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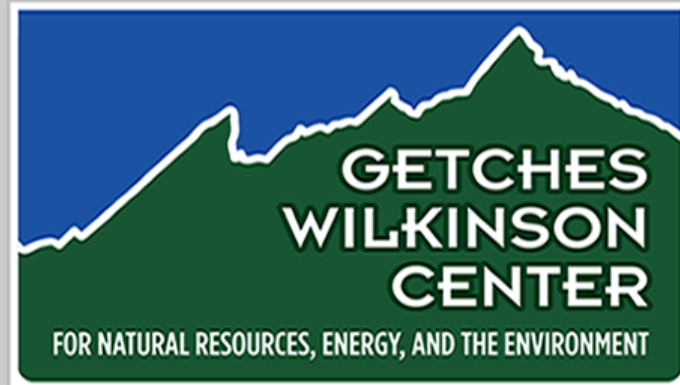
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RESOURCE LAW NOTES: THE NEWSLETTER OF THE NATURAL RESOURCES LAW CENTER, no. 11, Apr. 1987 (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).

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Resource Law Notes

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

Number 11, April 1987

Water Law and Public Lands Conferences Scheduled

The Natural Resources Law Center is presenting two conferences in this year's annual summer program. The first, entitled **Water As a Public Resource: Emerging Rights and Obligations**, will be held June 1-3, 1987. This conference focuses on the legal rights associated with a broad range of public uses and interests in water including recreation, fish and wildlife protection, and water quality. Evolving legal areas such as the public trust doctrine, instream flow laws, federal reserved rights, and wetlands protection will be discussed.



(Photo courtesy of Boulder Daily Camera)

AGENDA

Monday, June 1, 1987

Overview

- 9:15 Charles F. Wilkinson, *Water As A Public Resource: The Legal Basis*
- 10:50 Ralph W. Johnson, *In the Beginning God Created the Public Trust Doctrine?*
- 11:45 Joseph L. Sax, Luncheon Speaker, *Public Values in Water: What Are They and How Should They Be Protected?*



Professor Joseph L. Sax

Recreational Uses of Water

- 1:30 Richard G. Hildreth, *Public Access to Shorelines and Beaches: Alternative Approaches and the Taking Issue*
- 2:15 John E. Thorson, *The Use of "Nonnavigable" Water for Public Purposes*
- 3:20 Panel: *Water Development, Wildlife, and Recreation*. Chris Paulson, Charles W. Howe, Robert M. Weaver, and James B. Ruch

Tuesday, June 2, 1987

Public Rights in Water Allocation and Use

- 8:45 Douglas L. Grant, *Public Interest Review in Water Rights Allocation and Transfer in the West*
- 9:30 Matthew W. Williams, *The New Montana Approach to Water Rights Allocation*
- 10:35 Richard H. Braun, *Emerging Policy and Strategy Choices for Protection of the Groundwater Resource*
- 11:20 Brian E. Gray, *Instream Flow Protection in the Western States: A Survey and Comparison*

- 1:45 David L. Harrison, *Converting Conditional Water Rights to Instream Flows: A Property Transfer Strategy*
- 2:30 Larry MacDonnell, *Federal Regulatory Rights in Water*
- 3:30 Christopher H. Meyer, *New Developments in Water Rights on Public Lands: Federal Rights and State Interests*
- 4:15 David H. Getches, *State Water Planning to Protect Public Needs*

Wednesday, June 3, 1987

The Public's Interest in Water Quality

- 8:45 Bruce D. Ray, *The Clean Water Act, Water Quality, and Water Use*
- 9:30 Patrick A. Parenteau, *Wetlands Protection: The 404 Program*
- 10:35 Ronald B. Robie, *Integrating Water Quality Objectives with Traditional Water Rights in California: The Sacramento-San Joaquin Delta Case*
- 11:20 Jan Laitos, *The Conflict Between Water Rights Administration and Water Quality Protection*
- 1:45 Panel: *Reconciling Large-Scale Water Development and Water Quality Effects*. Max H. Dodson, Tad Foster, Barbara Green, and James W. Sanderson

The second conference, **The Public Lands During the Remainder of the 20th Century: Planning, Law, and Policy in the Federal Land Agencies**, will be held June 8-10, 1987. Public land management has undergone major changes in recent years in response to the greatly increased planning responsibilities mandated by Congress. This conference begins with an examination of this planning process and then turns to a consideration of a number of key issues on a resource-by-resource basis.

AGENDA

Monday, June 8, 1987

Overview

- 9:00 John D. Leshy, *Planning as a Major Tool of Public Land Management*

- 10:35 Jeff M. Sirmon, *Progress and Problems in National Forest Planning*
 11:10 David C. Williams, *Public Land Management: Planning, Problems, and Opportunities*
 11:45 Questions and Discussion
 12:45 Charles F. Wilkinson, Luncheon Speaker, *Public Land Planning: Will the Current System Endure?*

The Timber Resource

- 1:45 A. Allen Dyer, *Setting the Allowable Timber Cut*
 2:30 Wells Burgess, *Standards for Judicial Review of Forest Plans*
 3:35 Peter M. Emerson, *The Gardener's Ethic and Other Lessons From Forest Planning*
 4:10 James Riley, *Timber Industry Concerns in Forest Planning*

Tuesday, June 9, 1987

The Range Resource

- 9:00 E. T. Bartlett, *Livestock Grazing on Public Lands: Procedures and Issues*
 9:50 Wayne Elmore, *Riparian Management: Back to Basics*

The Mineral Resource

- 10:55 Guy R. Martin, *The Arctic National Wildlife Refuge: A Case Study in Reconciling Nationally Significant Wildlife Protection, Wilderness and Mineral Potential*
 1:20 Constance E. Brooks, *Changes in Altering Land Classifications and BLM Land Use Planning: The National Wildlife Federation v. Burford Case*
 2:00 *The Oil Shale Saga: Where Do We Stand?*

The Wildlife Resource

- 3:10 Hank Fischer, *Recovering the Wolf in the Northern Rocky Mountains*
 3:40 Don Snow, *Grizzly Bears, Politics, and the Language of Efficiency*



(Photo courtesy of Denver Museum of Natural History)

- 4:10 Panel: *Wolves, Grizzlies, and the Public Lands*. Hank Fischer, Lorin Hicks, Patrick Y. O'Brien, Don Snow, and John Weaver

Wednesday, June 10, 1987

- 8:45 Dean Bibbes, *Repositioning Arizona Lands*

The Recreation Resource

- 9:15 Harris Sherman, *Ski Development in National Forests*
 9:45 Denis P. Galvin, *Carrying Capacity in the National Parks*

The Preservation Resource

- 10:35 William J. Lockhart, *BLM Land Planning and Consistency Obligations to Provide for Protection of Natural Values on Adjacent Protected Lands*



(Photo courtesy of Boulder Daily Camera)

- 11:15 Arnold W. Bolle, *Wilderness Protection on Forest Service Lands: Badger-Two Medicine*

The Water Resource

- 1:30 Thomas E. Wilson, *Watershed Management and Water Quality Protection*
 2:15 James F. Engelking, *Integrating Private Water Development Activities into Federal Land and Resource Planning and Management*

The conferences will be held at the University of Colorado School of Law in Boulder. The standard registration fee is \$480 which includes attendance at all sessions, a course notebook containing detailed outlines prepared by all speakers, two lunches, a cookout dinner on Monday evening and a reception on Tuesday evening, and refreshments at all breaks. For further information please contact the Center at (303) 492-1286.

Center Holds *Granite Rock* Luncheon

On April 20, 1987 the Center sponsored a special luncheon program on the recent United States Supreme Court decision in the case of *California Coastal Commission v. Granite Rock Company*. By a 5 to 4 margin the Court upheld the authority of the California Coastal Commission, a state agency, to require that mining operations on federal lands obtain a state permit. At issue was a limestone quarry operating on unpatented mining claims in Los Padres National Forest. The holding appears to permit states to regulate the environmental impacts of mining on public lands.

Speaking at the luncheon program were **Professor John Leshy**, Arizona State University College of Law, and **Don H. Sherwood**. Professor Leshy worked on the preparation of an *amicus* brief presented to the Supreme Court on behalf of 19 states and the Western Governors' Association supporting the State of California. His book on the 1872 Mining Law, *The Mining Law: A Study in Perpetual Motion*, has just been published by Resources for the Future. He served as Associate Solicitor for Energy and Resources in the Department of Interior, 1977-80. Don Sherwood is an attorney with Sherman & Howard where he practices mining law. He teaches mining law at the University of Denver and has written and spoken extensively on mining law subjects.

Center Invites Fellows Applicants

The Natural Resources Law Center initiated its Fellows Program in the fall of 1982. Under this program nine fellows have visited at the University of Colorado School of Law. These fellows have included practicing attorneys, professors of law from Australia and China, and a professor of water and forestry. The research projects undertaken by the fellows during their visits have involved a wide variety of topics in the areas of water, energy, public lands, and the environment. The projects have resulted in a number of publications and conference presentations.

The Center is now inviting applications for the two academic semesters in 1988. Applicants should be interested in pursuing advanced research on a topic related to natural resources law or policy. The research should result in written material publishable by the Center. In conjunction with their research and writing, Fellows are invited to participate in the related activities of the Law School and the Center.

For further information, contact Professor David Getches, University of Colorado School of Law, Boulder, Colorado 80309-0401 or the Center.

Center Cosponsors Workshop On Front Range Water

Finding water for the growing urban demands along the Front Range of Colorado was the subject of a recent workshop jointly sponsored by the Center and the Boulder County Bar Association. Held in Boulder on April 11, 1987, the workshop focused on the available sources of supply and, especially, on the legal and institutional issues affecting these supply sources. Options considered were the Two Forks project, agricultural transfers and exchanges, West Slope exchanges, reuse, groundwater, and conservation. In addition, the concept that water supply for the Denver metropolitan area be provided by a single entity was discussed.

Speakers at the conference were Ull Kappus, David H. Getches, Robert F. T. Krassa, Monte Pascoe, James S. Lochhead, John U. Carlson, Dennis M. Montgomery, Dan Luecke, Marcia M. Hughes, Peggy Cucitti, Robert Golten, and Gregory J. Hobbs, Jr. Clyde Martz, newly appointed Executive Director of the Colorado Department of Natural Resources, was the luncheon speaker.

An Interview With Clyde O. Martz



Clyde O. Martz,
Executive Director of
Colorado Department of
Natural Resources

Clyde Martz is the Executive Director of the Colorado Department of Natural Resources. Born and raised in Lincoln, Nebraska he graduated from the University of Nebraska. He interrupted his law school studies at Harvard to serve in the Navy during World War II. He then returned to Harvard and graduated in 1947. Shortly thereafter, he started teaching at the University of Colorado School of Law in Boulder. In 1962 he moved into private practice with the present Denver firm of Davis,

Graham & Stubbs. He was Assistant Attorney General for Lands and Natural Resources in the U.S. Department of Justice between 1967 and 1969. He returned to Washington, D.C. for one year in 1980 as Solicitor of the Department of the Interior.

This interview was taped March 15, 1987.

Q: What drew you to Colorado?

A: I was drawn I suppose by the girl I intended to marry. I had tentatively taken employment in New York City because it was perceived at Harvard to be where the action was. Ann was not particularly attracted to New York City as a place to live. Accordingly I agreed with her, to try for a job in Colorado.

Q: Is your wife from Nebraska?

A: Yes, Fremont, Nebraska.

Q: Why did you come to teach at the University of Colorado?

A: I got the job teaching by a kind of fluke. I had not intended to teach but had been advised by one of my professors that the best way to find an opening in Colorado was to write to the dean of the law school. I was told that he

usually knew where openings might exist. I phrased the letter to Dean King in such a way that he thought I was applying for a teaching job. He happened to be in a crisis. It was about two weeks before the semester was to start and one of his professors had withdrawn because of housing problems. So he invited me to come out for an interview and gave me a job for one year. He gave me what I later learned to be the "dog" courses—mining law, water law, and oil and gas law.

Q: Were those courses being taught before you arrived?

A: No, they had not been taught in recent years. Oil and gas had never been taught. Mining law had been taught by an adjunct professor from time to time. I don't believe water law had been taught. At any rate, there were no teaching materials available for the courses.

Q: How did you set about preparing to teach those courses? You had not had them before; there were no casebooks; in fact, it sounded like teaching was not something you had really considered.

A: I took the teaching job for the purpose of getting to Colorado and spending a year finding an opportunity to move into practice. In preparation of the course in oil and gas I talked to A. W. Walker and Maurice Merrill at Texas and Oklahoma, respectively. They had outlines that they had

"I got the job teaching by a kind of fluke."

used for the course. There were no casebooks, but they did provide me with outline materials. There was a Costigan mining law book which had been printed in 1913 or 1914; there hadn't been many changes in mining law since that publication. And in water law, I had to build the material

principally from the statutes and Colorado case law for that first term.

Q: You also had very little time to put the materials together.

A: Some days I was a day ahead of the class and more frequently a day behind, but I learned a lot in working with the class. I've often said that students, unlike clients, don't assume you know what you're talking about. I would learn from the questions the students asked and by, use of the Socratic method, if I didn't know the answer to a question, to ask the students to look it up and discuss it the next class period. And I of course would do likewise. Interestingly enough, a substantial number of the students from those early classes went into natural resources law as an area of concentration. I have often thought that maybe the

"I've often said that students, unlike clients, don't assume you know what you're talking about."

best way to teach is to learn with the students cooperatively rather than to lecture on the one hand and absorb on the other. The students did become excited about the subject matter and pursued it through their professional careers.

Q: You then turned those materials into the first casebook ever developed on natural resources law.

A: Yes, the first time I taught the class we used mimeographed materials. I say mimeographed, not xeroxed, because there were no photocopiers in those days and it was a laborious process to duplicate enough materials for the class. But we did prepare a set of cases and statutes as the course progressed, and I revised that for the next year and improved it. The year following, West Publishing Company asked me to put it together in the form of a natural resources casebook.

Q: What do you think the major developments or changes have been in the subject matter of natural resources law now, compared to when you put those materials together in the 1950s?

A: The procedures have materially changed in water law, largely because of the 1969 Water Rights Determination Act. But the basic law of water, in my judgment, remains unchanged; it rests on constitutional declarations of rights and responsibilities; the legislation merely prescribes the procedures that must be followed in adjudicating and administering water rights. The same is perhaps less true in other states which did not have constitutional limitations upon the appropriation and reservation of water by public authority. We have there seen the development of public trust doctrines and greater freedom of administration by the state and public sectors.

In mining, there has been very little change in the basic hard rock mining law, except as rights have been reserved in various federal statutes. The Federal Land Policy and Management Act of 1976 has been characteristic of the congressional attitude toward the 1872 Mining Law. It provided that except for a recordation change in Section 314 of that act and a few other specific changes, the Mining Law is preserved in its original form.

In oil and gas law, there has been the biggest change. In 1947 when I started teaching the course there was very little case law, even in Texas and Oklahoma. There was also very little statutory law. Rights were determined largely by contract, and frequently by handshake contracts, which were widely used in the oil and gas industry at that time. Most of the oil and gas law has developed subsequent to 1947.

Q: If you were doing a natural resources casebook today, would it look different than the one that you did in 1951?

A: The principal additions would be the federal statutory evolution I have mentioned and environmental law. I think it is important that environmental law, as it affects resources, be integrated and understood as part of natural resources law, not as a separate subject. I fault our present status of environmental law as being a single purpose law that does not address cost-benefit considerations of resource development.

Q: So that would be an addition to your book?

A: Yes, I don't even think I would have it as a separate section, except as some statutory materials might require. I would put the environmental cases into the oil and gas, mining and water substantive areas so that the law student/future lawyer would see environmental compliance and mitigation as part of the planning and development process for resource use.

Q: What sorts of changes have you seen in legal education during your years of teaching?

A: I think our curricula over a period of time got fractured into too many peripheral subject areas, either because of the interest of individual faculty members in an area of specialization or in an attempt to appeal to students with diverse interests. To me the fundamentals, the ABCs so to speak, should be stressed—contracts, torts, property law, procedure, legal writing. These are basics and every student should have them instead of taking courses where they memorize provisions of statutes in specialized areas which change with time.

"I fault our present status of environmental law as being a single purpose law that does not address cost-benefit considerations of resource development."

I have seen an interesting contrast between classroom teaching and law firm teaching that has led me to some thoughts about teaching methodology. In the natural resources area of my firm, I have had associates come to work who have had no background in oil and gas or mining law in eastern law schools. I have given them assignments to do research in those areas in conjunction with a problem we were addressing and found they were every bit as capable of producing an analytical discussion of a subject area, suggesting various courses of action and drawing conclusions, as were the young people who had taken intensive training in the particular subject areas. I think the responses I would get in a day or two of investigation by

students without any background was better than what I had ever found on a final examination from students who completed a substantive course. I have concluded that maybe the better way to teach is to get students to analyze problems and to think about solutions developed in the classroom, the same way they would conduct research in practice, as a means of analyzing issues and providing support for particular approaches.

Q: Did you teach natural resources law courses exclusively?

A: No, I taught property law, land use planning; contracts law at the University of Illinois and wills and estates, administrative law, and government regulation of business. It was a diverse package. I think that's good. I think we tend to specialize too much when the principal service a lawyer can give to a client is judgment in balancing interests both of business and regulation and counseling on legal opportunities available in directing any course of action.

Q: What prompted you to switch from teaching to private practice?

A: Well, it was a ridiculous set of circumstances. When I was still in law school I thought I had a job with the predecessor of the present firm of Davis, Graham & Stubbs and I got married on the basis that I had a job with that firm and came out to Denver on my honeymoon. I was advised that, in the meantime, another young man, Byron White, had come along and beaten me out of the job. I was assured by the firm that if Byron didn't work out they would give me a call. Well, fifteen years later I attended a Holmes Lecture where Judge Wyzanski spoke on Oliver Wendell Holmes' philosophy that a man never does anything significant after he reaches the age of forty unless he changes his career. I was laughing about that over the weekend and on Monday morning got a call from the firm saying that Byron hadn't worked out, that is to say that he had gone back to Washington as Attorney General, and that they were trying to find a resource lawyer to fill his place. They thought I might have some ideas of resource lawyers in the state who might be interested in making a move to Denver. And so, on the spur of the moment, I said "What about me?", remembering that I had been promised a job under these circumstances. The firm, being made up of men of honor, recognized the prior obligation and asked me to come down. So I started my new career at the age of forty.

Q: Does it seem to you that teaching was something of a detour?

A: That's a hard one to answer. As I said earlier I had never intended to teach as a career. I had gone into that work by happenstance, but I had liked it very much and was most content there, doing what I did. I don't really know

"... the principal service a lawyer can give to a client is judgment in balancing interests both of business and regulation and counseling on legal opportunities available in directing any course of action."

to my wife that I knew exactly what Holmes had meant because I had become comfortable in teaching. I couldn't add very much to the classes because of limited amounts of time and could teach from year-to-year without much effort. So I guess practice appealed to me as an adventure at doing something different, to see if I could be any good in practice.

Q: That was in 1962. Was the practice largely natural resources sorts of cases?

A: At that time the firm only had about sixteen lawyers, I believe, so we did not have the specialization that we have today. I worked in property law, resources law, banking law, contract law and litigation. I have always tried to have broader rather than narrower specialty interests, again in the belief that one can serve his clients better if he has a little breadth. I studied oil and gas and mineral taxation because I believed it was important in planning a transaction structure to be aware of the tax benefits and detriments. I thought it important for the transactional lawyer to have that background, rather than look to an independent tax lawyer to evaluate a document.

Q: You have maintained an unusual breadth in your areas of practice even in the face of today's trend toward increasing specialization. Have you found that to be a difficulty, that desire to remain broad while trying to keep up with the rapid changes in specific areas of the law?

A: That's hard to answer because I can't say if I am as up to date in everything as someone who is specializing in a particular subject. I have never felt uncomfortable in my understanding of the subject matter and have a belief that no matter how expert a person becomes in any area he needs to research every problem *de novo* because there will be nuances discovered that may be beneficial or detrimental to a particular transaction.

I think one disadvantage of not specializing is that one does not become known as a specialist. In the competition of the law, I suspect one who is recognized as a specialist in a narrow field has an edge in drawing clients in that field over the generalist. I believe that is one of the reasons we have developed specialties.

Q: In 1967 you went to Washington D.C. to work for the Department of Justice. What work did you do back there?

A: I was Assistant Attorney General for the Lands and Natural Resources Division of the Department of Justice. I believe about 150 lawyers were in that division. We did all of the condemnation work, all of the environmental work, which wasn't very much at that time, as well as all of the litigation for the Interior Department, Corps of Engineers, and Forest Service dealing with water development, minerals, and other things.

"... life is built on a pyramid of paradoxes, the prevalent one being that one does get more satisfaction and more happiness out of what he does than what he gets."

why I made the decision to change as quickly as I did. It was not due to unhappiness in teaching. I was quite content. But it is true that after the Wyzanski lecture I did confess

Q: There were a lot of things going on at that period of time in the public lands area, a lot of changes underway coming out of changed policies of the '60s. That must have made for an active period of time while you were back there.

A: Yes, and it was active in anticipation of the future. That was the period when the students were marching on the campuses across the country for environmental reforms, it was a time when the administration was exploring ways to control decision-making so there would be full consideration of environmental impacts. In fact, before the National Environmental Policy Act was enacted in 1969, we were directed administratively to prepare a memorandum of decision with respect to any major decision made to show we had considered environmental, economic, and related factors. It was really that administrative practice that I always thought was intended by NEPA, not a vehicle for preparing multi-volume studies at great expense, but a vehicle that would show consideration was given by the decision-maker to impacts of decision-making on environmental, economic and other areas. I believe that the statement of policy in NEPA is an ideal statement of what we ought to have in balance for resource development, resource conservation, and environmental protection. Congress was looking to a way to make man live compatibly with his environment. But then in the 1970s we had an environmental explosion with some 14 major single-purpose environmental laws that looked to the removal of particular environmental abuses without regard to the impact or cost on other industries and programs. I think the pendulum really started swinging in the 1960s from resource development to environmental protection and has now swung all the way to environmental extremism. We are presently struggling to bring it back to a middle course.

Q: You returned to Washington in a different capacity, as Solicitor of the Department of the Interior, eleven years later. What differences did you find?

A: There had been quite significant changes in that eleven year period in the way cases were handled for the Interior Department. When I was in the Justice Department in 1967 to early 1969, the Interior Department operated as a client who had a litigative need, affirmative or defensive. The Justice Department had discretion to take the case or not take the case, depending upon its evaluation of the justiciable character of the claim. There were times while I was in Justice when I did not think a claim by Interior was meritorious and declined to pursue its case.

By 1980, the Interior Department had taken over many of the judicial functions except actual court appearances and it actually handled court appearances in a number of areas like claims under the Surface Mining Control and Reclamation Act. It did all the briefing on appeal cases; it prepared the trial briefs and did much of the trial preparation for the Justice Department. Interior was much more involved in 1980 in doing the same things I had been involved with in Justice eleven years before. I also found that when I was presented with the files on matters I had turned down eleven years before, there had been a great deal of irritation at the Interior Department about this s.o.b. over in Justice who wasn't taking all the cases.

Q: Of the many issues you worked on at Justice and Interior are there any that stand out in your memory?

A: I suppose the federal water adjudication and reserved rights issues would be in that category. When I was in the Justice Department, the issue of federal

reserved rights first arose, that is beyond the Indian reservations in the Winters case, and the issue as to whether the federal government was subject to state jurisdiction for the quantification and dating of its water rights. I took the position that we should quantify all rights in order that the state could administer priorities. I asked Agriculture to prepare a list of their water rights and the points of diversion and place and character of use so filings could be made. My recollection is they said they could get that material put together in sixty to ninety days. As you know it has not been put together completely yet. When I was in Interior eleven years later, we worked on reserved rights issues. I issued a reserved rights opinion, and met with state engineers in the west to try to explore ways in which quantification could be effected by agreement. I think we made some progress.

Q: It's an issue that still continues to have life.

A: I think the issue has been addressed and has been resolved. What we're dealing with now is the application of principles to specific fact situations. I think the law is clear that reserved rights are limited to the primary use for which

"I was assured by the firm that if Byron White didn't work out they would give me a call."

each reservation is made; but with respect to each reservation, we have to address the primary purpose and the kind of water needed for that purpose.

Most of the wilderness areas are in the upper reaches of the watershed, and instream flows will exist because of location, whether there is an appropriation or reserved rights. It's only in the downstream wilderness areas where instream flow rights become critical. In those cases instream flow appropriations are permitted in Colorado and, conjunctively with the United States, ought to provide the water needed to avoid continuous litigation of the subject.

Q: How about in your private practice? What cases stand out in your recollection?

A: I guess the Leo Sheep case must be mentioned since it went to the United States Supreme Court. That Court held that there were no implied rights by reservation in the railroad land grant patents involved in the case and that, as a consequence, there was no right of access to public lands across private lands. It had a wide impact on land and wildlife management.

Another case, *People v. Roger Fellhauer*, was the first test of the right to administer tributary ground waters on a priority basis under Colorado law and was the decision that led to the reorganization of Colorado water law in 1969.

Other cases for which I have a fond memory are the Snake River cases near Jackson, Wyoming involving the sufficiency of meander lines as moving property boundaries. The meander lines on the Snake River are as much as three miles apart with many river channels in between. Starting in 1963 the United States began asserting that the meander lines were fixed property boundary lines, as they were not actually the boundary of the river at the time the surveys were made. It claimed the land between the meander lines belonged to the United States. I was first exposed to that issue in 1968 when I was in the

"It's only in the downstream wilderness areas where instream flow rights become critical."

Department of Justice. Suit was brought by the United States to establish title on the east side of the Snake River and I was counsel of record before the court of appeals; the United States won the case. Thereafter in the 1970s I represented land owners on the west side of the Snake River before the same judge, Judge Kerr, on landowner claims that the meander lines were not grossly in error and that the riparian owners held title to the thread of the river as a matter of law. The first landowners case was a memorable trial because the judge would continually inquire how the facts of that case differed from the one I had won on behalf of the United States. The facts were just different so the results were necessarily different.

Q: In addition to your legal work you have been very active with various professional organizations. For example, you have served as President of the Rocky Mountain Mineral Law Foundation, served as Chairman of the American Bar Association's Natural Resources Section, and were Chairman of the Advisory Board of the Natural Resources Law Center for several years. How have you found the time for these extra activities?

A: The projects are all challenging I guess. When asked to do such things, maybe I can't say no. They are all rewarding. I get a great deal of satisfaction out of working on projects with other people. The Rocky Mountain Mineral Law Foundation was kind of a dream that we had to bring together all the universities in the Rocky Mountain states and the mining associations and oil and gas associations as well to exchange ideas on the solution to problems and to prepare research materials of value to the industry. At the time the idea was first developed, I was at the Law School and had the facilities of the Law School to help coordinate materials and edit the papers that were prepared for publication. I worked on the project as a matter of convenience as there was no one else in a position to do it. Then the Foundation grew until it has become a very valuable research organization in the area.

The American Bar Association job again was a challenge to make the work of the Natural Resources Section more valuable to eight thousand section members across the country. I enjoyed the tour of duty in developing a monograph program, changing the style of a publication from that of a law review, which really was not competitive with law reviews across the country, into a magazine with current materials of value to practicing attorneys. We extended the programs from continuing legal education alone to timely reports on changes occurring in the law.

Q: Most recently you have taken on still another career by becoming Executive Director of the Colorado Department of Natural Resources. What prompted you to take this position?

A: The governor has quite an exciting portfolio of dreams he seeks to accomplish and many of them are the same as those I have had ever since I was in the Justice Department. First and foremost, to bring into balance the interests of the people of Colorado in economic resource

development and use, enhancement of the environment and enhancement of wildlife and tourism—believing that each of these interests has great value, that people are served by the enhancement of each, but that people get more if we can develop all in a balanced posture. The governor also believes that state government ought to form a partnership with people, and not act so much as a regulator, but as a partner in the development and protection of the resources of the state. Also, he believes that local decision-making should not be disregarded unless we can first demonstrate there is some particular public interest that is impaired by the local course of action. He also seeks to make government cost-effective by addressing all of the government programs to see if the benefits obtaining to the people of Colorado are commensurate with their cost. I have long advocated all of these policies. While I had great reservations at age 66 of starting a new career, I was so excited by what the governor wanted to accomplish that I felt I would like to join the team.

I have done that and I think I'm working harder now than I've ever worked in my life. With 1,200 individuals in the department who have divergent views as to how the resources in our state should be employed, and the legislature that at the moment is very supportive of a team effort between the executive and the legislature in implementing sound programs, there is an opportunity, I think, for things happening now if we put in enough time and effort to get the issues on the table.

Q: How did you develop such strong personal motivation?

A: It is a philosophy of life I learned from early teachings. I have tested it from time to time and am a firm believer that all of us are equipped with minds and bodies to be productive and that life is built on a pyramid of paradoxes, the prevalent one being that one does get more satisfaction and more happiness out of what he does than what he gets. You can test it in so many, many situations. One might think he would enjoy life more if he had enough resources that he did not have to work a day in his life; but you know people in that posture are not happy. The reason lies in the way we're built and the fact that there

"The governor has quite an exciting portfolio of dreams he seeks to accomplish . . ."

is a greater satisfaction from strain and creativity than from relaxation. These are the paradoxes we see in life. I have enjoyed living, having an opportunity to do creative things, and having time to pursue them.

Q: And now you have a new set of challenges with the Department of Natural Resources. You have had a couple of months there on the job. How does the agenda look to you? What do you think will occupy the majority of your time?

A: Pursuing the three objectives of the governor. We're working aggressively to balance the interests of the Wildlife Division, which makes up almost half of my manpower, with the concept of development and economic stability.

We have late bill status for several bills this year. One is to consolidate the Division of Mines and the Division of

Mined Land Reclamation into a new Division of Mining that will have a twofold objective, one of developing the mining industry, the other to regulate it as prescribed by law. That move is getting a lot of support from the mining industry. It is going to eliminate some of the inspections which are duplicitous with those performed at the federal level. It will coordinate activities of the Department of Health and the Department of Natural Resources in mine regulation.

An independent measure is seeking authority of the legislature to consolidate by memoranda of agreement all of the permitting processes for mining in one place so that the developer need not go to thirteen or fourteen different agencies to get approval for a project.

We are working on ways to improve the administration of water through the State Engineer's Office, to broaden the satellite monitoring program by increasing downlinks and shortening the time of response on river administration. Actually we have 24 programs on the table identified as being constructive and creative; we'll see how far we can go with each of them.

Out-of-Basin Water Exports in Colorado

Larry MacDonnell

Under the prior appropriation doctrine, water is not restricted in its use to lands adjoining a stream. Indeed, the seminal 1882 case of *Coffin v. Left Hand Ditch Company*, which held that the appropriation doctrine applied in Colorado even before its official adoption in the 1876 Constitution, involved the diversion of water out of the south fork of the St. Vrain Creek for use on agricultural lands in the Left Hand Creek drainage. The Colorado Supreme Court concluded that the right to use water should not be restricted to the watershed of origin. Rather it noted the many benefits of allowing water to be moved to places where its use would be most productive.

Colorado also has a long history of permitting changes of water rights. As early as 1883 the Colorado Supreme Court allowed a change in the point of diversion. An 1891 decision upheld a change in use from irrigation to municipal purposes. The rule established then and maintained thereafter is that changes of water rights should be permitted so long as other water rights are not injured.

The essential wisdom of these decisions remains intact today. Colorado's water resources must be able to serve the state's needs. Placing artificial geographic restrictions on the place of use or otherwise limiting the transferability of water resources may unnecessarily hinder our ability to meet these needs.

At the same time it must be recognized that the permanent removal of water from a river basin has economic and social consequences for that area. In a very real sense there is no such thing as "excess" or "surplus" water in a stream. The flows of water in a basin are part of that basin's natural system. In many areas the reliable flows of surface water have been fully allocated for us by those holding water rights. In other areas surface flows exceed current diversions. In either situation when water is permanently removed, the system itself is changed.



East Portal of Roberts Tunnel
(Photo courtesy of Denver Water Department)

Protection of Water Rights

The water law structure is designed to protect existing water rights against any adverse effects associated with such changes. Thus, for example, new water rights are always junior in priority to established water rights. Water rights utilized to divert water resources from a basin are subject to the requirement that any senior water rights must be fully satisfied. Of course, subsequent water rights are then junior to those diverting water out of the basin and may not object to this removal of water even though the reduced flows may well affect the efficacy of those rights. If existing water rights in a basin are transferred in ownership for the purpose of taking that water out of the basin for another use, the water court must be satisfied that there will be no injury to other existing water rights.

Other Affected Interests

The removal of water affects interests broader than those protected by our system of water rights. For example, flows of water may support a viable recreation and tourism economy. People may visit an area to float a raft down whitewater streams, to fish for trout, to camp alongside a flowing river. The businesses supported by these activities do not own the water that is being used. Yet the economic value associated with water in these uses may be substantial. As another example, the value of irrigated agriculture exceeds that of dry land farming. If the sale and transfer of agricultural water rights cause a significant reduction in an area's economic activity, related businesses are likely to be harmed. The property tax base may decline, reducing funding available for schools and services. As still another example, removal of flows of water may have effects on water quality, causing increased treatment expense for those in the area.

How, if at all, are the various interests being accounted for? Colorado law does require that when a conservancy district constructs a project to take water out of the Colorado River basin, it must ensure that present and prospective consumptive uses of water are not impaired or increased in cost. This requirement has been translated to mean that the conservancy district must build "compensatory" storage on the west slope. Cities like Denver, Aurora, and Colorado Springs—the current proponents of large transmountain water projects—are not governed by this law.

Colorado water law does permit water rights for instream flows, but to date these rights have only been obtainable by the Colorado Water Conservation Board. The major use of this program has been to protect certain high quality cold water fisheries, typically in high mountain settings, designated by the Colorado Division of Wildlife.

Denver Water Board Agreements

The Denver Water Board (DWB), in connection with its efforts to develop its conditional water rights on the west slope and the South Platte through construction of the Two Forks project, has entered into two important agreements. In its 1985 agreement with Summit County, the DWB agreed to subordinate certain of its water rights in order to assure that towns and ski areas in Summit County can reliably obtain needed water under more junior water rights. The DWB also agreed to maintain the summertime water levels in Dillon Reservoir to protect recreational uses and to participate in a program to protect the water quality of Dillon Reservoir. In return the County agreed to provide "full and complete" support for the "South Platte Reservoir"—i.e., Two Forks, to issue the necessary permits for the Straight Creek Project, and to undertake certain steps to provide replacement water to offset losses caused by the subordination agreement.

The second agreement, reached in December 1986, involved the Colorado River Water Conservation District (River District), and the Northern Colorado Water Conservancy District and the municipal sub-district (Northern). The DWB agreed to lease water from a reservoir to be built by the River District for at least 25 years at \$250 per acre-foot per year and to stipulate to a decree establishing that the River District has exercised reasonable diligence in maintaining certain conditional water rights. The Board also agreed to reduce its planned rate of diversion for the Eagle-Colorado Project and to operate that project so as to protect certain west slope diversions occurring at the time project construction begins.



Dillon Reservoir
(Photo courtesy of Denver Water Department)

In pursuing the Green Mountain Pumpback Project, the DWB agreed to a number of conditions, especially regarding operation of the reservoir that would be utilized to replace the functions of the Green Mountain Reservoir. For example, the reservoir is to be operated in a manner that will "minimize impacts and enhance the recreation economy" of the west slope's headwaters region. The west slope water rights that are to be protected in the operation of the proposed Eagle-Colorado Project are also to be protected in the operation of this reservoir. Significantly, the DWB agreed to construct the reservoir with "compensatory" storage for the west slope of 25,000 acre-feet plus 15 percent of the yield from the Green Mountain Pump-

back Diversion. The Board also agreed that it will utilize its South Platte decrees "with reasonable efficiency" and maintain a "comprehensive water conservation program."

The major concession on the part of the River District was its agreement not to oppose construction of the Two Forks Reservoir, Straight Creek, and the Williams Fork Extension. In addition, the River District and Northern agreed to settle existing litigation involving DWB water rights for the Straight Creek and Piney River Units of the Roberts Tunnel Collection System and the Eagle-Colorado Project (as modified).

Through these agreements, the DWB has, in fact, addressed a number of the important effects on the west slope associated with its water development activities. Water supplies needed to support growth in Summit County have been made more secure. Measures were adopted to protect the recreational, aesthetic, and water quality values of Dillon Reservoir. A compensatory storage feature was added to the Green Mountain Pumpback project. Existing water rights for west slope towns, agriculture, and snowmaking are protected, though water rights for industrial purposes are not. Nor are instream flow rights mentioned, although the three parties did agree to look for "solutions to minimum streamflow maintenance on the Colorado River in Grand County."

The Two Forks EIS

The draft environmental impact statement for the Two Forks project has identified several likely effects on the west slope which may require mitigation. Fish habitat on the Williams Fork and the Colorado River is likely to decrease somewhat due to lower water levels. Reduced streamflows also will affect rafting and kayaking opportunities on the Blue River and kayaking on the Colorado River. Some loss of revenues is expected to result from reduced fishing, rafting, and kayaking. In general these effects are judged to be minimal.

Interestingly, the most significant effect was found to be on existing west slope water rights junior to those held by the DWB. Especially affected are the water rights held by several communities in Grand County and the diversion rights for the Windy Gap project. As mentioned, the December 1986 agreement does address these concerns in connection with the Green Mountain Pumpback project and the Eagle-Colorado project. Moreover, the parties also agreed to request the Colorado Water Resources and Power Development Authority to make a feasibility study of water supply options in the Fraser River Valley.

Transfers of Agricultural Water

Recently, front range cities have turned their attention to the supplies of water available for purchase from agricultural users. Colorado Springs and Aurora have acquired shares in the Rocky Ford Ditch Company and the Colorado Canal Company entitling them to water from the Arkansas River. Apparently the land on which this water had been applied also was purchased. The decrees transferring the water rights contain the normal provision regarding dry up of these lands to make available the historic consumptive water use. Moreover, to protect remaining water right holders in the ditch systems there are provisions to leave enough water to compensate for seepage losses and reservoir evaporation.

An apparently unique part of the agreement in the settlement that led to the decrees was a provision that lands to be dried up would first be revegetated with a grass cover that can exist without irrigation. Aurora is working with the

Crowley-Otero Soil Conservation Service in an experimental program to determine the most suitable grasses for this purpose and has committed not to take water from the area until the grass cover is in place.

The City of Thornton has purchased a large number of shares in the Water Supply & Storage Company, a ditch company with very senior rights on the Poudre River, together with the farms which had been using the water. In November 1986 a settlement was reached by which Thornton agreed to pay \$10 million to Water Supply & Storage and to add another 3,000 acre-feet of water to the system from Colorado-Big Thompson supplies. In return, Water Supply & Storage effectively agreed to stop its efforts to prevent the transfer.

An Assessment of Colorado Water Export Activities

Several preliminary observations may be made about these water supply activities in Colorado. First, Colorado may be unique in the west in the relative absence of direct restraints placed on such movements of water. According to a 1984 study, Colorado has had more water rights transfer activity between 1963 and 1982 than any other western state. In part this is related to rapid urban growth. But California and Arizona have grown even more rapidly during this same period. Yet there has been relatively little water rights transfer activity in these states.

Second, many of the direct effects of the large-scale water transactions in Colorado appear to be addressed either directly or indirectly. On its face the Colorado water rights system seems unduly restrictive in the matters considered in allocating water rights and approving transfers of existing rights. In practice it appears that there are less-visible checks and balances at work in the system that result in a great deal of out-of-court negotiation. The DWB's conditional water rights on the west slope are relatively senior. The Board is not constrained to provide compensatory storage as are conservancy districts. Yet it found it advantageous to subrogate its water rights to Summit County interests, to promise to protect other more junior west slope water rights, to help the west slope build storage by promising to lease most of the stored water for at least a 25-year period, and to agree to add a compensatory storage element to its proposed Green Mountain Reservoir replacement. In the transfer context, the City of Thornton found it prudent to buy off its opposition with money and additional water.

Although this cursory examination suggests that many of the direct effects of these water transactions are being addressed, it is not possible to evaluate the actual effectiveness of these agreements at this time. The fact that the parties involved all agreed to these arrangements suggests that, for the present at least, satisfaction was found. One aspect needing further attention is whether all essential interests are in fact represented in these agreements. For example, in the west slope situation, existing industrial water rights are not among those the DWB has promised to protect. What is the basis for excluding these rights? Moreover, Summit County was able to negotiate an agreement that protected its major interests. However, similar interests in Grand County appear not to have fared as well—apparently because of a weaker bargaining position.

As suggested earlier, even the indirect effects have been addressed to some degree. The DWB has agreed to operate Dillon Reservoir so as to maintain its recreational uses and to participate in a water quality improvement



Irrigated beans

(Photo courtesy of U.S. Dept. of Agriculture, Soil Conservation Service)

program. It has agreed to operate the proposed Green Mountain Reservoir replacement so as to minimize impacts and enhance the recreation economy of the headwaters region of the west slope. It has promised to look for "solutions" to minimum streamflow maintenance on the Colorado River in Grand County. As a consequence of the permitting process associated with Two Forks, it is likely to have to engage in some fishery enhancement activities and possibly other types of mitigation. The revegetation of dried up farmland in the Arkansas River Valley also represents a modest step toward addressing an indirect effect of agricultural water transfers.

Legislative Proposals

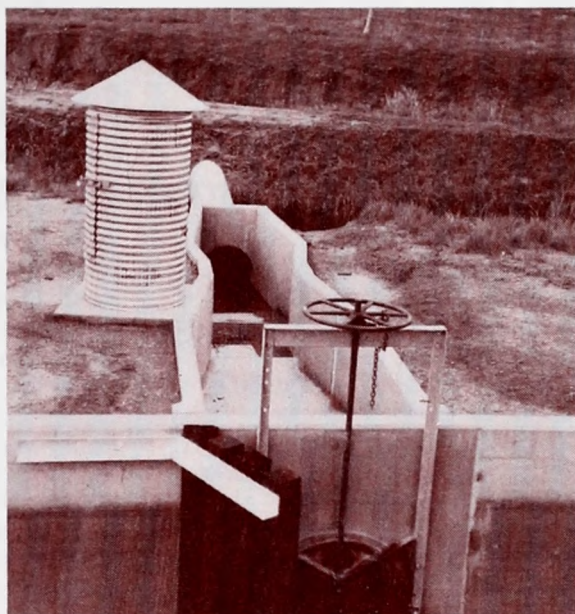
Last year the Colorado legislature debated at some length two bills that would have provided state financing for new water projects taking water from the Colorado River basin. A special fund derived from sales tax revenues was to be established. Fifteen percent of the money in such fund was to be utilized to assist construction of compensatory west slope storage, to assist construction of facilities needed to maintain water quality standards in the Colorado River Basin, to restore or maintain "adequate streamflows" in the Colorado River Basin depleted by transbasin diversions, and to pay for other mitigation measures "identified by a local, county or state land use process." The Colorado Water Conservation Board was to make the initial determination of what mitigation actions should be financed. However, the legislature itself would have had to actually approve any such expenditures. Apparently the major point of disagreement centered on whether the project proponent would still be responsible for mitigation desired by west slope counties but not accepted by either the board or the legislature. The interesting aspect of this bill was its implicit recognition of the major effects of large-scale transbasin exports.

This year the Colorado legislature is considering a bill that would create a \$25 million fund to be administered by the Colorado Water Conservation Board. The money would be used to help pay the costs associated with mitigating impacts on wildlife caused by water diversion and storage facilities. As presently drafted the project proponent would be responsible for mitigation costs up to five percent of the total project costs. The fund would then be used to pay for additional costs, up to another five percent.

Adequacy of Compensation

Is there still need for compensation in the case of water exports? Or does the present legal system provide adequate mechanisms to protect the area of origin? The standard I would seek to apply is that the area of origin should be at least as well off after the export as before the export. Under this analysis, the benefits to an area (e.g., payment to holders of water rights, availability of new storage capacity, employment from project construction and operation, etc.) should at least equal the costs to the area (effects on junior water rights, water quality, instream flows, income and employment losses, wildlife impacts, etc.). It seems to me that the fundamental issue is the same irrespective of the basin from which the water is diverted and irrespective of whether it is being diverted based on a new or conditional water right or the transfer of existing decreed rights.

My preliminary assessment is that there may in fact still be a need for compensation to address third party effects of transbasin exports. In the transmountain context, much depends on the outcome of the Two Forks permitting process and the kinds of mitigation the Corps of Engineers requires. There are still a number of important unresolved issues regarding the scope of the Corps' authority and the standard to be applied in evaluating project impacts. At this point, I am encouraged by the



Water Diversion Structure for Irrigation
(Photo courtesy of U.S. Dept. of Agriculture,
Soil Conservation Service)

negotiated agreements established by the DWB which appear to address other major west slope issues. But questions remain regarding whether all necessary interests are represented and are fairly protected in such ad hoc settlements.

I am less comfortable with the situations involving transfers of substantial quantities of agricultural water to urban uses in distant locations. Although the holders of water rights are themselves compensated and other existing water rights must not be injured, no other interests are recognized in the transaction. Unlike the transmountain diversions, federal permits and county land use regulations are not likely to be involved. Thus many of the potential impacts may not be addressed. The only real leverage in this process appears to rest with senior water rights holders who, if they oppose the transfer, can add substantial transactions costs.

In principle, transfers of agricultural water can be very beneficial. However, possible negative effects on those rural areas must not be neglected. The economic base in many of these areas already is declining. A straightforward mechanism that could help address this problem without unduly impeding beneficial transfers is an export fee assessed on a per-unit basis. Such a fee could provide the basis for an economic development fund that would return money to the area for other beneficial purposes.

Summary

By way of summary, let me repeat that Colorado's water resources should not be artificially restricted in their movement. At the same time, large-scale water transfers permanently removing water from a basin have important effects which may not be fully addressed in the transaction. Transmountain diversions appear to account for many of the effects because of the compensatory storage law in the case of conservancy districts and because of federal permitting and county land use regulations in the case of municipal projects. Large scale transfers of agricultural water are not subject to these controls. Rather than imposing restrictions that could unnecessarily hinder valuable transfers of this kind, I would suggest that a fee be assessed on an acre-foot basis with the monies going to a rural development fund that would benefit the area from which the water is transferred.

[This article is based on a presentation made at the Colorado Water Issues Public Forum on February 17, 1987.]

Publications and Materials of the Natural Resources Law Center

Books

- *Tradition, Innovation, and Conflict: Perspectives on Colorado Water Law*, Lawrence J. MacDonnell, ed., 1987. \$18
- *Special Water Districts: Challenge for the Future*, James N. Corbridge, Jr., ed., 1984. \$15

Conference Materials

- *External Development Affecting the National Parks: Preserving "The Best Idea We Ever Had,"* 580-page notebook of outlines and materials from 2-day, Sept. 1986 conference. \$40.
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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, Jr., 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. \$5.

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