parks,* Marcy Culpin, Robert Cahn, Kenneth Erickson, Merrill Mahaffey, and Alfred Runte

Monday, September 15, 1986

8:30-9:15 a.m.	*The National Park Idea: Historical Misconceptions and Ecological Realities,* Alfred Runte
9:15-10:40	Panel: *Perspectives on External Threats to National Parks,* Richard H. Briceland, Joseph Browder, Stephen Gleason, T. Destry Jarvis, Estus Whitfield
11:00-11:30	Case Study: *Restoring the Biological Integrity of Everglades National Park,* Estus Whitfield
11:30-12:00	Case Study: *The Challenge of the Greater Yellowstone,* Bill Bryan
1:00-3:00	Panel: *Legal Issues Associated With Protecting Park Resources. Air:* Molly Ross; *Water:* A. Dan Tarlock; *Wildlife:* George Cameron Coggins
8:30 p.m.	*The Future of the National Parks: Recreating the Alliance Between Commerce and Conservation,* Robin Winks

Tuesday, September 16, 1986

8:30-10:15 a.m.	Panel: *Jurisdictional and Institutional Issues. Public Lands:* Robert B. Keiter; *Private Lands:* Michael Mantell; *International Issues:* Daniel Magraw
10:35-11:05	*Congressional Activities Regarding Park Protection,* Robert F. Hurley
11:05-11:45	*A Simple Solution to a Thorny Problem: Focusing on Alternatives,* David Mastbaum
12:45-2:45	Panel: *Protecting Our National Parks—What Should Be Done?* Lawrence J. MacDonnell, Moderator; William J. Lockhart; Richard H. Briceland; Stephen Gleason; T. Destry Jarvis; David Mastbaum

For further information, please contact the Center at (303) 492-1286.

Hazardous Materials Transportation Program Planned

The Natural Resources Law Center together with the Colorado Governor's Office is presenting a half-day program on the laws and regulations governing the transportation of hazardous materials. The program will be held at the University of Colorado School of Law on Saturday, September 6, 1986. Presentations will review relevant federal, state, and local (in Colorado) laws and regulations and will discuss prosecution issues under these laws.

PROGRAM: **Overview of the Federal System**, Joel W. Cantrick, Cantrick & Rees; **Overview of Colorado's Laws**, Gerald E. Dahl, Colorado Municipal League; **Federal Hazardous Materials Regulations**, Florence Phillips, Colorado Governor's Office; **Evidentiary Issues**, Carl Varady, Boulder City Attorney's Office; **Experience with the Denver Ordinance**, Judge Brian T. Campbell, Denver Court and Thomas S. Moe, Denver City Attorney's Office.

For additional information please contact the Center at (303) 492-1286.

Williams Appointed To D.C. Circuit Court

Stephen F. Williams, a faculty member of the University of Colorado School of Law and member of the Center's Faculty Advisory Committee, has been appointed to the Circuit Court of Appeals for the District of Columbia. Professor Williams has been a member of the faculty at the University of Colorado since 1969 where he has taught courses in oil and gas law, water law, environmental law, public land law, and administrative law among others. He has published extensively, primarily in the natural resources area. Since 1984, Professor Williams has held the position of Natural Resources Law Scholar at the law school. He will be moving to Washington, D.C. prior to the fall semester.

Center Hosts Chinese Fellow

Cheng Zheng-Kang, an associate professor at the Peking University School of Law, has come to the University of Colorado School of Law to be a Fellow at the Natural Resources Law Center. Professor Cheng teaches environmental law at Peking University and also acts as legal advisor to the National Environmental Protection Bureau of the People's Republic of China (PRC). Between 1981 and 1985 he organized and led the drafting groups charged with establishing laws in the PRC related to water pollution control, environmental noise control, wildlife, toxic substances control, solid waste management, natural conservation areas, and air pollution control. He has published extensively in China, both as an author and an editor, and has translated several books from English to Chinese.

While visiting the Center, Professor Cheng is spending time at the Office of the Regional Counsel for EPA Region 8 learning about the various activities involved in enforcement of U.S. environmental laws. He will audit courses at the Law School during the fall semester and lecture on Chinese environmental law.

Conference scenes (clockwise). At the water conference: Undersecretary of the Interior Ann McLaughlin, Colorado Governor Richard D. Lamm, Ray Moses and Chuck Howe, and a conference participant. At the hazardous waste conference: Region 8 Administrator John Welles.

Annual Summer Conferences Held

The Center's Seventh Annual Summer Program offered two conferences in June. The first was **Western Water: Expanding Uses/Finite Supplies**. This conference featured luncheon talks by Colorado **Governor Richard D. Lamm** and Undersecretary of the Department of the Interior **Ann McLaughlin**. The conference attracted 115 registrants from 19 states plus the District of Columbia.

The second conference was **Getting a Handle on Hazardous Waste Controls**. This conference attracted about 100 registrants from 16 states plus the District of Columbia. **John G. Welles**, Regional Director for EPA Region 8, presented a luncheon address.

Notebooks containing speakers' outlines and related materials are available from the Center. Tapes of the conference proceedings may also be purchased from the Center.

Navigating the Wetlands Jurisdiction of the Army Corps of Engineers

by
Christopher H. Meyer*

Last December, the Supreme Court handed down its decision in *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985) upholding the Army Corps of Engineers' ("Corps") assertion of jurisdiction to regulate the discharge of dredged and fill material into certain wetlands owned by a Michigan home developer. Conservationists hailed the ruling as a significant victory in their battle to stem the tide of wetlands destruction.[1] Despite the jubilation, the victory was far from complete, as the Court's decision was limited to those wetlands "adjacent" to navigable waterways—not the full range of isolated sinks, bogs, and potholes which dot the landscape.[2] This article will explore the convoluted historical development of the Corps' wetlands jurisdiction and offer some thoughts on its constitutional limits.

The Rivers and Harbors Act: Roots of the Corps' Current Authority

The Corps' regulatory involvement with the disposal of dredged and fill material began with the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§401-403 (1982) ("RHA"), the first act of Congress to confer upon a federal agency comprehensive regulatory authority over navigable waters. Section 10 of the Act, 33 U.S.C. §403 (1982), forbids private parties from engaging in any excavation, construction, alteration, modification of or within "navigable waters" without a permit from the Corps. While the Act was originally aimed at physical obstructions to navigation, it has been interpreted broadly by federal courts since the 1960s to prohibit virtually all forms of water pollution discharges. *United States v. Republic Steel Corp.*, 362 U.S. 482 (1959); *United States v. Standard Oil Co.*, 384 U.S. 224 (1966); *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971) (each dealing with section 13 of the RHA which prohibits the discharge of "refuse" into navigable waters and their tributaries).

Not until 1968, however, in response to growing public concern over environmental quality, did the Corps promulgate rules interpreting section 10 of the Act to authorize consideration of ecological as well as navigational factors. 33 Fed. Reg. 18,686-88 (Dec. 18, 1968). These new regulations provided for a "public interest review" by the Corps in the course of administering its RHA regulatory program. The regulations were upheld in their first judicial test. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971) (upholding the Corps decision to deny a land filling permit solely on the basis of fish and wildlife concerns). Despite this gradual broadening of environmental considerations, the geographical scope of the Act has remained transfixed upon the traditional definition of "navigable waters."[3] It took congressional action in 1972 to break the Corps' authority loose of its historical fetters.

Enactment of Clean Water Act: Congress Stretches Its Constitutional Muscle

The narrow view of the Corps' authority was abandoned by Congress in 1972 when it enacted the Clean Water Act ("CWA"), 33 U.S.C. §§1251-1376 (1982) (originally termed the Federal Water Pollution Control Act). Unfortunately, the arcane terminology of navigability was retained, and continues to muddle the regulatory process today.

Section 301 of the Act, 33 U.S.C. §1311 (1982), prohibits the discharge of pollutants into "navigable waters" unless the discharge complies with section 402 or section 404, 33 U.S.C. §§1342, 1344. Section 402 deals with so-called point sources of pollution under the National Pollution Discharge Elimination System ("NPDES"), and is administered by the Environmental Protection Agency ("EPA"). Section 404 created a separate permit system to be administered by the Corps[4] for the disposal of dredged or fill material.

The 1974 Regulations

While the CWA authorized the Corps only to regulate discharges into "navigable waters," it provided an expansive, new definition of the term reaching far beyond the meaning of the same words employed in the RHA.[5] The CWA defines "navigable water" as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7) (1982). As the legislative history makes clear, Congress intended by this language to encompass the broadest possible constitutional interpretation. *See* S. Rep. No. 1236, 92nd Cong., 2d Sess. 99, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3822.

Nevertheless, the Corps issued regulations (implementing both section 10 and section 404) which limited its jurisdiction under each program to navigable waters as the term had been previously defined under section 10. 39 Fed. Reg. 12,115-37 at 12,119 (April 3, 1974). Curiously, the Corps did include in these regulations a limited definition of wetlands, but only for purposes of stating a "policy" of protecting wetlands, and not for purposes of expanding the Corps' jurisdiction so that it could protect them. 39 Fed. Reg. 12,115 (1974) (codified at 33 C.F.R. §209.120(g)(3) (1975)).

This action was challenged by the Natural Resources

Defense Council and the National Wildlife Federation in *Natural Resources Defense Council v. Callaway,* 392 F. Supp. 685, 686 (D.D.C. 1975). In a terse, one-page opinion the court invalidated the Corps' restrictive reading of the Act, declaring: "Congress by defining the term 'navigable waters' in [the CWA] to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability."

The 1975 Regulations

In response to *Callaway,* the agency issued new interim final regulations which, for the first time, expanded the definition of navigable waters to include wetlands. These regulations contained, however, two significant limitations: First, the wetlands had to be created by periodic *inundation,* not saturation (in addition to their supporting vegetation which requires saturated soil conditions). Second, they had to be contiguous or *adjacent* to other navigable waters. 40 Fed. Reg. 31,320-44 at 31,324 (July 25, 1975).

The 1975 regulations received considerable criticism from both sides, and congressional attention was focused on the Corps' new definition of navigability. However, legislative efforts to cut back on the Corps section 404 jurisdiction went down to defeat when a joint House-Senate Conference Committee was unable to resolve differences between bills which had passed both houses. *See* 122 Cong. Rec. 16,569 and 28,771 (1976).

The 1977 (Current) Regulations

In 1977 the Corps again revised and expanded[6] its jurisdictional rules. 42 Fed. Reg. 37,122-164 (1977) (codified at 33 C.F.R. §§320-330.8 (1985)). Notably, the new wetland definition (1) lacked the earlier regulation's "periodic inundation" requirement (so long as wetland-type vegetation was present, it made no difference whether the water came from inundation or saturation) and (2) eliminated the requirement that the wetlands be adjacent to navigable water.[7] These regulations also adopted a new nomenclature, referring to the Corps jurisdiction no longer in terms of "navigable waters" but rather as "waters of the United States." 33 C.F.R. §323.2(a) (1985) (this terminology derives from the CWA itself, 33 U.S.C. §1362(7) (1982)). In the last days of that year Congress again amended the CWA, but left the Corps new section 404 program intact—despite concerted lobbying efforts to eliminate the Corps' new found jurisdiction over non-navigable wetlands.

The Riverside Bayview Challenge

One aspect of these new regulations was put to the test in *United States v. Riverside Bayview Homes, Inc.,* 106 S. Ct. 455 (1985). The case arose in a suburb of Detroit where the respondent owned eighty acres of undeveloped land located about a mile west of Lake St. Clair, a navigable waterway. The area had been platted, and storm sewers and fire hydrants had been placed there seventy years ago, but no further action was taken toward development until Riverside Bayview began to fill in wetlands without a permit in 1976.

The respondent challenged the Corps' assertion of regulatory authority over wetlands which were not physically inundated by a navigable waterway, but were merely located adjacent to a navigable waterway and saturated by ground water.[8]

The Court addressed the argument at four levels: (1) are these wetlands included within the Corps' regulations? (2) If so, do the regulations fall within the scope of the Corps' authority? i.e., Did Congress intend to reach these wetlands? (3) If so, did Congress have the power to reach these wetlands under the commerce clause? (4) If so, does this exercise of power constitute a taking for which compensation must be paid?

In a unanimous decision the Supreme Court ruled on each point: (1) Yes, the adjacent, saturated wetlands fall within the Corps' regulations. (2) Yes, the Congress intended to reach these wetlands. (3) The Court did not explicitly address the power of the Congress to reach these wetlands, apparently assuming that the existence of such power is beyond question. (4) It is not necessary to reach the taking question (or to construe the law narrowly to avoid reaching it) because the question of compensation may always be raised in a subsequent action against the government.

On the first point, the Court described the question of the Corps' regulations as "an easy one," S. Ct. at 460, and chastised the appeals court for "fashioning its own requirement of 'frequent flooding,'" S. Ct. at 461, where the regulations plainly defined wetlands to include those lands subject either to inundation or saturation by ground water, 33 C.F.R. §323.2(c) (1982).

The Court provided a more detailed analysis on the second point, ultimately concluding that the Corps "acted reasonably in interpreting the Act," S. Ct. at 465, to include the wetlands as Congress intended a more wholistic and ecologically based regulatory program than one confined to arcane principles of navigability.

The curious, and unfortunate, thing is what the Court did not decide. Fourteen times the Court mentioned the term "adjacent" in connection with wetlands, and in note 8 at S. Ct. 462, the Court states explicitly that it is not passing on the authority of the Corps to regulate wetlands which are not "adjacent to bodies of open water." Instead, the Court focused its opinion solely on one of three categories of wetlands which are included in the Corps 1977 regulations: 33 C.F.R. §323.2(a)(7) ("Wetlands adjacent to [other] waters"), but not 33 C.F.R. §§323.2(a)(2) ("All... interstate wetlands") and 323.2(a)(3) (intrastate... wetlands...which could affect interstate or foreign commerce").

Finally, the takings claim, like the claim that the wetlands fell without the scope of the Act, was disposed of quickly by the Court. The decision by the appeals court, 729 F.2d 391 (6th Cir. 1984), rested largely on the perceived need to steer clear of a potential taking without just compensation. The Supreme Court dismissed this concern pointing out that (1) even if the permit were denied there may be other viable uses available to the owner, S. Ct. at 459, and (2) even if the permit is denied, and no alternative

use is available, and taking has occurred, the owner may always bring a separate action for compensation under the Tucker Act, 28 U.S.C. §1491 (1982), S. Ct. at 460. While the Court left the takings question open, its strong language on the issue ("spurious constitutional overtones," S. Ct. at 460) and its recitation of a string of cases upholding federal regulation against fifth amendment challenge, hardly gives encouragement to those who hold out the hope that regulation of wetlands may be compensable.[9]

The Constitutional Limits of Wetlands Regulation

The tortured course wetlands jurisdiction has taken is all the more remarkable in that it is completely unnecessary. While the Corps has edged along what it perceived as a constitutional tightrope, it has in fact been treading solid constitutional ground. Only poor vision and an apparent failure to read the case law made the ground seem so far away.

The law is well settled that commerce clause authority

> extends not only to "the use of channels of interstate or foreign commerce" [such as navigable waters] and to "protection of the instrumentalities of interstate commerce... or persons or things in commerce," but also to "activities affecting commerce."

Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 276-77 (1981) (quoting *Perez v. United States,* 402 U.S. 146, 150 (1971)).[10] Congress' utilization of the "navigable waters" language reflects no more than an anachronistic throwback to that era, long past, characterized by a restrictive view of the commerce power. As the Court said in *Wickard,* "[Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature." *Wickard* at 120. Yet, such devotion to nomenclature continues, I believe, as a consequence both of habit and of overabundant caution. This cautious habit is shared by the Corps, which continues to construe its jurisdiction narrowly (despite its broad 1977 regulations), the Congress which continues to employ terms of art laden with unnecessary constitutional baggage while renouncing the constitutional limitations in its legislative history, and the Supreme Court which has trod ever so delicately around easy constitutional questions. The unfortunate result is the needless confusion over isolated wetlands left unresolved in the *Riverside Bayview* case.

Given that Congress may legislate beyond the reach of navigable-in-fact waters, and has chosen to do so, the only question is what are the limits of that jurisdiction? The test is straightforward: Congress' determination that discharge of dredged or fill material into the nation's wetlands substantially affects interstate commerce must be upheld if there is "any rational basis for such a finding." *Surface Mining* at 276; *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 258 (1964). Given the critical role played by wetlands commerce as well as health and recreation,[11] there cannot be any serious question that such a rational basis exists.

In short, the Supreme Court ducked an issue which it easily could have resolved. As the court found in *Natural Resources Defense Council v. Callaway,* 392 F. Supp. 685, 686 (D.D.C. 1975), Congress exercised its full constitutional power in enacting the CWA. That power reaches wetlands everywhere in the nation. But for now, we must be content with a ruling that wetlands adjacent to navigable water bodies fall within the scope of the Corps' authority regardless of what made them wet.

The broader issue, however, may not lie dormant for long. The question sidestepped by the Supreme Court is now before a federal district court in Galveston, Texas, where the National Wildlife Federation has challenged the Corps' failure to exercise its jurisdiction over a wetland known only as "Pond 12" as well as "a policy or pattern or practice" of ignoring its section 404 responsibilities on isolated wetlands throughout the United States. Amended Complaint at 7 (March 11, 1986). In defense of its refusal to exercise more broadly its section 404 powers, the Corps has taken, in effect, the curious position that its own regulations are unconstitutional. Because the wetlands at issue are not adjacent to navigable waterways, the court, assuming it reaches the merits, may be expected at last to address the constitutionality of the sweeping powers vested in the Corps by the Congress in 1972.

Endnotes

** Mr. Meyer serves as counsel to the National Wildlife Federation's Rocky Mountain Natural Resources Clinic in Boulder, Colorado, and is an associate professor adjoint at the University of Colorado Law School. This article is based on a presentation given by Mr. Meyer at the Section 404 seminar cosponsored by the Natural Resources Law Center in March, 1986.*

1. Until recently, wetlands have been regarded as having little value (except for their potential for conversion to fast lands). As a result of this incomplete understanding of their true worth, and of federal and state policies promoting their development, over half the nation's wetlands have been lost. Want, *Federal Wetlands Law: The Case and the Problems,* 8 Harv. Envtl. L. Rev. 1, 3 (1984). Wetland destruction continues today at a rate of 450,000 acres annually. U.S. Fish and Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* 31 (1984). It is recognized now, however, that

Rocky Mountain National Park, setting for the upcoming national parks conference.

wetlands serve a variety of critical environmental, commercial, safety, and health needs. For instance, wetlands serve to maintain ground water supplies and prevent flooding by retaining rainwater, to purify water by absorbing and recycling nutrients and other pollutants, and to provide essential nesting, wintering, and resting habitat for countless species of migratory waterfowl. Council on Environmental Quality, *Our Nation's Wetlands, An Interagency Task Force Report* 2, 23, 27 (1978) (GPO No. 041-01100045-9) ("CEQ"). Wetlands even have been employed to treat sewage.

2. The question of the broader scope of Corps' authority is now before a federal district court in Texas, *National Wildlife Federation v. Laubscher,* Civil Action No. G-86-37 (S.D. Tex. filed Jan. 15, 1986).

3. In 1972 the Corps published a definition of the term "navigable waters of the United States" for purposes of defining the scope of the RHA. 37 Fed. Reg. 18,289-92 at 18,290 (Sept. 9, 1972). The regulation simply codified the evolution of federal case law up to that point. Navigable waters were defined as: (1) all waters *presently* used to transport interstate or foreign commerce (derived from *The Daniel Ball,* 77 U.S. (10 Wall.) 557 (1870); (2) all waters used *in the past* to transport interstate or foreign commerce (derived from *Economy Light and Power Co. v. United States,* 256 U.S. 113 (1921) (in other words, once navigable, forever navigable); or (3) all waters *susceptible to use* in their ordinary condition or *by reasonable improvement* to transport interstate or foreign commerce (derived from *United States v. Appalachian Electric Power Co.,* 311 U.S. 377 (1940); as well as waters subject to the ebb and flow of the tide. These regulations remain essentially in tact in 33 C.F.R. §§323.2(a), 329.4 (1985) (see 33 C.F.R. §323.2(b) (1985) for a definition of the same term under the Clean Water Act).

4. While the Corps has the primary regulatory function under section 404, the EPA has ultimate authority in permit decisions by virtue of its power to veto permits issued by the Corps. Section 404(c), 33 U.S.C. §1344(c) (1982). Moreover, EPA holds the ultimate responsibility for determining the scope of "navigable waters" for the purposes of section 404. 43 Op. Att'y Gen. No. 15 (Sept. 5, 1979); *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 903 n.12. The Corps and EPA share authority to bring enforcement actions to halt the unpermitted discharge of dredged or fill material into wetlands. Sections 309, 404(s)(1), 33 U.S.C. §§1311(a), 1319(b) and (c), 1344(s)(1) (1982). Finally, the Corps' authority may be transferred to states that have devised federally approved permit programs. Section 404(g), 33 U.S.C. §1344(g) (1982).

5. Although the scope of jurisdiction under section 404 of the CWA is generally thought to include (and surpass) that of section 10 of the RHA, there are three narrow exceptions to that rule in which jurisdiction may be found under section 10 but not under section 404: (1) an exemption from section 404 coverage applies (e.g., certain agricultural activities are exempt), (2) activities affecting a waterway but not involving the disposal of dredge or fill material are involved, and (3) the action predates the CWA.

6. While the 1977 regulations generally expanded the Corps' jurisdiction, in two very limited respects, the regulations reflected a tightening of jurisdiction: (1) the new wording made clear that the wetland must be a wetland at the time of the proposed action (not just in the past), and (2) the new wording also made clear that the "abnormal" presence of wetland vegetation is not sufficient to convert the area into a wetland.

7. The 1977 regulations do contain a provision on adjacent wetlands, 33 C.F.R. §323.2(a)(7) (1985), but this appears to be redundant and completely absorbed by two broader classifications of qualifying wetlands for which there is no adjacency requirement, 33 C.F.R. §§323.2(a) (2) and (3) (1985).

8. The Court readily disposed of respondent's threshold argument that no wet*lands* can fall within the definition of *waters* of the United States, describing it as a "simplistic response." 106 S. Ct. at 462.

9. The compensation question recently was taken up but hardly elucidated in an inscrutable opinion by the Federal Circuit in *Florida Rock Industries, Inc. v. United States*, Nos. 85-2588, 85- 2609, slip op. (Fed. Cir. May 14, 1986).

10. The commerce clause has been read this broadly for over forty years. *See Wickard v. Filburn,* 317 U.S. 111 (1942) (federal crop limitations extending to wheat consumed on farm premises upheld as proper exercise of the commerce power where the only effect on interstate commerce was that the wheat consumed may have displaced interstate wheat which the farmer otherwise would have had to purchase); *Katzenbach v. McClung,* 379 U.S. 294 (1964) (Civil Rights Act held proper exercise of commerce power where the only effect on interstate commerce was purchase of meat by Ollie's Barbeque and the likelihood that black people would travel and eat out more often in the absence of discrimination).

11. Wetlands have been estimated to provide $140 billion worth of flood protection and water purification services. Ninety-eight percent of Maine's $50 million-per-year fish harvest "was made up of species that depend upon wetlands for some part of their life cycle." The prairie potholes of the Northern Great Plains produce over one-half of the newborn wild duck population every year. U.S. Fish and Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* 42 (1984); remarks of Sen. Chafee during the 1977 floor debate.

Steve LaSatz, Vice President for Law at Rocky Mountain Energy presents a $10,000 check for the Natural Resources Law Center to Associate Dean Clifford Calhoun and Larry MacDonnell.

No Park is An Island: A Simple Solution for the Thorny Problem of Park Protection

by
David Mastbaum

David Mastbaum is an attorney practicing in Boulder, Colorado. He is a graduate of the University of Michigan Law School. He was lead counsel for the Environmental Defense Fund in the Allen-Warner Valley proceeding, involving the construction of a large proposed energy project near Bryce and Zion National Parks. He also represents the environmental intervenors in the Juniper-Cross Mountain case before the Federal Energy Regulatory Commission, which involves the construction of two dams on the Yampa River above Dinosaur National Monument. He has climbed, skied, run, and walked in most of the western National Parks. Mr. Mastbaum was a fellow at the Natural Resources Law Center during the spring semester, 1986.

"Simplification of Means and
Elevation of Ends is the Goal"
- Henry David Thoreau

The year 1864 was a particularly savage one in the fratricidal conflict between the federal government and the confederate states. In May alone, during the battles of the "Wilderness" and "Spotsylvania Courthouse," Grant lost over 36,000 soldiers and Lee's losses exceeded 17,000. It was during this year, also, that President Lincoln signed into law a bill ceding to California, for use as a park only, and for all time, the "'cleft' in the Granite Peak of the Sierra Nevada," the incomparable valley—Yosemite—and the nearby Mariposa Big Trees, the magnificent *Sequoiadendron Gigantea.* This legislation, passed and signed at the height of Civil War misery and brutality, was the seminal point in the eventual birth of the national park system, which Joe Sax of Michigan Law School calls one of "the few unambiguous triumphs of American public policy," and Wallace Stegner, the respected historian, writer, and conservationist, simply calls "the best idea we ever had."

Evolution of the National Park Idea

The Yosemite bill was the first time federal land had been dedicated to a non-utilitarian purpose. It marked the beginning of a change in the notion, which had been the cornerstone of American public land policy up to that time, that nature should be subdued and used, to the idea that it should be respected, indeed preserved. This transformation, probably, had its roots in the writings of the famous early nineteenth-century traveler and painter of American Indians, George Catlin, and the great transcendental philosophers of New England, Thoreau and Emerson.

The thrust of the 1864 Yosemite legislation—America's unique natural wonders required special protection if they were to be enjoyed by future generations—was formally translated into the national park idea with the creation of Yellowstone National Park a few years later in 1872. Setting aside an area larger than Rhode Island and Delaware combined, "as a public park or pleasuring ground for the benefit and enjoyment of the people," and placing its enormous natural resource potential off limits to private resource development interests was a dramatic step. However, Yellowstone, like all of the early national parks of the West, was an island in the vast American wilderness and because of the great abundance of land, commercial interests did not feel threatened. Indeed, certain business interests, such as the railroads, became major supporters of the parks, providing not only access, but also offering a wide variety of services for tourists.

"The Loch" — Rocky Mountain N.P., CO. *Photo by Bill Sontag.*

The national park idea was a success. Newspapers and magazines, caught up in the uniqueness and romance of creating great outdoor museums, supported the parks strongly and often. People flocked to the parks and western politicians pushed for new parks to be established.

By 1916, eighteen parks existed and Congress and the President recognized the need to establish a comprehensive and systematic protection scheme. The National Park System Organic Act was adopted and a National Park Service was created to manage the parks "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

The first Park Service Director, the charismatic and indefatigable Steven Mather was a master of the public relations game, and he made certain the word got out about these parks. He achieved his goal, probably beyond his wildest expectations. Visitor increases, especially with the coming of the automobile and its new highway system were staggering.

Today the system has over 330 units, a potpourri of America's natural and cultural heritage—from the great natural parks, to the historical parks, to the very popular urban recreation areas. This amounts to nearly 80 million acres—one percent of the land in the continental United States and fourteen percent of Alaska. In 1985, these parks had over 250 million recreation visits.

Managing and Protecting the Parks

Despite this enormous popularity, indeed, in part because of it, all is not well with the parks. Severe overcrowding at some parks, along with pressure from political and commercial interests to take advantage of the bonanza, means that crucial internal management policies, about the type of recreational experience that the parks will offer, must be shaped. Matters that require attention

include limitations on the number of visitors, entrance and user fees, determining how much of the park system should remain as wilderness or primitive areas, and the type of facilities that should be made available.

Park decision-makers are being forced to shape the future of these great enclaves with a shrinking budget, despite increased visitation, and in a political arena where the major actors seem genuinely confused about park management, given the tension between their conventional political wisdom of less government and the obvious need to protect the crown jewels of America's public lands. Joe Sax, in his thoughtful book, "Mountains Without Handrails: Reflections on the National Parks," tackles the internal management quagmire well. While one may disagree with Sax's rendition of why the parks were created and for whom, he has proffered sensible solutions designed to restore and preserve the parks. These solutions don't require a lot of money, but an awareness that in visiting a national park, one should "[p]ut aside the plastic alligators of the amusement park" and focus on nature, which "taken on its own terms, has something to say that will you will be glad to hear."

External Threats to the Parks

The greatest challenge to the national parks system, however, is not correcting the course of internal management policies, but incompatible development beyond park boundaries. Examples of external park-threatening activities can be found throughout the system. Yellowstone's famous geysers are threatened by proposed geothermal development. The critical habitat of its endangered grizzly bears is threatened by oil and gas exploration and development. The burgeoning demand for domestic, commercial, and agricultural water in south Florida has impaired the natural flow into Everglades National Park, endangering the park's fauna and flora. Oil, gas, and coal exploration and timbering are threatening Glacier's bears and elk by jeopardizing habitat. At Dinosaur National Monument, which straddles the Colorado-Utah border, proposed dams would reduce and alter stream flow endangering riparian plants and wildlife.

The thorny problem of external threats raises as many issues as does attempted reform in that arcane kingdom known as western water. While the Constitution's Commerce and Property clauses, the Organic Act of the Park Service, and the specific legislation required to create a national park all suggest that the Secretary of the Interior has an affirmative obligation to protect the parks from threatening development on adjacent lands, in practice the too-general commands in these laws do not provide sufficient muscle for a well-meaning, but weak and weary Park Service.

Moreover, other federal, state, and local environmental and land use laws, while establishing general standards, do not take account of the special natural and cultural values for which the parks were created, and therefore fail to protect them. Finally, and perhaps the crux of the problem, cooperation between the National Park Service, other federal agencies, and state and local governments with regard to park protection is difficult, at best, given the competing and at times conflicting responsibilities and goals of these entities. For example, the Department of Energy viewed Park Service concerns about the proposed siting of the high-level radioactive waste dump, a stone's throw away from Canyonlands National Park in southeastern Utah, as the ravings of a single-purpose agency with little or no understanding of a serious national dilemma.

The problem of incompatible development beyond park boundaries is one of relatively recent vintage. During most of the first one hundred years of their existence, the national parks were protected, for the most part, from external development by their isolation. However, beginning in the 1970s the natural buffers around the parks rapidly began to disintegrate with increased demand for timber, minerals, hydrocarbon fuels, and urban encroachment. In addition, air quality degradation in and around some parks from a combination of old and new air pollution sources, some of which are situated hundreds of miles from any park, creates an administrative nightmare with all of the accompanying technical difficulties, political sensitivities, and economic consequences.

The Saga of the Kaiparowits Plateau

The enormous vulnerability of the parks to development beyond their borders and the ephemeral nature of their *de facto* buffers was dramatically brought to the country's attention in the isolated desert country of south-central Utah in the early 1970s. In 1972, then Secretary of the Interior, Rogers C.B. Morton, announced a plan to build enough new power plants in the Southwest to produce an additional thirty thousand megawatts of capacity. The flagship of this scheme, the Kaiparowits project, was originally planned as a mine-mouth, five-thousand megawatt (later reduced to three thousand megawatts), coal-fired plant. It would have been been the largest single power plant ever built. The project was to be financed primarily by California utilities, to whom most of the energy would go.

The proposed project site was within a 250-mile radius of the "Golden Circle" of southwestern desert parks—at the time comprising more than 25 percent of the country's national park land. This area contains some of the most majestic and unusual desert landscape in the world. The local people, county and municipal governments, and the State of Utah strongly supported the project because they saw it as a panacea for a depressed economy with chronic unemployment. However, air pollution from the project would have significantly reduced the magnificent vistas in this mysterious land of red rocks, deep blue sky, intricate carved canyons, and bizarre rock formations—land set aside as national parks for all the people.

Primarily because of increasing construction costs, reduced demand for energy in California, and strong public support for park protection (especially after Robert Redford appeared on Sixty Minutes to discuss what the Kaiparowits project would do to the "Golden Circle" of parks), the utilities abandoned the project in 1976. Even after Kaiparowits was scrapped, however, and despite numerous studies which established that very few jobs would be created directly for local people because of the skills required, and that tourism was the best hope for the economy of southern Utah, local support for massive energy development remained high, with a symbolic environmentalist, Robert Redford, being burned in effigy in Kanab, Utah.

The Kaiparowits controversy should have triggered an awareness of the need for a systemwide Park Service strategy to ensure that the parks would be protected from external threats. The problems of protecting national parks

from development beyond their borders were focused sharply—a project offered in the national interest which would impair essential park values, conflict between the Park Service and other pro-development federal agencies, and strong local support for the project. However, the death of the project and the election of Jimmy Carter, perceived to be pro-park and pro-environment, lulled people to sleep.

Redwood National Park: Designed to Fail

The mid-1970s also saw an intense struggle to save Redwood National Park from the effects of logging operations on adjacent lands, which were causing severe erosion and stream sedimentation and, thereby, threatening to destroy the very trees the park was intended to protect. Redwood National Park was created in 1968. The political compromises surrounding the establishment of the park's boundaries ignored ecological principles, particularly the need for watershed protection necessary for the survival of the giant trees. Unlike most of the other great national parks in the West, which were created long before adjacent development posed a problem, Redwood's boundaries were drawn to ensure that logging would continue unabated on abutting lands which also ensured that the Park would fail.

The responsibility and authority of the Secretary of the Interior to protect Redwoods was litigated and, in a series of three somewhat confusing court decisions, that responsibility and authority were established. However, despite the mandatory duty of the Secretary to protect the park from external threats, the Interior Department lacked sufficient funds to purchase adjacent lands—the only realistic solution—and the court found the Secretary had done all that he could. The ball was now passed to Congress.

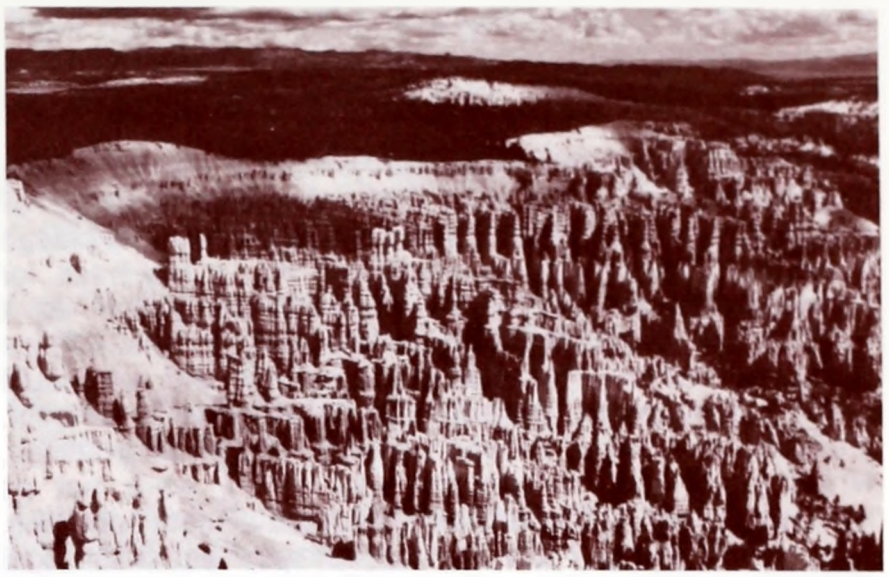
Congress did act in 1978 and authorized additional funds to protect and rehabilitate the Park. Congress also realized, at the time, that parks were vulnerable to increasing development beyond their boundaries and amended the Park Service Organic Act. It added vague and general language about the "high public value" of the park system and the need to manage the system to protect "the values and purposes for which these areas have been established."

Unfortunately, this rhetoric, like the 1916 statute, while well-meaning and establishing good policy objectives, neither provides the specificity nor creates the non-discretionary duty which would ensure that the Park Service, in the face of strong opposition from other federal agencies, local governments, and commercial interests (whose projects are often touted as essential to the national interest) can meet its obligation to protect the parks.

Allen-Warner Valley—Parks vs. Energy

The conflict between park values and development on adjacent land took center stage in the late 1970s. A massive energy project, identified by its proponents as essential to the national interest, was pitted against the esthetic and recreational values of two very popular national parks.

The Allen-Warner Valley Energy system called for two coal-fired power plants (one only 17 miles upwind from Zion National Park) with a combined capacity of 2500 megawatts, a large strip mine virtually abutting Bryce



Bryce Canyon N.P., Utah. *Photo by Bill Sontag.*

Canyon and only about three miles from its scenic Yovimpa Point overlook, hundreds of miles of pipeline to transport the coal (in semi-liquid form) from the mine to the power plants, a dam, and reservoir. This cumbersome proposal was the kind of outlandishly complicated stuff that technological satirist Rube Goldberg's cartoon character, Professor Lucifer Gorgonzola Butts, might have concocted.

The absurd and unnecessary complexity of the project, however, was not the real problem. Air pollution from the power plants would have had a serious effect on Zion's and the region's air quality. The strip mine near Bryce Canyon would have imperiled the magnificent panorama from the southwestern part of the park. Mining operations would be visible from Yovimpa Point and other parts of the park, and there would have been disturbing noise from blasting and machinery operation heard throughout the park. Moreover, the project would cost a lot more than alternatives that were also environmentally better and would avoid harm to the parks.

Most of the five billion dollars required to build the project was to come from California's two largest electric utilities. Therefore, before the project could proceed, a certificate of public convenience and necessity was required from the California Public Utilities Commission (CPUC). The CPUC had for years paid lip service to the notion that cheaper energy alternatives such as conservation, cogeneration, small-hydro, and geothermal should be the first choice of utilities before nuclear and coal plants. The availability and cost of these alternatives were, therefore, central issues in the proceeding, which lasted over 100 days. The evidence (to the surprise of even the CPUC and its staff) was overwhelming—a combination of alternative energy sources could replace Allen-Warner Valley and would not only be cheaper for rate payers, but also would provide substantial benefits for the utilities shareholders. The utilities, after the close of the hearing, but before the CPUC could issue its decision, saw the handwriting on the wall and abandoned the project in favor of the alternatives.

This meant, of course, that California could meet its energy needs without jeopardizing the important natural values Bryce and Zion were established to protect. Ironically, President Carter and his Interior Department, which had done so much for the national park system by adding millions of acres of parkland in Alaska, instead of supporting and advocating the alternatives which could

have avoided harm to Bryce and Zion, embraced Allen-Warner Valley and even attempted to undermine the California proceeding. Luckily, the attempt was not successful.

The administration saw this project as a way to reduce dependence on unreliable and expensive foreign oil supplies at the time of the Iranian hostage crisis and placed it on the "Critical Energy Facilities" list, a fast-track for favored projects. They saw Allen-Warner Valley as a symbol that the administration (contrary to the opinion polls) was not inept, at least in the energy field, and could make a big energy project happen. Apparently smaller, cheaper, and more environmentally benign alternatives, which could also reduce the use of oil, were not as symbolic as big coal plants and untested synfuel schemes. The well-meaning Park Service, despite its clear legal authority to protect the parks and despite the command of the National Environmental Policy Act that, where conflicts exist in using resources alternatives should be pursued vigorously, was caught between its trust responsibilities and the illogical, politically motivated, energy policy of the President.

The CPUC proceeding had provided a forum to examine alternatives to Allen-Warner Valley, and the system worked despite the hostility of the Carter Administration. While Park Service personnel informally supported the effort to develop alternatives which would avoid harm to Bryce and Zion, they did not actively develop and promote alternatives or participate in the California proceedings. Yet, there was strong historical support for this type of aggressive and vigorous stewardship.

Protecting Olympic's Sitka Spruce—
A Paradigm of Effective Stewardship

Sitka Spruce — Olympic National Park. *Photo by D. Huff*

When World War II broke out, the frames of airplanes, for the most part, were made of wood. The shortage of metals at the start of the war made the need for timber to construct airframes particularly important. Sitka spruce wood was ideal for this purpose, and the most concentrated and accessible stands of Sitka spruce were those of Olympic National Park.

Olympic National Park is located on a peninsula on the western edge of Washington State. The Pacific slope of the park is a primeval rain forest with magnificent conifer stands, which grow up the lower slopes of the glacier-carved Olympic Range. These mountains have about sixty glaciers and rise to nearly 8,000 feet. Sitka spruce grows very well under the ideal conditions found on Olympic's western slopes.

The War Production Board—the federal agency responsible for ensuring adequate war materials—Northwest timber and commercial interests, and Great Britain and France (with an acute need for airframe timber) placed substantial pressures on the Park Service to allow logging of Sitka spruce in Olympic. Then Park Service Director Newton Drury, with support of the Secretary of the Interior, the tough and resourceful Harold Ickes, began actively to pursue the availability of alternatives to Sitka spruce to avoid or at least minimize the sacrifice of Olympic. Understanding the tension between park preservation and the harsh realities of war, Drury confronted the issue directly:

> ...[T]he virgin forests in the national parks should not be cut unless the trees are absolutely essential to the prosecution of the war, with no alternative, and only as a last resort. Critical necessity rather than convenience should be the governing reason for such sacrifice of an important part of our federal estate.

Clearcutting — Olympic National Forest. *Photo by D. Huff*

The National Park Service sought out alternative supplies of Sitka spruce as well as substitute materials for constructing airframes. Substantial and accessible stands of these trees were found in British Columbia and Alaska. Moreover, increased supplies of aluminum became available, a material that was found to be better than wood for airframes. Thus, there was no need to log in Olympic and the War Production Board withdrew its order to the Park Service.

The Park Service strategy of aggressively investigating and pursuing alternatives to Olympic's Sitka spruce worked. Undertaken in the midst of World War II, with all of its patriotic fervor, it is a clear example of the kind of stewardship needed to protect the national parks now, as external threats loom larger and larger. However, despite having clear authority and responsibility actively to seek out alternatives when parks are threatened, without a specific and unambiguous legislative command, as the Allen-Warner Valley case illustrates, the Park Service may not be as bold as it was under the leadership of Drury and Ickes during World War II.

Some Final Thoughts

In a report entitled *State of the Parks—1980,* initiated by Congress and prepared by the Park Service, the magnitude of the external threats issue becomes too apparent. While the report is not perfect (its underlying data are certainly difficult to decipher), its central conclusion is beyond dispute—the parks are in trouble from incompatible development on adjacent land. The Park Service, in this report, specifically recognizes the importance of a park protection strategy based on developing alternatives to park-threatening activities:

> The National Park Service cannot remain on the sidelines and expect to reject a proposed project merely because it poses a potential threat to park resources or park values. As Federal Land Managers, we must be prepared to identify viable alternatives in those situations where proposed development activity would damage the parks.

Yet, nearly six years have passed since *State of the Parks* was released and the Park Service has been unable to implement a formal program to ensure that alternatives are vigorously pursued and considered when a park is threatened by external development. While Congress has considered some legislation to protect the parks from external threats, these legislative proposals, for the most part, just restate the problem rather than provide needed additional clout for the Park Service, and they have gone nowhere. It is true that the Park Service has ample legal authority and, in fact, the legal responsibility to establish the procedures that would ensure the kind of alternatives review suggested above. Yet the political reality is that resource development, these days, is seen by too many politicians as more important than protecting the natural and cultural values of the national parks. However, because so many millions of people from all walks of life have found this great and unique American institution to be so important a sanctuary, the choices we make today about protecting the parks will be a good measure of the quality of our society.

* * * * * * * * *

At the height of World War II, a former park ranger then in military service wrote to Park Service Director Drury, urging that the parks remain open for the duration of the war. It was important, this soldier concluded, especially during the terrible crisis at hand to have:

> ...recreation areas where inspiration combines with relaxation to give a new lease on life and hope for the future.

Suggested Reading on the National Parks

Books

Everhart, William C., *The National Park Service* (rev. ed. Boulder: Westview Press, 1983).

Ise, John, *Our National Park Policy: A Critical History* (Baltimore: John Hopkins Press, 1961).

Runte, Alfred, *National Parks: The American Experience* (Lincoln: University of Nebraska Press, 1979).

Sax, Joseph L., *Mountains Without Handrails: Reflections on the National Parks* (Ann Arbor: University of Michigan Press, 1980).

Shankland, Robert, *Steven Mather of the National Parks* (rev. ed. New York: Alfred A. Knopf, 1970).

Periodicals

Comment, "Protecting Parks From Development Beyond Their Borders," 132 U. Pa. L. Rev. 1189 (1984).

Hudson, "*Sierra Club v. Department of the Interior:* The Fight to Preserve Redwood National Park," 7 Ecol. L. Q. 781 (1978).

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Sax, "Buying Scenery: Land Acquisitions For the National Park Service," 1980 Duke L. J. 709 (1980).

Stegner, "The Best Idea We Ever Had," Wilderness, Spring 1983 at 4.

Tarlock, "For Whom the National Parks?" 34 Stan. L. Rev. 255 (1981) (Book review).

Publications And Materials Of The Natural Resources Law Center

Books

- *Tradition, Innovation, and Conflict: Perspectives on Colorado Water Law,* Lawrence J. MacDonnell, ed. (forthcoming Sept. 1986). $15.
- *Special Water Districts: Challenge for the Future,* James N. Corbridge, ed. Book containing edited papers from the workshop on Special Water Districts, Sept. 11-13, 1983. $15.

Conference Materials

- *Western Water: Expanding Uses/Finite Supplies,* 406-page notebook of outlines and materials from 3-day, June 1986 conference. $60.
- *Getting a Handle on Hazardous Waste Control,* 361-page notebook of outlines and materials from 2-day, June 1986 conference. $50.
- *Western Water Law in Transition,* 415-page notebook of outlines and materials from 3-day, June 1985 conference. $60.
- *Public Lands Mineral Leasing: Issues and Directions,* 472-page notebook of outlines and materials from 2-day, June 1985 conference. $40.
- *The Federal Impact on State Water Rights,* 365-page notebook of outlines and materials from 3-day, June 1984 conference. $60.
- *The Federal Land Policy and Management Act,* 350-page notebook of outlines and materials from 3-day, June 1984 conference. $60.
- *Groundwater: Allocation, Development and Pollution,* 450-page notebook of outlines and materials from 4-day, June 1983 water law short course. $55.
- *New Sources of Water for Energy Development and Growth: Interbasin Transfers,* 645-page notebook of outlines and materials from 4-day, June 1982 water law short course. $55.

Occasional Papers

- "Regulation of Wastes from the Metal Mining Industry: The Shape of Things to Come," Lawrence J. MacDonnell, NRLC Occasional Papers Series. 32 pages. $3.
- "Emerging Forces in Western Water Law," Steven J. Shupe, Water Resource Consultant, NRLC Occasional Papers Series. 21 pgs. $2.50

- "The Rights of Communities: A Blank Space in American Law," Joseph L. Sax, Professor of Law, University of Michigan, NRLC Occasional Papers Series. 16 pgs. $2.50.
- "Nuisance and the Right of Solar Access," Adrian Bradbrook, Reader in Law, University of Melbourne, Australia. NRLC Occasional Papers Series. 54 pgs. $5.
- "Tortious Liability for the Operation of Wind Generators," Adrian Bradbrook, Reader in Law, University of Melbourne, Australia. NRLC Occasional Papers Series. 74 pgs. $5.
- "The Access of Wind to Wind Generators," Adrian Bradbrook, Reader in Law, University of Melbourne, Australia. NRLC Occasional Papers Series. 77 pgs. $5.

Research Reports

- "The Endangered Species Act and Water Development Within the South Platte Basin," Lawrence J. MacDonnell, Colorado Water Resources Research Institute (Completion Report No. 137). $6.
- "Guidelines for Developing Area-of-Origin Compensation," Lawrence J. MacDonnell, Charles W. Howe, James N. Corbridge, W. Ashley Ahrens. NRLC Research Report Series. 70 pgs. $5.

Reprints

- "Implied Covenants in Oil and Gas Leases," reprint of two articles by Stephen F. Williams, Professor of Law, University of Colorado. 40 pgs. $4.50.

Audio Tapes

- *Western Water Law in Transition,* cassette tapes of speakers' presentations. Full 3 days--$150. Half-day segments--$35 each.
- *Public Land Mineral Leasing: Issues and Directions,* cassette tapes of speakers' presentations. Full 2 days-- $100. Half-day segments--$35 each.

Other Materials

- *Symposium: Workshop on Natural Gas Prorationing and Ratable Take Regulation.* 57 U. of Colorado L. Rev./Issue 2/Winter 1986 (special issue containing papers and proceedings from workshop sponsored by the NRLC). $7.50.

Newsletter

- *Resource Law Notes* is available without charge. Write or call the Center to add your name to the mailing list.

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