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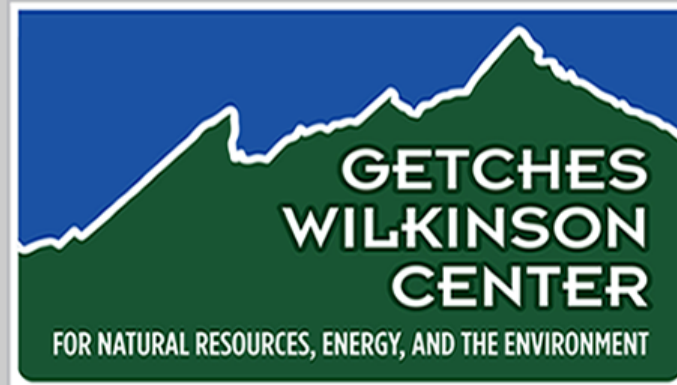
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RESOURCE LAW NOTES: THE NEWSLETTER OF THE NATURAL RESOURCES LAW CENTER, no. 12, Nov. 1987 (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).

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Resource Law Notes

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

Number 12, November 1987

Water in the West

A Symposium in honor of

Raphael J. Moses

January 16, 1988

Raphael J. Moses, an alumnus of the University of Colorado School of Law ('37), began his law practice in Alamosa in 1938. In 1962 he came to Boulder where he became a founding partner of the law firm Moses, Wittemyer, Harrison & Woodruff.

He has served in many capacities, among them as Special Assistant Attorney General for the Rio Grande Compact, 1957-58; on the Colorado Water Conservation Board, 1952-58; on the Western States Water Council, 1965-77; and as a lecturer at the University of Colorado School of Law, 1966-76. He has received numerous awards from the University of Colorado and other organizations, too many to mention them all here.



Raphael J. Moses

In tribute to Ray and to celebrate the 50th anniversary of his graduation, the School of Law and the Natural Resources Law Center are publishing a book entitled *Water in the West: Essays in Honor of Raphael J. Moses*. The essays included in the book will be presented and discussed on Saturday, January 16, 1988, at a water law symposium at the University of Colorado School of Law.

Chapter 1: To Settle a New Land: An Historical Essay on Water Law in Colorado and the American West, **Professor Charles F. Wilkinson**, University of Colorado School of Law

Chapter 2: A Global Perspective on Western Water, **Professor Emeritus Gilbert F. White**, Department of Geography, University of Colorado

Chapter 3: International Problems with Mexico Over the Salinity of the Lower Colorado River, **Joseph Friedkin**, Engineering Consultant

Chapter 4: Water as an Economic Commodity, **Professor Charles W. Howe**, Department of Economics, University of Colorado

Chapter 5: New Commons in Western Waters, **Professor A. Dan Tarlock**, Chicago/Kent College of Law, Illinois Institute of Technology

Chapter 6: The Groundwater Resource, **Clyde O. Martz**, Davis, Graham & Stubbs

Chapter 7: Accommodating Interests in a Shared Resource Between States and the Federal Government, **John U. Carlson**, Carlson, Hammond & Paddock

Chapter 8: The Emerging Recognition of a Public Interest in Water: Water Quality Control by the Public Trust Doctrine, **Professor Ralph W. Johnson**, University of Washington School of Law

Chapter 9: Pressures for Change in Western Water Policy, **Professor David H. Getches**, University of Colorado School of Law

A brochure giving more detail about both the book and the symposium will be sent out in November. If you wish additional information, please contact the Center.

Environmental Law Program Held in China

On August 16 through 18, 1987 a delegation of 10 Americans met with a 14-member Chinese delegation to compare the systems of environmental law in the two countries. The meetings were held on and near the campus of the University of Peking in Beijing, People's Republic of China. This program was the fruition of nearly three years of discussion, planning, and organization involving **Dean Betsy Levin** and the Natural Resources Law Center.

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At work in Beijing: American delegates to Sino-American Conference on Environmental Law include Professor Daniel B. Magraw, Professor George (Rock) Pring, and Professor David H. Getches (2nd - 4th from left).

The keynote speaker was **Qu Geping**, Director of the Chinese National Environmental Protection Bureau (comparable to the Administrator of the U.S. Environmental Protection Agency). He spoke of the very high priority which has been given to environmental protection by the Chinese government. The Chinese delegation was headed by **Zhu Zhong-Jai**, Deputy Secretary General of the Chinese Society of Environmental Sciences, and included representatives from the Chinese Society of Environmental Management, Economics and Law, the Chinese Academy of Social Sciences, China University of Political Science and Law, the Department of Urban and County Construction and Environmental Protection, the Academy of Chinese Sciences, the Chinese Research Academy of Environmental Sciences, the University of Peking Department of Law, and the National Environmental Protection Bureau.

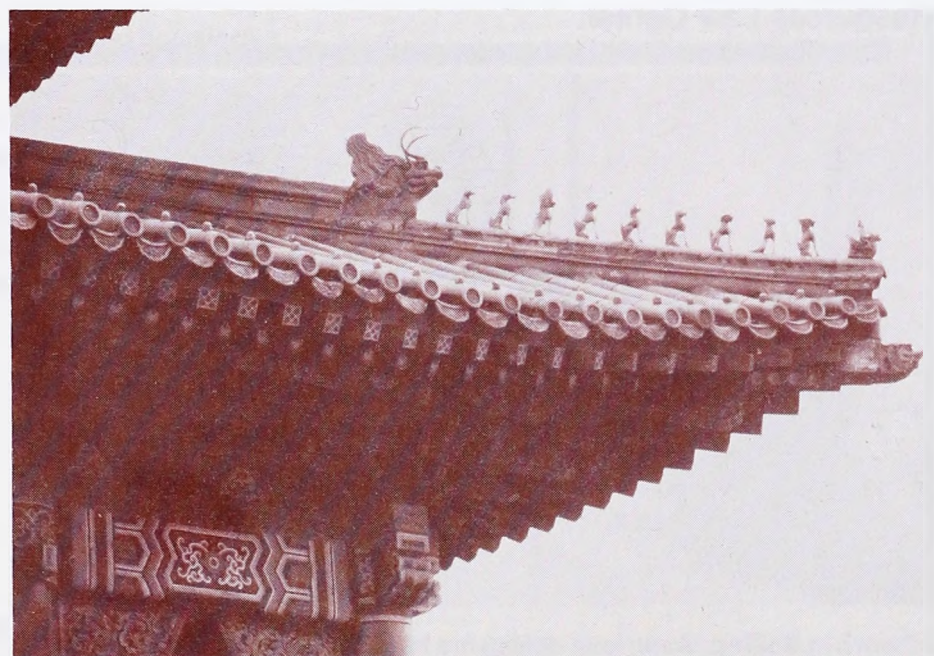
The American Delegation was headed by **Professor David H. Getches** of the University of Colorado School of Law and included **David R. Andrews**, McCutchen, Doyle, Brown & Enersen in San Francisco, **Devra Lee Davis**, National Academy of Sciences, **Professor Stuart L. Deutsch**, Chicago Kent College of Law, **Lawrence J. MacDonnell**, Natural Resources Law Center, **Professor Daniel B. Magraw**, University of Colorado School of Law, **Richard D. Morgenstern**, U.S. Environmental Protection Agency, **Professor George W. Pring**, University of Denver College of Law, **Thomas Speicher**, U.S. Environmental Protection Agency, and

Professor A. Dan Tarlock, Chicago Kent College of Law.

Papers were prepared by members of both delegations. Written translations of the American and most of the Chinese papers were available in Chinese and English at the meeting. There was also simultaneous translation of the oral summaries of the papers made by delegation members and of the subse-



Group portrait of Sino-American conference delegates.



Detail from roof structure in the forbidden City (old Imperial Palace), Beijing, People's Republic of China.

quent questions and discussion periods.

In line with the comparative orientation of the program the presentations were organized around several general topics: the general legal structure and regulatory approach; pollution control; wildlife and natural area protection; and enforcement. The development of environmental law in China did not begin in an organized way until 1979. Since then, rapid progress has been made. Environmental protection law in China parallels American law in a number of important respects, including the general regulatory approach and the requirement for environmental impact assessments. One interesting difference is the use of pollution fees by the Chinese. Another important difference is the paramount role of central planning in China and the manner in which matters like pollution control are directly incorporated into programs for economic development. Still another striking difference is the relative infancy of the Chinese legal system itself and



Porcelain panda bear statue along roadside in Beijing, People's Republic of China.

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Instream Flow Program Planned in Spring

A program focusing on the major developments in the laws and programs establishing legally protected instream flows in prior appropriation doctrine states will be held at the University of Colorado School of Law on **March 31 and April 1, 1988**. Emphasis will be placed on emerging issues, including how to define the purposes of instream flow rights and the associated water quantities, how to administer and enforce these rights, and how to integrate state programs and federal instream flow requirements. A brochure containing program details will be forthcoming from the Center in January.

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the general lack of experience in using legal processes to implement and enforce environmental requirements.

Support for this program was received from McCutchen, Doyle, Brown & Enersen, the U.S. Environmental Protection Agency, Chicago Kent College of Law, and the University of Denver College of Law (through contributions from the Colorado Bar Foundation, J. Brian Stockmar, Parcel, Mauro, Hultin & Spaanstra, and the Rocky Mountain Mineral Law Foundation). The Natural Resources Law Center will publish the papers prepared by the delegation members as a conference proceedings. Discussions are underway regarding a second conference, this one to be held in the United States, probably in 1989.

Dean Betsy Levin Leaves Law School; Wilkinson Joins Law Faculty

Dean Betsy Levin, under whose leadership the Natural Resources Law Center came into being, left the University of Colorado School of Law on September 1, 1987, to assume the position of Executive Director of the Association of American Law Schools in Washington, DC. During Dean Levin's tenure, the Center grew from a concept to an active organization, enhancing the law school's already rich offerings in natural resources law. (See article on Five-Year Report of Center activities in this issue of *Resource Law Notes*.) Professor of Law **Clifford Calhoun** is serving both as Acting Dean and as a member of the law school's Natural Resources Law Center Committee this year.

In June **Charles F. Wilkinson** joined the University of Colorado law faculty from the University of Oregon School of Law. Professor Wilkinson, who has been a frequent speaker at Center conferences, has published widely in the areas of water law, public land policy, management of national for-



Charles F. Wilkinson

ests, and Indian law. He too is serving on the NRLC Committee.

In addition to Professors Wilkinson and Calhoun, two other law faculty members have joined the NRLC Committee. **Professor Courtland Peterson**, former Dean of the School of Law, has specialized in comparative and international law. He teaches contracts, conflict of laws, and remedies, and is particularly interested in alternative dispute resolution. **Associate Professor Daniel B. Magraw** teaches international law and international development policy, with some emphasis on natural resources development. He has written extensively on the subject of transboundary harm. He spoke on "International Law and External Threats to National Parks" at the Center's conference on *External Developments Affecting the National Parks* in September 1986.

Center Produces Five-Year Report

To summarize its activities during its first years of existence the Center has produced a "Five Year Report, 1982-1987." Following is the Executive Summary from that report.

In the fall of 1981 the University of Colorado School of Law decided to establish a "Center for Natural Resources Law." Dean **Betsy Levin** convened a "Natural Resources Advisory Committee"* to consider the proposal and to suggest activities that such a Center should undertake. At that meeting, **Marvin Wolf** of Wolf Energy Company (a 1954 graduate of the Law School) announced his commitment of a challenge grant of \$250,000 to support the Center, subject to raising an additional \$500,000 from other sources.

The Center's purpose was defined to be the promotion of education and scholarship in the area of natural resources law and policy. The need for such a Center grew out of a concern for the wise development and use of our scarce natural resources and the many difficult choices that are involved. Demand for energy and minerals, for water, timber, recreation, and a high quality environment often involve competing and conflicting objectives. Through programs in the areas of education, research, and publication the Center seeks to improve understanding of these issues, to facilitate exchange of ideas, and to promote better decision making for natural resources management, use, and conservation.

Prior to the establishment of the Center, the Law School, under the direction of Professor **David H. Getches**, had been organizing and presenting "short courses" on topics of natural resources law. The first official activity of the newly created Center was a continuation of that short course series in June 1982. During the past five years the Center has sponsored 20 conferences and workshops on a broad range of topics. These programs have ranged from major national conferences to small focused workshops. Nearly 1,800 participants have at-

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*This committee was chaired by **Clyde Martz** and included **John Carlson, Stanley Dempsey, Hubert Farbes, Guy Martin, Ruth Maurer, Charles Meyers, Raphael Moses, Laurence Moss, Robert Pasque, David Phillips, Charles Robb, Robert Sievers, Ernest Smith, Leo Smith, Dan Tarlock, Marvin Wolf, and Ruth Wright**. This group became the Center's first Advisory Board.

tended these programs. These participants have represented 32 states and the District of Columbia. Approximately 25 percent of the participants were practicing attorneys, 23 percent were affiliated with state or local government, 17 percent were from private business, 15 percent were with the federal government, 10 percent were from academia, 5 percent represented public interest groups, and 5 percent fell into other classifications.

The Center supports two visitors programs. The *Distinguished Visitors Program* brings prominent scholars, practitioners, and government officials involved in natural resources to the Law School for several days. Distinguished Visitors have included Senior U.S. Circuit Court Judge **Jean S. Breitenstein**, now deceased (April 1983); **Charles J. Meyers**, former Dean of the Stanford Law School and now partner in the Denver office of Gibson, Dunn & Crutcher (April 1984); **Clyde O. Martz**, formerly Solicitor of the U.S. Department of the Interior, now a partner in the Denver firm of Davis, Graham & Stubbs (April 1985); **Cecil D. Andrus**, former Secretary of the Interior and now elected again as Governor of Idaho (September 1985); and **Carol E. Dinkins**, former Assistant Attorney General for Land and Natural Resources in the U.S. Department of Justice, then Deputy Attorney General, now returned to private practice with Vinson & Elkins in Houston (September 1986).

The *Fellows Program* offers an opportunity for persons from business, government, legal practice, or universities to spend a semester in residence at the Law School doing natural resource-related research and writing. The Center has hosted nine fellows from different disciplines and from several different countries under the auspices of this program. A number of publications and presentations have resulted from the research of these fellows.

The Center has increased its emphasis on research and publications. Research projects generally are supported by a specific grant. The Center has undertaken nine research projects, resulting in one book, two book chapters, a special issue of the *University of Colorado Law Review*, two other published papers, several research reports, and several conference presentations. Several of these projects have been highly interdisciplinary in nature, involving related fields such as economics and engineering. The Center also supports natural resource-related research by Law School faculty. Law students work as research assistants on these projects.

The Center produces a variety of publications to help disseminate the results of its activities. Substantial notebooks containing detailed outlines prepared by the speakers are produced in association with each major Center conference. The Center has published two books—*Special Water Districts: Challenge for the Future* and *Tradition, Innovation, and Conflict: Perspectives on Colorado Water Law*. The Occasional Papers and Research Reports series, established to make available other materials produced by the Center, now contains 10 items. In addition, the Center has published 11 issues of its newsletter, *Resource Law Notes*.

The Center relies for its funding entirely on gifts, grants, and revenues from its activities. The successful fund raising campaign to match the challenge grant made by **Marvin Wolf**

provided a sound financial base for the Center. Half of the funds received by the Center have come from gifts. One-third have come from conference revenues. Another 10 percent of Center funds have come from project-related grants, with the remainder from sale of materials and interest.

In 1986 Center expenditures totalled about \$230,000. Of this amount approximately 45 percent related to conducting conferences and other educational programs of the Center. Thirty percent related to the research and publication activities of the Center. Ten percent of the expenditures supported the Center's visitor programs, and fifteen percent related to Center administration.

In five short years the Center has actively pursued its goal of promoting natural resource-related education and scholarship. Its programs have reached a wide, national audience, providing valuable information and training in the area of natural resources law. These programs also have served to provide provocative forums for discussion on important natural resource issues. Increasingly, the Center's research and publications help to inform the practice of natural resources law, the conduct of natural resource-related business, and the development of policy. The existence of the Center at the University of Colorado School of Law has stimulated and enhanced the learning environment of the School and helped to attract outstanding new students. In the future the Center plans to continue its programs and activities and, subject to funding support, increase its emphasis on public policy. Copies of the complete Five Year Report, 1982-1987, may be obtained by contacting the Center.

June Conferences Address "Water as a Public Resource" and "Public Lands Planning"

The Center's Eighth Annual Summer Program held in June 1987 offered a look at two timely natural resources law topics. *Water as a Public Resource: Emerging Rights and Obligations* considered the extension of the public trust doctrine to areas previously not covered by this concept, as well as developments in other public uses of water. Subheadings included "Recreational Uses of Water," "Public Rights in Water Allocation and Use," and "The Public's Interest in Water Quality." Among the 27 knowledgeable speakers, three helped frame the debate the first morning. **Charles J. Meyers**, of Gibson, Dunn & Crutcher, Denver, spoke "In Defense of Private Rights in Water," while **Ralph W. Johnson**, Professor of Law, University of Washington, and **Joseph L. Sax**, Professor of Law, University of California-Berkeley, presented



James N. Corbridge, Jr., Chancellor of the University of Colorado, Boulder, introduces speakers at June conference, *Water as a Public Resource*.

presented

the case for increasing public values in water. Colorado Governor **Roy Romer** was wrap-up speaker for the 3-day conference, attended by 133 people from 19 states and the District of Columbia.

Public Lands During the Remainder of the 20th Century: Planning Law and Policy in the Federal Land Agencies looked at management and planning issues related to seven major resources in the public lands: timber, rangeland, minerals, wildlife, water, recreation, and preservation values. **Charles F. Wilkinson**, Professor of Law, University of Colorado, gave a



Larry MacDonnell (center) moderates panel on "Reconciling Large-Scale Water Development and Water Quality Effects." From left: Tad Foster, Max Dodson, MacDonnell, Barbara Green, and James Sanderson

luncheon talk on "Public Land Planning: Will the Current System Endure?" Ninety-three registrants from 15 states and DC heard a wide variety of viewpoints from 26 speakers, including **Guy R. Martin**, Perkins Coie, Washington, DC, on "The Arctic National Wildlife Refuge: A Case Study in Reconciling Nationally Significant Wildlife Protection, Wilderness and Mineral Potential" and **Harris D. Sherman**, Arnold & Porter, Denver, on "Ski Development in National Forests." An especially innovative development in public land management was presented by **Wayne Elmore**, from the Bureau of Land Management in Oregon, speaking on "Riparian Management: Back to Basics."



Colorado Governor Roy Romer addresses "Balancing the Competing Demands for Colorado's Water Resources."

Notebooks of the speakers' outlines and materials and also audiotapes of the conference proceedings may be purchased from the Center.

Transmountain Water Diversions in Colorado

By James S. Lochhead

Jim Lochhead is a shareholder in the firm of Leavenworth & Lochhead, P.C., in Glenwood Springs, which emphasizes water rights, municipal, and real estate law. He received his B.A. and J.D. degrees from the University of Colorado. He is a member and past chairman of the Colorado Water Conservation Board and is the Colorado Commissioner to the Upper Colorado River Commission. This paper is based on a presentation given at the center conference on "Finding Water for the Front Range," April 1987.



Jim Lochhead

This article will discuss the history of the struggle between the Eastern and Western Slopes of Colorado to control and utilize waters originating near the Continental Divide. The struggle has two basic elements at its roots. The first is physiographic: the Eastern Slope is relatively arid, whereas the Western Slope provides a snowpack which sustains the entire Colorado River. The second element is socioeconomic: the Eastern Slope holds the bulk of the state's population and eco-

nomie activity. It was only natural, then, that as the Eastern Slope grew and outstripped its local water supply, it would look to the Western Slope for new sources of water.

The continuing battle over transmountain waters has taken many forms. The battle has been waged in the courts, the Colorado legislature, the Congress, and before various federal agencies. It has involved many different parties, governmental entities, private interests, citizens groups, state and federal agencies, and elected representatives.

Early Affirmations of the Right to Divert Transbasin

The legal right to appropriate and transport water from one watershed to another has been attacked since statehood, and Colorado courts have consistently affirmed the right to make such a diversion. In the 1882 case of *Coffin v. Left Hand Ditch*

It was only natural, then, that as the Eastern Slope grew and outstripped its local water supply, it would look to the Western Slope for new sources of water.

Co., the Supreme Court of Colorado was faced with the first test of Colorado's appropriation doctrine. The case involved the diversion of waters by ditches from St. Vrain Creek for irrigation use in another basin. In an attempt to limit the scope of the appropriation doctrine, the objectors in the St. Vrain Creek drainage argued that those within the natural drainage basin had a better right to the use of the waters originating there than one who came before them and transported the water out of the

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natural drainage area. The Supreme Court denied this assertion as not in keeping with the doctrine of prior appropriation nor with the policy underlying the adoption of this doctrine. In soundly defeating any concept of riparianism, and in what is viewed as one of the cornerstones of Colorado's "pure" appropriation doctrine, the Court established that priority of right is not dependent upon the *locus* of its use. The Court took a practical view in recognizing Colorado's arid nature and the "imperative

The Court took a practical view in recognizing Colorado's arid nature and the "imperative necessity" of allowing diversion of water for beneficial use elsewhere.

necessity" of allowing diversion of water for beneficial use elsewhere. To award priority to those within the natural drainage basin would stifle Colorado's agricultural economy by limiting the ability of farmers to utilize water on the most productive lands. *Coffin*, therefore, represents the Court's initial statement on Colorado's free market, entrepreneurial system of water rights adjudication.

However, the affirmation of the right to divert water from one basin to another did not stem debate over the issue. The eastern portion of the state developed first, and very early in our history the available water supplies natural to that area became over-appropriated. Therefore, water still in abundance on the Western Slope became the focal topic of contention. Concerns on the Western Slope were for the most part economic, originating in a fear that the Eastern Slope would become so populous that it would effectively seize control of Colorado's economy. Just as Upper Basin states sought to preserve the water of the Colorado River for future use in the face of rapid development in the Lower Basin, so the Western Slope sought to preserve its interest in water originating there.

Although *Coffin* held that a water user in the basin of origin did not have a better priority *per se* than a transbasin diverter, Western Slope interests argued that the right to transbasin divert should be conditioned. In *City and County of Denver v. Sheriff*, the City of Denver sought to appropriate water on the Western Slope for use on the Eastern Slope by means of an elaborate collection and tunnel system. While not directly attacking Denver's right to appropriate, West Slope interests sought to have the Court place restrictive conditions on the use of the water so diverted. The trial court, located on the Western

The Western Slope was in a particularly strong bargaining position at this time...

Slope, agreed with this argument and placed the condition in its decree granting Denver's water rights that all of Denver's water so decreed were "supplemental" to its prior existing decrees. Denver was required to fully and economically utilize such prior existing decrees before it could use any of the newly adjudicated rights.

The purposes of this condition were obvious: To prevent Denver from selling or leasing its present supply and using only transmountain waters to satisfy its own needs, and to forestall the transmountain diversion project granted by the decrees. The condition also reflected a position which has since been espoused by the Western Slope, that Denver must make full use of Eastern Slope water before looking to the Western Slope for further supplies.

In striking down these restrictions on use of transmountain waters, the Colorado Supreme Court's reasoning took two distinct positions. First, the Court said that the restriction interfered with property already owned by the City. The Court characterized the condition as an "arbitrary invasion" on the City's vested property rights. Second, the Court recognized the special nature of the need for water associated with a growing municipality: The need in the present to begin to secure an adequate supply for the future. Likewise, the Court affirmed the right to appropriate water for interbasin transfer. In what has since been referred to as the "great and growing cities doctrine," the Court recognized the great expense and planning required to supply a growing municipality and characterized the adjudication of water for reasonably anticipated future needs as the "highest prudence."

Compensatory Storage

With the expansion of irrigated agriculture on the Eastern Slope, the West Slope was viewed as a source of additional irrigation supply. Moreover, agriculture could look to the federal government for financial assistance with the huge cost of

The principle of compensation for the basin of origin was further ingrained in 1943...

project construction. First, however, the agricultural interests had to have a mechanism to organize and thereby deal with the federal government. In response, the Colorado legislature provided for the creation of water conservancy districts. The first of these districts was the Northern Colorado Water Conservancy District, created to develop the Colorado-Big Thompson Project then under consideration.

The Western Slope was in a particularly strong bargaining position at this time since its representative in Congress, Congressman Edward T. Taylor, was Chairman of the Appropriations Committee of the House. By virtue of his position, he was able to block attempts to obtain public financing for projects which would divert water from his district to the Eastern Slope unless concessions were made to protect his district. Additionally, an organization, the Western Slope Protective Association, was developed to preserve and protect the waters of Western Colorado affected by proposed transbasin diversions. This group, the predecessor to the Colorado River Water Conservation District, was able to negotiate with the Northern District to achieve lasting compensation to the Western Slope for the removal of waters to the Eastern Slope. These concessions led to the doctrine now known as "compensatory storage."

The principle of the recognition of rights in the "basin of

origin" grew out of the holding in *Wyoming v. Colorado*. In that case, the United States Supreme court dismissed purely philosophical objections to interbasin transfers and held that as between two states under the appropriation doctrine, the rule of equitable apportionment of waters applied. "Equity" for the basin of origin was also implicitly recognized in the negotiation of the Colorado River Compact of 1922, which required the upper basin states to deliver certain quantities of water at Lee's Ferry, but which also reserved to the Upper Basin water for future development.

With these two developments in mind, Western Slope interests wanted some type of limitation placed on the Colorado-Big Thompson Project in order to protect their existing and

...Yet, the Water Board is not obliged under Colorado law to provide compensatory storage.

future needs. Thus, it was agreed in Senate Document No. 80 that Green Mountain Reservoir would be built to a storage capacity of approximately 154,000 acre-feet to be held for use by the Western Slope in return for the right to divert an expected 320,000 acre-feet to the East Slope. This storage capacity had two purposes:

1. To protect Western Slope water rights by releasing water to replace out-of-priority diversions by the Colorado-Big Thompson Project;

2. To provide for future domestic and irrigation uses on the Western Slope.

The principle of compensation for the basin of origin was further ingrained in 1943, when the Colorado legislature amended the original Water Conservancy District Act to include a requirement that any facility of a water conservancy district designed to export water from the Colorado River basin be designed, constructed, and operated so that present and prospective uses of water within the Colorado River basin would not be "impaired nor increased in cost at the expense of the water users within the natural basin." Although the statute does not refer to storage, the history of Green Mountain Reservoir has led water interests to refer to this enactment as the "compensatory storage statute."

This statute was applied in the legislation authorizing the construction of the Fryingpan-Arkansas Project. Colorado established operating principles for the Project and included this provision almost verbatim. The operating principles were subsequently incorporated into the federal law authorizing con-

...downstream appropriators have no vested right to a continuation of importation of foreign water introduced by another.

struction and operation of the Project. Thus, the Project itself included a requirement that the construction of Ruedi Reservoir be completed and operational for replacement and compensatory purposes, in the same manner as Green Mountain Reservoir, before any water was diverted to the Eastern Slope. The

project allows for this compensatory storage in addition to the rights and benefits granted to Western Slope water users to the water stored in Green Mountain Reservoir.

The issue of the meaning of the water conservancy district act limitation arose with a subdistrict of the Northern Colorado Water Conservancy District, when the Subdistrict failed to include compensatory measures in its plans for the Windy Gap Project. The issues involved the detail with which the plan for compensation must be stated in a water rights application by a conservancy district. In remanding the decision to the trial court, the Colorado Supreme Court, in *Colorado River Water Conservation District v. Municipal Subdistrict*, held that the Subdistrict's plan was not detailed enough. In settling the case, the Subdistrict subsequently agreed to a number of concrete measures for the benefit of the Western Slope.

This statutory requirement is limited, however, in that it applies only to water conservancy districts. There are other entities on the East Slope which can finance transmountain diversion projects. For example, the Denver Water Board, which provides for much of the entire Denver metropolitan area, exerts the most persuasive impact of any single agency, city, or district. Yet, the Water Board is not obliged under Colorado law to provide compensatory storage.

Rights to Transbasin Return Flow

As various interests appropriated new West Slope water, downstream Eastern Slope users grew to depend on the increased flow which such diversions produce. Thus, contro-

...a policy that Eastern Slope importers should make maximum use of water diverted from the Western Slope.

versies arose in change in point of diversion and change in use adjudications on the Eastern Slope. One such controversy was involved in *Brighton Ditch Company v. City of Englewood*. Englewood had purchased Eastern Slope irrigation rights and sought to change their use to municipal purposes. Prior to this point, Englewood had been supplied with Western Slope water by Denver. After the proposed change, Englewood would be supplied with Eastern Slope water. Some protestants claimed that the result would be a diminution in the flow to which they had come to depend. The Court rejected this contention, holding that downstream appropriators have no vested right to a continuation of importation of foreign water introduced by another.

With impending droughts, overappropriation of water supplies and continued opposition to transmountain diversions, a number of proposals have been made to stretch the use of water on the Eastern Slope. Such plans cut down on the amount of Western Slope water needed, but they also reduce the return flow supply to downstream Eastern Slope users. In *City and County of Denver Board of Water Commissioners v. Fulton Ditch Irrigation Company*, Denver sought a declaratory judgment allowing it to make successive uses of diverted transmountain water still under Denver's control. Viewing imported water as developed, the Court held that, in the absence of agreements to the contrary, and without express statutory

authorization, Denver could reuse, make successive use of, and after use make disposition of imported water. This legal principal was based in part upon a policy that Eastern Slope importers should make maximum use of water diverted from the Western Slope. This concept has been incorporated into statutory law in C.R.S. Section 37-82-106(1).

The Latest Challenge

The most recent challenge to the right of an Eastern Slope diverter to appropriate water for transbasin diversion came in the case of *City and County of Denver v. Colorado River Water Conservation District*. In that case, the Colorado River Water Conservation District challenged Denver's authority to appropriate water not reasonably needed by it, for use exclusively outside the territorial limits of the City and County. The River District argued that Denver was prohibited by the home-rule provisions of the Colorado Constitution, Colorado statute, and the Denver City Charter from appropriating water for use solely outside its boundaries. The Court ruled that Denver did have such power. The Court found that the provision of water service to the metropolitan area was a matter of mixed state and local concern. Although the state has enacted numerous statutes regulating the use, development, and provision of water service, it has not specifically restricted (and has, in fact, authorized) extraterritorial municipal supply. Moreover, the Court relied on evidence which established that Denver and the metropolitan area are socially and economically intertwined. Thus, provision of metropolitan-wide water service was held to also be a matter of local concern to Denver. Therefore, the Court implicitly harkened back to its "great and growing cities doctrine" originally articulated in the 1939 case of *City and County of Denver v. Sheriff*.

However, another argument raised by the Western Slope interests places some limitations on the application of that broad doctrine. Importantly, Denver's situation had changed since the *Sheriff* case was decided. The Poundstone Amendment had eliminated Denver's ability to annex. Denver could not argue that its appropriations were based upon anticipated expansion of its boundaries. Its appropriations were to be for permanent water service outside its boundaries. Therefore, the

The River District argued that Denver was prohibited by the home-rule provisions of the Colorado Constitution, Colorado statute, and the Denver City Charter from appropriating water for use solely outside its boundaries.

River District argued that Denver was subject to the rule established in *Colorado River Water Conservation District v. Vidler Tunnel and Water Company*. In that case, the Colorado Supreme Court held that in the absence of firm contractual commitments for the use of water not intended for use by Vidler on its own land, and in the absence of any agency relationship between Vidler and the intended users, Vidler had not formed the necessary intent to appropriate water to apply to beneficial use. The River District argued that in the selling of water outside

its boundaries, Denver was acting in its proprietary capacity and, therefore, was subject to the ruling in the *Vidler* case that water could not be appropriated for "speculative" purposes. The Court found inadequate evidence of Denver's intent to appropriate water, under the *Vidler* test, since it had not been established that the proposed appropriations were necessary to satisfy existing contracts. Instead, the Court found evidence that Denver was appropriating water under an assumption that it would be providing water to metropolitan growth that would occur in the future. The Court remanded the case for a determination as to whether Denver had plans to use the water within its own boundaries, firm contractual commitments to supply that water to users outside its boundaries, or agency relationships with such users.

The parties did not have an opportunity to litigate the specifics of Denver's intent to appropriate water under the *Vidler* rule on remand, however, since the case was settled in the comprehensive agreement between Denver and the Colorado River Water Conservation District, discussed later in this article.

Land Use Issues

Local Western Slope governmental entities have more recently attempted to regulate the asserted negative impacts of transbasin diversions through the imposition of comprehensive plans, zoning regulations, subdivision regulations, building codes, and regulations issued pursuant to House Bill 1041 (C.R.S. Section 24-65.1-101 *et seq.*). Attempted regulation by Grand County brought legal challenge by the City and County of Denver over the issue of Grand County's authority to regulate Denver's Williams Fork Diversion Project. Among other argu-

The Court held that Denver had no interest in or preferential right to water in Green Mountain Reservoir.

ments, Denver asserted that its activities in developing the project could not be regulated because of Denver's plenary authority as a home-rule city pursuant to Article XX of the Colorado Constitution, and because such regulation would deprive Denver of its constitutional right to appropriate and develop water rights. In the case of *City and County of Denver v. Bergland*, the Federal District Court ruled that Grand County's land use regulations as applied to Denver's transbasin water project were facially valid. Although Denver is a home-rule municipality, its activities are subject to regulation by other authorities when undertaken in another county. Furthermore, although the right to appropriate water is constitutional, the Court found that the manner and method of appropriation can be reasonably regulated. Therefore, Grand County could constitutionally regulate the impacts of construction and operation of Denver's transbasin diversion project. The Court specifically reserved judgment on whether Grand County *applied* its regulations in a manner consistent with state and federal law and, thus, whether such application was subject to preemption. On their face, however, the Court found the regulations were not in conflict with state law.

Eastern and Western Slope interests currently have the

opportunity to test the limits of the application of local land use regulation on transbasin diversions. The Cities of Colorado Springs and Aurora have made application to Eagle County under the County's House Bill 1041 Regulations for review of their proposed Homestake II Project, and are undergoing the County review process.

Controversies Over Operations

Even for those transmountain diversions which are in place, controversy exists as to the proper operation of these projects. Of particular importance is Denver's right to fill Dillon Reservoir, located on the Blue River upstream from Green Mountain Reservoir. The so-called "Blue River Decree" established the relative priorities of Green Mountain and Dillon Reservoirs. The Blue River Decree is actually a series of litigations commencing in 1952 with the issuance of decrees by the District Court in Summit County, and continuing with Federal District Court litigation through the present time. Through this series of litigations, Denver has asserted both a priority to the use of Blue River water and an interest in Green Mountain Reservoir. Both of these claims have been repeatedly denied by the Federal District Court. One of the later affirmations of the Western Slope's rights in Green Mountain Reservoir came in the Novem-

Governor Richard Lamm created the Denver Metropolitan Area Water Roundtable.

ber 2, 1977 decision by Judge Alfred Arraj, in an action brought by the Colorado River Water Conservation District and the United States to compel Denver to release water in Dillon so as to allow Green Mountain Reservoir to fill. The Court held that Denver had no interest in or preferential right to water in Green Mountain Reservoir. Therefore, Denver is not entitled to divert any of the water from the Blue River before Green Mountain Reservoir has filled or is assured of filling to capacity each year. The Court also denied Denver's claim that it could store water in Dillon Reservoir out of priority and compensate the United States only for lost power production in Green Mountain Reservoir. Denver may have the right to effectuate exchanges, but such exchanges must clearly protect not only power production but Western Slope rights to the "compensatory" pool in Green Mountain Reservoir. Exchanges by Denver can be allowed only when the fill of Green Mountain Reservoir is assured, when the water to be exchanged is on hand, and when power replacement is provided.

Denver has through the years operated such an exchange utilizing its Williams Fork Reservoir. Although, as a technical matter, three separate exchanges operate (the "Williams Fork to Dillon exchange," the "Williams Fork to Green Mountain to Dillon exchange," and the "Williams Fork to Straight Creek exchange"), the exchanges basically provide for the release of water from Williams Fork Reservoir as substitute storage for water that would otherwise have been stored in Green Mountain Reservoir but for the out-of-priority storage in Dillon Reservoir. The effect of the exchange is to protect water users in Western Colorado downstream from the confluence of the Blue River and the Colorado River from adverse effects caused by the out-

of-priority storage at Dillon Reservoir. A number of concerns continue to remain, however, with regard to the operation of the exchange and its potential damage to interests in Summit County in particular. Another effect of the exchanges is to increase the efficiency of Denver's Roberts Tunnel Collection System. This increases Denver's firm annual yield from the Blue River in Summit County by about 10,000 acre-feet. Summit County, therefore, remains concerned about the impacts of the exchanges. The issues surrounding these exchanges were raised again by Summit County with the negotiation by Denver and the Colorado River Water Conservation District of an agreement settling various litigated claims, discussed later in this article.

As the process evolved, it became apparent that there were conflicts not only between the East and West Slopes but within the East and West Slopes as well.

The Metropolitan Area Water Roundtable

In 1980, in an effort to end continued dispute and litigation over providing an adequate supply of water to the Denver metropolitan area through a "negotiated" solution, Governor Richard Lamm created the Denver Metropolitan Area Water Roundtable. The group was composed of some 30 representatives of various water interests on both the East and West Slopes. As originally designed, the effort was intended to reach a consensus on the legitimate needs of the Denver metropolitan area for water, and the most acceptable projects, methods, and mitigations to meet those needs. As the process evolved, it became apparent that there were conflicts not only between the East and West Slopes but within the East and West Slopes as well. The process lasted almost six years and was sometimes bitter. However, by discussing their concerns, the various interests found that there were some common grounds upon which agreement could be reached. As a direct result of the Roundtable process, three developments occurred which will have a continuing impact on the ability of the Eastern Slope to divert water from Western Colorado:

1. Denver filed applications with the U.S. Army Corps of Engineers for site specific and system-wide permits for the construction of various projects, resulting in a massive environmental impact statement process.

2. Denver entered into an agreement with Summit County to address Summit County's specific concerns.

3. Denver entered into an agreement with the Colorado River Water Conservation District to settle ongoing litigation, provide a short-term supply of water to Denver, and establish a basis for future cooperation.

The latter two agreements are discussed below.

Denver/Summit County Agreement

On September 18, 1985, Denver and Summit County entered into an agreement designed to resolve concerns that had been expressed by Summit County through the Roundtable process. Specifically, those concerns involve future water use

within Summit County above Dillon Reservoir (that is, junior to Dillon), recreational reservoir levels in Dillon Reservoir, and water quality problems in Dillon. In exchange for Summit County's support for a reservoir by Denver on the South Platte River and the County's agreement to issue land use permits for the Straight Creek Project, Denver agreed to address these concerns.

With regard to providing for future water use within Summit County, Denver agreed to subordinate storage in Dillon Reservoir and the operation of the Williams Fork exchanges to 3,100 acre-feet of depletions by Summit County at any point above Green Mountain Reservoir. In exchange, Summit County agreed to a complex set of provisions providing Denver with adequate replacement water for the amount of the subordination. Denver also agreed to provide to the Town of Silverthorne and Summit County storage space in Dillon Reservoir, under certain conditions.

As to recreational water levels in Dillon Reservoir, Denver agreed to provide minimum "target elevations" during specified periods of the summer recreation season.

Finally, as to water quality, Denver agreed to allow major municipal wastewater treatment plants located in Summit County to discharge tertiary treated effluent directly through the Roberts Tunnel to the North Fork of the South Platte River when Denver is transporting a minimum of 50 c.f.s. of water through the Roberts Tunnel, under certain conditions. Denver also agreed to contribute to the cost of constructing nonpoint source phosphorous control projects and also agreed to work with the County to design a water quality monitoring program.

Denver/Colorado River Water Conservation District Agreement

Also as a result of the discussions undertaken through the Roundtable process, Denver, the River District, the Northern Colorado Water Conservancy District, and the Municipal Sub-district of the Northern District entered into an agreement on December 15, 1986 designed to resolve a number of long-standing disputes. The agreement was also spurred by the impending litigation of the remand from the Colorado Supreme Court in *City and County of Denver v. Colorado River Water Conservation District*, and Denver's challenge to "due diligence" filings by the River District for a number of its projects located on the Western Slope.

The agreement was further triggered by the perceived "tap gap" problem in Denver—a short-term water supply shortage—and the River District's desire to construct a reservoir on Rock Creek in Grand County.

The first element of the agreement was a provision for the lease of up to 15,000 acre-feet of water per year by the River District to Denver from the proposed Rock Creek Reservoir. Denver will utilize water released from Rock Creek Reservoir as an exchange to allow out-of-priority storage in Dillon Reservoir, and diversion through the Roberts Tunnel, in a manner similar to the Williams Fork exchanges. Under the lease terms outlined in the agreement, the lease could generate a revenue stream to the River District of up to \$3.75 million per year.

The second major element of the agreement was the settlement of the pending litigation referenced above. Denver limited its claims for the Eagle-Colorado Project and limited

calls on the Windy Gap Project owned by the Municipal Sub-district of the Northern District, subordinated calls for nonindustrial uses upstream of the project, and subordinated to downstream municipal and irrigation rights "perfected" at the time of construction of the project. In exchange, the River District allowed the entry of a decree in the remand case awarding to Denver its claims to the Straight Creek and Piney River units of the Roberts Tunnel Collection System, and the Eagle-Colorado Project as modified by the agreement.

The third element of the agreement concerned the "Green Mountain Pumpback Project." The Green Mountain Pumpback was originally proposed by interests in Eagle County, to allow Denver to utilize Green Mountain Reservoir by physically pumping water back to Dillon through a pipeline, replacing the equivalent function of Green Mountain Reservoir for the benefit of the Western Slope by construction of another reservoir. The parties agreed to enter into discussions to allow for the operation of the Green Mountain Pumpback, and established various parameters and limitations for such operation.

Finally, Denver agreed that as part of the project to deliver Green Mountain water to the metropolitan Denver area, Denver will commit to utilize with reasonable efficiency the water available to Denver from its decrees on the South Platte River, utilize return flows in accordance with the Blue River decrees, and conserve existing supplies through a comprehensive water conservation program.

The only certainty is that these issues will produce continuing controversy.

As with prior exchanges and operations of Dillon Reservoir, Summit County has expressed concern over the impact of the Rock Creek Lease and the Green Mountain Pumpback. Specifically, the effect of the agreement, if implemented, is to tunnel Denver's foreseeable transmountain water diversions through the Roberts Tunnel. This concentrates adverse impacts on Summit County. In defense, the River District argues Summit County is protected by its prior agreement with Denver and promises that money generated from the Rock Creek Lease can be used to offset such adverse impacts. The only certainty is that these issues will produce continuing controversy.

Denver/Public Service Company Agreement

The Colorado River Water Conservation District, and local land use regulating authorities, are not the only entities affecting the availability and operation of transmountain diversion projects. One of the major "calls" on the Colorado River is located at the Shoshone Power Plant. This hydroelectric facility is located on the Colorado River approximately 10 miles east of Glenwood Springs. The plant is a "run of the river" facility and operates under two water rights priorities. The first is a 1902 water right, the oldest industrial water right on the Colorado River, for 1250 c.f.s. The second is a 1929 water right for 158 c.f.s. The only water rights on the Colorado River senior to the Shoshone plant are for agricultural uses in the Grand Valley near Grand Junction (the so-called "Cameo" call).

On April 14, 1986 Denver and the Public Service Company

of Colorado entered into a letter agreement providing, among other things, that Public Service will "subordinate" its senior right to Denver when Denver determines that its available water supplies are "critically impacted" and if no vested downstream or upstream water decrees in Colorado will be injured.

The meaning and effect of the agreement is unclear. The Colorado State Engineer has taken the position that the agreement operates as a selective subordination and that he will not honor the agreement unless appropriately decreed in water court.

Complete elimination of the Shoshone call for all water users during the non-irrigation season results in a "free river", allowing use by any upstream water user. Selective subordination of the Shoshone water right to Denver alone would result in Denver's continued otherwise out-of-priority use while other water users are curtailed during the non-irrigation season. This would create the impact of causing more water users to be out of priority than would otherwise occur. Preliminary indications of the yield to Denver's system is a result of this subordination (if implemented) are from 15,000 to 40,000 acre-feet per year.

The principal impact of any elimination of the Shoshone call will be increased non-irrigation season depletions by upstream transbasin diversions in the Colorado, Fraser, Blue, and Eagle Rivers. Additionally, diversions for West Slope municipal and snowmaking uses upstream from Shoshone may increase, subject to other more local water rights calls (including instream flow rights) and the effect of increased transbasin diversions. These are impacts about which the Western Slope has been concerned since the first transmountain diversion project was originated.

Conclusion

Issues inherent in the original transbasin diversions of water continue to be fought both by the proponents and objectors to transbasin diversion projects. The concerns of the Western Slope will continue to be discussed and fought over in political and legal arenas, and were summarized in a letter dated August 16, 1984 from the President of the Colorado Water Conservation District to Governor Richard Lamm. The letter stated:

As you are well aware, transmountain diversions of water which result in the total removal of water from a river basin have extraordinary impacts compared to the typical in-basin water use. These impacts and resulting damage include but are not limited to the following:

1. The lack of water to meet existing and future demands in certain areas of western Colorado.
2. The likelihood of transferring to the Western Slope the entire burden of supplying water to meet the Colorado River Compacts requirements.
3. Additional costs and burdens caused by the removal of high-quality water from headwaters streams thereby increasing downstream salinity.
4. The construction or reconstruction of new headgates and diversion facilities in order to obtain the amount of water appropriators are entitled to under existing decrees.
5. The denial of municipal expansion of water and sanitation systems, especially in the counties from which the water is

diverted.

6. Increased capital and operating costs for water and sanitation plants, particularly in the Fraser and Blue River valleys.

7. The reduction or elimination of land tax based by the purchase of private property by tax-exempt entities.

8. The loss of agricultural lands and agricultural production due to reduced water supplies.

9. Detrimental socioeconomic and environmental impacts on local municipalities, counties, and the entire Western Slope.

10. The consequences of measures used to mitigate impacts on species listed as threatened or endangered.

11. Degradation of the West Slope recreation industry which depends on the esthetics and utility of full-flowing streams.

The above list is certainly not meant to be all inclusive.

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., 1983. \$15

Conference Materials - Notebooks and Audiotapes

- *Water as a Public Resource: Emerging Rights and Obligations*, 555 page **notebook** of outlines and materials from 3-day conference, June 1987, \$60; **cassette tapes** of speakers' presentations, full 3 days, \$150.
- *The Public Lands During the Remainder of the 20th Century: Planning, Law and Policy in the Federal Land Agencies*, 535-page **notebook** of outlines and materials from 3-day conference, June 1987, \$60; **cassette tapes** of speakers' presentations, full 3 days, \$150.
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- *Western Water: Expanding Uses/Finite Supplies*, 406-page **notebook** of outlines and materials from 3-day conference, June 1986, \$60; **cassette tapes** of speakers' presentations, full 3 days, \$150.
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- *Public Lands Mineral Leasing: Issues and Directions*, 472-page **notebook** of outlines and materials from 2-day conference, June 1985, \$40; **cassette tapes** of speakers' presentations, full 2 days, \$100; half-day segments, \$35 each.

Occasional Papers

- "A Brief Introduction to Environmental Law in China," Cheng Zheng-Kang, Professor of Law, University of Peking, Beijing, China, NRLC Occasional Papers Series, 1986. 36 pages. \$3.
- "Regulation of Wastes from the Metal Mining Industry: The Shape of Things to Come," Lawrence J. MacDonnell, NRLC Occasional Papers Series, 1986. 32 pages. \$3.
- "Emerging Forces in Western Water Law," Steven J. Shupe, Water Resource Consultant, NRLC Occasional Papers Series, 1986. 21 pgs. \$3.

- "The Rights of Communities: A Blank Space in American Law," Joseph L. Sax, Professor of Law, University of California, Berkeley, NRLC Occasional Papers Series, 1984. 16 pgs. \$3.
- "Nuisance and the Right of Solar Access," Adrian Bradbrook, Reader in Law, University of Melbourne, Australia, NRLC Occasional Papers Series, 1983. 54 pgs. \$5.
- "Tortious Liability for the Operation of Wind Generators," Adrian Bradbrook, Reader in Law, University of Melbourne, Australia, NRLC Occasional Papers Series, 1983. 74 pgs. \$5.
- "The Access of Wind to Wind Generators," Adrian Bradbrook, Reader in Law, University of Melbourne, Australia, NRLC Occasional Papers Series, 1983. 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), 1985. \$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, 1985. 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, 1983. 40 pgs. \$5.

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

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