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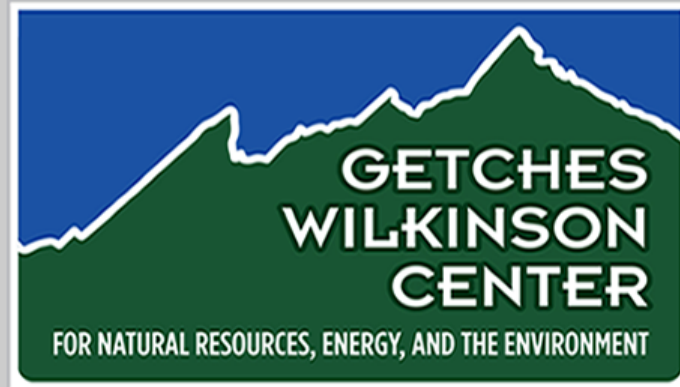
Getches-Wilkinson Center Newsletters

Resource Law Notes Newsletter, no. 27, winter
issue, Jan. 1993

University of Colorado Boulder. Natural Resources Law Center



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RESOURCE LAW NOTES, no. 27, winter issue, Jan. 1993
(Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).

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RESOURCE LAW NOTES

Natural Resources Law Center • School of Law • University of Colorado at Boulder



Number 27

Winter Issue, January 1993

NRLC Spring Programs:

Joint NRLC/Boulder Bar Program, Feb. 26: Municipal Water Suppliers

On Friday, February 26, 1993, the Natural Resources Law Center and the Natural Resources and Environmental Section of the Boulder County Bar Association will cosponsor a day-long symposium on municipal water suppliers in a changing regulatory environment. Topics will include the impacts of the recently enacted Amendment 1 to the Colorado Constitution, water development and rights of way over federal public lands, Colorado's "can and will" doctrine, and Safe Drinking Water Act requirements. Continuing Legal Education credits will be available for participants, and lunch will be provided.



Former Governor of Arizona, Bruce Babbitt (right), who presented the fourth annual Raphael J. Moses Natural Resources Lecture, October 29, greets Ray Moses (left). Law Dean Gene R. Nichol is in the center. See story on page 11.

Announcing Center's National Water Policy White Paper

Now available—*America's Waters: A New Era of Sustainability*, the product of an intensive two-day workshop in December 1992 involving 30 national water policy experts. The white paper outlines guiding principles and makes detailed recommendations for the Clinton-Gore Administration.

Watch for more details on the workshop in the next issue of *Resource Law Notes*, but order your copy of *America's Waters* now from the list of publications on page 10.

Lujan v. *Defenders of Wildlife* Decision Leads Spring Hot Topics

The first of three spring semester Hot Topics in Natural Resources lunch programs is scheduled for Friday, January 29. University of Colorado Law Dean Gene Nichol, a constitutional law expert, will analyze the recent U.S. Supreme Court decision in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). His discussion will concentrate on the decision's impacts on standing in environmental litigation.

Additional Hot Topics programs this spring will focus on "The Local Role in

Annual Water Conference Set For June 14-16

"Water Organizations in a Changing West" will be the topic of the Center's annual water conference, June 14-16, 1993. The program grows out of research project sponsored by the Ford Foundation, in which the Center has been studying the evolution of irrigated agricultural communities in the West. The conference will address the broad array of issues facing both urban and agricultural water supply and management organizations in the West. Representatives of such organizations will discuss innovative approaches they have taken to meet changing needs and demands.

continued on page 2

Review of *Waters and Water Rights* (R.E. Beck ed. 1991)

This 7-volume set is a complete rewrite of the original Clark treatise and is a valuable research tool on water law and management. Some of the topics such as "prior appropriation" appear in the earlier work and are here updated. Other topics have been added to reflect the changes in water law and policy of the past 15 years. Included in this latter category is a thorough treatment by Professor Harrison Dunning of "The Public Right to Use Water in Place," and extensive materials on reallocation.

In addition to authoring sections in three volumes of the treatise, Professor Beck has done an admirable job of editing the works of several eminent scholars, including Dunning on public rights, John Davidson on distribution and storage organizations, and Albert Utton on international waters. Examples of the treatise's coverage on selected topics is presented below, followed by some general comments on the series' overall organization and usefulness as a reference tool.

The rights of the stockholders in a mutual ditch company are considered in John Davidson's chapters under Part V, "Distribution and Storage Companies." Chapter 25 provides a nice introduction to this topic area by describing the historical context in which these organizations developed, explaining why we have many different forms of irrigation supply organizations today. The materials cover both private and public organizations, analyzing the rules governing the relationship between water users and the organization and between the organization and external entities.

There may be an unwarranted emphasis on condemnation as a means for establishing ditch rights, which appears at section 26.04. Davidson credits Richard Harnsberger and his chapter on eminent domain, included in the earlier Clark treatise, for most of this material. A shortened piece on this topic would be sufficient given the decreased importance of this area in legal practice today.

The treatise has extensive coverage on water reallocation, including the reallocation of Bureau of Reclamation project water. There is a good overview of the major legal issues that should be considered by anyone representing any party to a proposed reallocation. The title, "Federal Reclamation Projects and the Role of the Bureau of Reclamation in Reallocation,"

may not accurately describe the broad scope of issues covered in this section.

Key issues discussed in the Bureau of Reclamation reallocation section include the state and federal laws applicable to reallocation, the significance of project boundaries, the right of the seller to profit from

reallocations, and the effect of appurtenancy restrictions. References to numerous cases and articles lead the reader to greater detail on all of these issues. It should be noted here that the treatise addresses general federal reclamation law in a separate chapter, Chapter 41, which should also be reviewed as helpful background on the reallocation issue.

Generally, the headings for this treatise are easy to follow and lead the reader quickly to descriptive, detailed subheadings. The index is lengthy and comprehensive, but the organization requires some perseverance in seeking out certain topics. This may be a necessary price to pay for the scope of topics covered. The same topic may be referenced under several headings, and the headings are not always cross-referenced. For example, the main heading of the index for water transfers may appear at first to be "Transfers of Rights," but there is also a major heading "Reallocation of Appropriative Rights." The general discussion of state transfer laws, which appears at section 16.02, is referenced only under the latter heading.

Overall, the authors and editor of *Waters and Water Rights* can claim victory in bringing the original Clark treatise into the modern era of water law and management.

- Teresa Rice

Waters and Water Rights

can be ordered directly from the publisher, The Michie Company, 1-800-562-1197. The 7-volume set costs \$675.

It is *not* available from the Natural Resources Law Center.

continued from page 1

Federal Public Land Management" and the reauthorization of the Endangered Species Act. Information on dates and speakers for these programs will be mailed to people on our mailing list in the Denver metropolitan area. Others wishing to receive more information should contact Kathy Taylor, (303) 492-1288.

These programs, which are accredited for Continuing Legal Education, are held at noon at the Hershner Room, One Norwest Bank Center (formerly United Bank Center), Lincoln and 17th Ave. in Denver.



Dean Gene R. Nichol to speak at Hot Topics, January 29

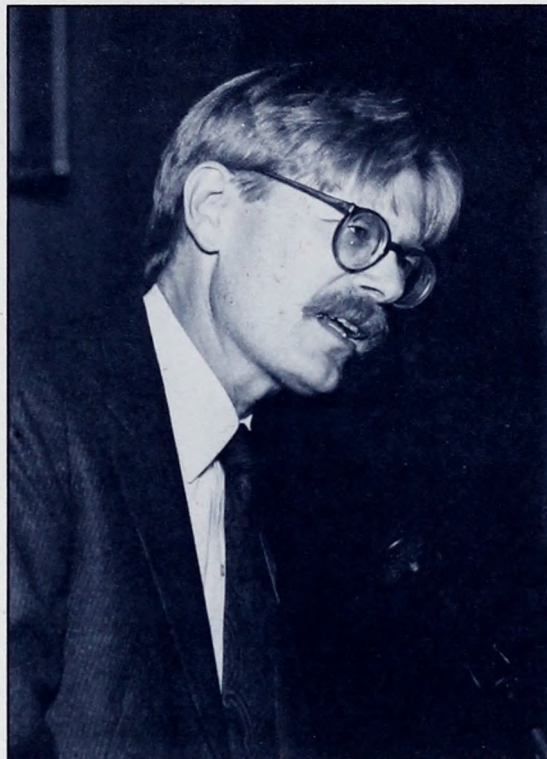
John Udem Carlson

A Memorial 1940-1992

The practice of water law in Colorado has attracted some of the state's finest lawyers over the years, a statement borne out by the remarkable legal career of John Carlson. In a group studded with outstanding practitioners, John stood out. He was an unlikely water lawyer in some respects. His Yale and Cambridge training produced a scholarly sort of person — hardly the sort of good old boy that is sometimes associated with the water community. I have it on good authority that in the early days of his career John's long hair and granny glasses cost him at least one client.

But at his roots John was a Montana country boy. He had a profound respect for the irrigation and urban water interests he represented. And he became a trusted counselor to these interests, respected by all he dealt with.

I got to know John because of his participation as a member of the Center's Advisory Board. He was one of our founding members and served on the Board until 1986. Over the years he spoke at many of the Center's conferences and programs. Whatever the topic, it was always worth listening to John. He had a remarkable intelligence and an understanding of Colorado water law perhaps without parallel. John used his scholarly abilities to



John Udem Carlson

author many fine articles including one for the Center's book *Water and the American West*. The School of Law called upon John in 1986 when it decided to raise money to

honor fellow water attorney, Raphael J. Moses (CU Law, '37). John led the successful fundraising effort that resulted in the creation of an endowment that now supports the annual Raphael J. Moses Natural Resources Research Lecture.

I haven't quite accepted the fact that John is gone. Over the years I relied on his advice and judgment many times. It is impossible to replace someone like that. In June 1992 we celebrated the Center's 10th anniversary with a special program and John, of course, was one of the speakers. His comments were unusually pessimistic, reflecting a deep concern with what he perceived to be the increasingly intractable divisions in the state concerning water development and use. They were also unusually personal, revealing traces of formative experiences that gave me a whole new sense of this complex and unique person.

Like many, many other people I will miss John. His greatly premature death leaves us all with a void — the loss of a truly outstanding lawyer, a wise and thoughtful counselor, a challenging thinker, a compassionate and caring human being. We in Colorado and in the water community have indeed been fortunate to have John as one of us. He set a standard of excellence, professionalism, ethics, intellectual achievement, and personal accomplishment that is a model for us all.

- Larry MacDonnell

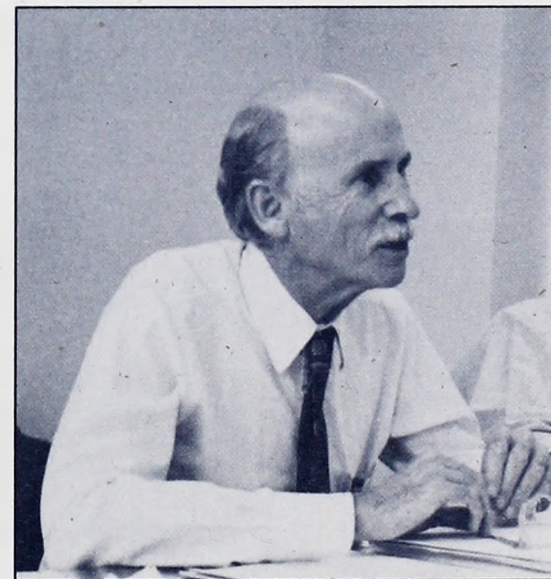
Advisory Board Changes

Over the years the Center has received invaluable support from its Advisory Board - distinguished Natural Resources professionals who meet twice a year and help guide the Center's research, conferences, finance, and general direction. Members serve three-year terms.

Departing members this January 1993, to whom we wish to express our gratitude, include Professor Margery H. Brown, from the University of Montana School of Law; Dr. Allen Dyer, Dean of the College of Natural Resources at Colorado State University; and Colorado Supreme Court Justice George E. Lohr. Longtime Board member Raphael J. Moses, of the Boulder firm Moses, Wittemyer, Harrison & Woodruff, ended ten years of active service to the Center in June 1992.

Dr. John W. Firor, from the National Center for Atmospheric Research in Boulder, ended his service for the past two years as Chair of the Advisory Board and becomes the Board's first "Chair Emeritus." James S. Lochhead, attorney with Leavenworth & Lochhead in Glenwood Springs, has now taken on the duties of Advisory Board Chair.

New members of the Board, whose terms will begin in 1993, include: Elizabeth Estill, Regional Forester, U.S. Forest Service, Denver; David L. Harrison, of Moses, Wittemyer, Harrison & Woodruff, in Boulder; Peggy E. Montano, of Saunders, Snyder, Ross & Dickson, Denver; and Albert C. Yates, President of Colorado State University in Fort Collins.

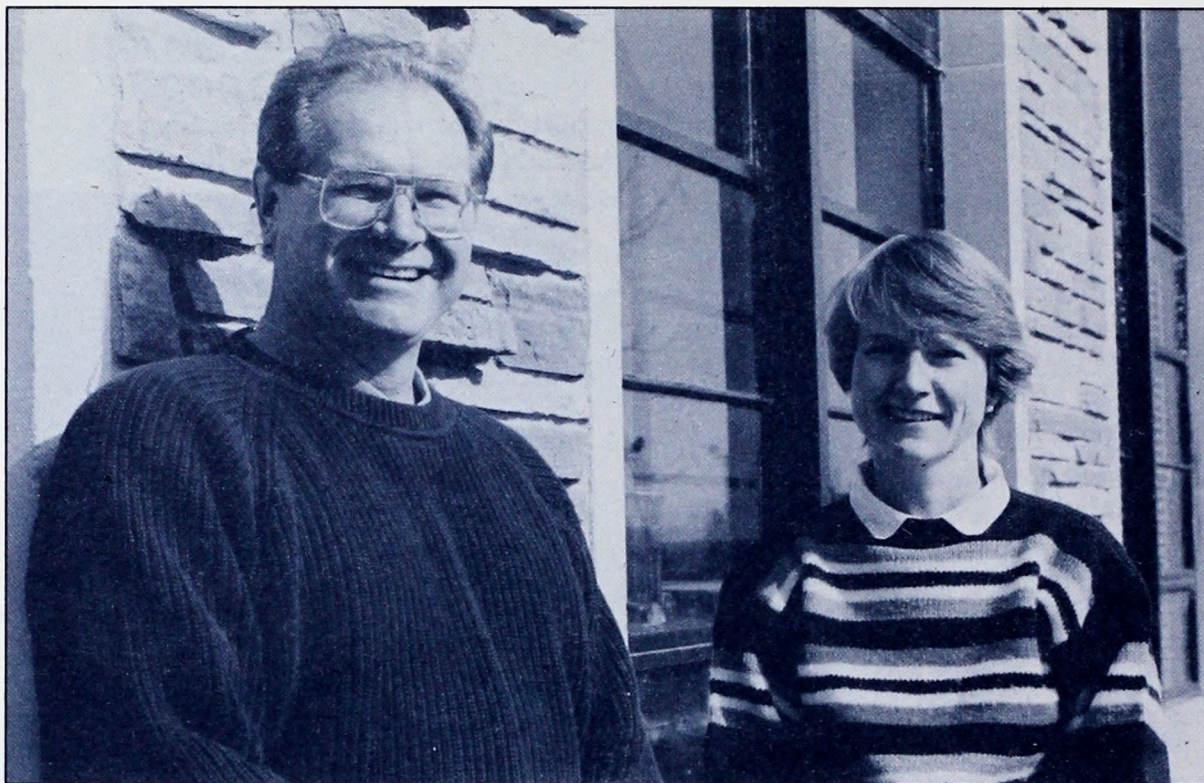


*John Firor, now NRLC Advisory Board
Chair Emeritus*

Visiting Fellows Enrich Center and Law School

During the fall semester the Center was pleased to host our fifth Burlington Resources Fellow. While at the Law School, Jim Colosky, an attorney from the Denver firm Clanahan, Tanner, Downing & Knowlton, researched implied covenants in oil and gas leases, evaluating possible additional responsibilities lessees might have to land owners regarding environmental protection. Colosky's B.A. is from Michigan State and J.D. from the University of Denver. An article from his research will be published in a future issue of *Resource Law Notes*.

Anita Halvorssen is a Fellow with the Center for the academic year 1992-93. A native Norwegian, she has a law degree from Norway, and has worked with the Norwegian Ministry of Environment. She and her husband now live in Boulder. Anita taught a course in European Community law at CU Law School last spring and was a panelist at the Law of International Watercourses Colloquium held in October 1991. She is working on a J.S.D. from Columbia University in New York. While at the Center she is pursuing her doctoral



NRLC visitors, fall 1992, Jim Colosky and Anita Halvorssen

studies in international environmental law.

Spring semester we will be joined by Stephen M. Born, Professor of Planning and Environmental Studies at the Univer-

sity of Wisconsin-Madison, who will be researching integrated resources/environmental management. More on his work will appear in the spring issue of *Law Notes*.

Center Hosts Brazilian Attorneys

In August the Natural Resources Law Center hosted a group of 13 environmental attorneys from Brazil, visiting the United States through a program of the U.S. Agency for International Development and the State University of New York. Colorado was the second stop on the visitors'

schedule; they spent their first week in Washington, D.C. with the Environmental Law Institute, the second week in Boulder, and the final week at Loyola University in Los Angeles.

During their stay, the group heard from a variety of speakers about natural resources

law and policy, and enjoyed field trips to see examples of natural resources management. They met with attorneys at the Native American Rights Fund, heard from researchers at the Natural Resources Ecology Laboratory in Fort Collins, toured the National Center for Atmospheric Research, travelled to Greeley to meet representatives of the Northern Colorado Water Conservancy District, toured the Cross Gold Mine in Caribou, visited a ranch near Kersey where Holistic Resource Management is practiced, walked through timber harvest sites and recreation management areas with a representative from the Arapaho National Forest, and spent a full day in Rocky Mountain National Park with a naturalist-guide. On their last evening the group gathered for a farewell dinner at the home of CU Law Professor David Getches in Boulder.

The visitors included government attorneys responsible for writing new environmental laws for their states in Brazil, private attorneys establishing environmental law practices, and law school professors and authors studying the U.S. legal system. They were enthusiastic and full of challenging questions for their hosts and contacts during this visit.



Visiting Brazilian environmental attorneys on field trip, August 1992

A Decade's Experience in Implementing A Land-Use Environmental Impact Assessment System in Israel

Ruth Rotenberg*

Introduction

The idea and procedure known as "environmental impact assessment" (EIA) or "environmental impact statement" (EIS) has been recognized worldwide as an eminent and essential means of good environmental practice.

Ten years ago, an EIA system was introduced in Israel within its comprehensive planning and building process, controlling all land-use activities and applying a preventive approach to assure sustainable development.

This paper presents the Israeli EIA system to the American reader. It starts with a presentation of the Israeli EIA system, introducing its legislative and historical background and describing the framework of the Planning and Building Law, and continues by reviewing the Israeli EIA Regulations — their main provisions and their actual implementation. Finally, some conclusions are drawn and recommendations made, with a view to strengthen the Israeli EIA system (without underestimating its merits) and to further improve its decision-making processes which may have environmental effects.

Legislative Historical Background of Israel's EIA System

The Planning and Building Law, 1965

Israel's land-use planning system is regulated under the Planning and Building Law of 1965 (published in the Official Records: Shefer Hachukim, 1965, p. 307; hereafter "PBL") that replaced a 1936 Town Planning Ordinance, enacted by the British Mandate.

*Legal Advisor to the Israeli Ministry of the Environment. This paper was written during a 3-month stay at the Natural Resources Law Center as a Visiting Fellow. The views, analysis, and conclusions expressed in the paper are those of the author and do not necessarily reflect the policies of the Israeli Ministry of the Environment.

The PBL establishes a comprehensive legislative framework which regulates all land-use development activities in Israel, public as well as private, within a three-level hierarchy system: national, district and local. According to the PBL, no work related to the building and use of the land can be initiated without a permit, and a permit cannot be issued unless it fully



Ruth Rotenberg

complies with the various outline (master) and detailed plans applying to the specific area and project.

The top level of the PBL hierarchy is the National Planning and Building Council (NPBC), composed of representatives of various government ministries, relevant public and professional organizations and local authorities. The NPBC is responsible for preparing national outline plans, reviewing regional outline plans and serving as an appeal board for decisions of the District Planning and Building Committees (DPBCs).

The National masterplans are prepared for land uses and projects of national significance such as national parks and nature reserves, solid waste disposal sites, water catchment basins, the coasts (Medi-

terranean coast and Lake Kinneret shores), electric power stations and networks, prisons, roads and railways, cemeteries, tourism and recreation.

The six DPBCs are composed of regional representatives of governmental ministries and of representatives of local authorities (municipalities) within each district. The DPBCs are responsible for the preparation and implementation of district outline plans, in accordance with policies and guidelines expressed in the national outline plans. The DPBCs are also in charge of reviewing and commenting on national outline plans and reviewing and approving local outline and detailed plans.

The local level consists of about one hundred Local Planning and Building Committees (LPBCs) serving one or more local authorities and composed of the elected members of the municipal councils. The LPBCs are responsible for the preparation of outline and detailed local plans or

GLOSSARY

DPBC	District Planning and Building Committee
EIA	Environmental Impact Assessment
EIAR	Environmental Impact Assessment Regulations
EPD	Environmental Planning Department (within Ministry of the Environment)
EPS	Environmental Protection Service (within Prime Minister's Dept)
LPBC	Local Planning and Building Committee
MOE	Ministry of the Environment
NEPA	National Environmental Policy Act (USA)
NPBC	National Planning and Building Council
PBL	Planning and Building Law of 1965
VOA	Voice of America

reviewing such plans presented to them by developers. The LPBCs are also responsible for issuing building permits and enforcement in cases of illegal building.

In addition to the above described three-level hierarchy, there are two special national-level committees. One is the Committee for the Protection of Agricultural Land, which is in charge of reviewing any development plan on agricultural land for other land-use purposes. The second is the Committee for Coastal Waters, which is responsible for all off-shore development projects. No plan or building permit regulating agricultural lands or an off-shore project may be approved without prior approval of the relevant above-mentioned committee.

The PBL provides for a public notification and participation process, which is an uncommon feature in the Israeli administrative system. A proper public notification is required prior to approval of all local and district outline plans, including a variation or amendment thereof. Any person interested in a submitted plan who considers himself aggrieved by the plan, any representative of a governmental ministry, or any public body enlisted under the regulations (such as the Nature Preservation Society), may file an objection to the plan. The opposing person or body has a right to present his objection in writing and the right to be heard by the planning committee. The PBL also provides for an appeal process in case an objection is rejected.

The Minister of the Interior is in charge of the PBL and most plans require his final approval and signature. The national plans are also subject to government (cabinet) approval. A notification of each approval of a plan must be published.

The Environmental Impact Assessment Regulations (EIAR)

The Environmental Impact Assessment Regulations were promulgated in 1981 under the PBL and came into force in July 1982 (published in the Official Records: Kovetz Hatakanot, 1982, p. 502). The preparation and promulgation of the EIAR took many years, starting March 1973, when the government of Israel decided to create the Environmental Protection Service (EPS) within the Prime Minister's Department.

In its decision on establishing the EPS, the government stated that one of the EPS functions would be "To prepare a program for the establishment of a system of

environmental impact assessment." The government also set the basic rules, the scope and nature of such a system, by specifically determining that "The program will be prepared in conjunction with the Ministry of the Interior and the National Planning and Building Council, ensuring preventive measures to avoid delays and duplication in the proper functioning of the planning and building agencies." The government expressed a worldwide growing concern for the need to consider environmental impacts within the development process to prevent and eliminate adverse environmental impacts, unreasonable depletion of resources, and ensure sustainable development.

Since then, the EPS has made numerous efforts for launching an EIA program, through steering committees and professional administrative working groups.

The Planning and Building Law provides for a public notification and participation process, which is an uncommon feature in the Israeli administrative system.

Within this period, the EPS was moved (in 1976) from the Prime Minister's Department to the Ministry of the Interior and became involved in the actual planning process, thus introducing environmental provisions to be included in several national masterplans, and drafting guidelines for the preparation of environmental reviews within various specific projects, such as the Hadera Electric Power Plant, and the state's largest wastewater treatment plant in the sands of Rishon LeZion.

These decisions and activities as well as the organizational changes (including the

appointment of environmental advisors to the national and district planning committees) laid the groundwork for introducing the 1981 EIAR, but not before some long and exhaustive discussions on the subject were conducted at the NPBC, and by a specifically designated sub-committee. The outcome of this long negotiation process was a compromised version of subordinate legislation — the Planning and Building (Environmental Impact Assessment) Regulations, signed by the Minister of the Interior on December 15, 1981, and entered into force on July 15, 1982.

Review of the Israeli Regulations Main Provisions of the EIAR

The Environmental Impact Assessment Regulations present in a brief manner the procedural and substantial requirements for preparing and submitting an EIA within the context of the planning and building process, thus applying to all — private as well as governmental — physical development activities.

Activities Requiring Assessment

The regulations specify types of some activities (plans) for which an EIA is mandatory: power plants, airports, seaports and hazardous waste disposal sites. The regulations also specify other activities — landing fields, jetties, national water supply arteries, dams and reservoirs, wastewater treatment plants, mining and quarrying sites, solid waste disposal sites and an industrial plant not within an industrial zoning area — as conditionally subject to an EIA request, where "in the opinion of the NPBC or the DPBC" considering those plans, may have a "significant environmental impact exceeding the local boundaries."

In addition to the above-listed identified activities, the regulations provide the grounds for a discretionary EIA requirement — that is, at the request of a representative of a governmental ministry in a PBC or at the request of the PBC considering a PB plan "whose implementation may, in its opinion, have a significant impact on the environmental quality." Such a request can be made at any state of the PB process prior to the plan's approval.

EIA Scoping and Content

The EIA Regulations state the following five elements as basic and specific requirements to compose a proper EIA document:

- A description of the environment, subject to a proposed plan, prior to the development activities. Attached to this



The Jordan River Valley, Israel

general environmental data base requirement is a broad definition of the term "environment" expressing a functional rather than geographical approach: "the environment which in the opinion of the PC may be affected by the plan's activities."

- A specification of the reasons for the preference of the proposed site of the plan and its activities. This requirement provides a legal basis for an alternatives' eliminating process, not for a complete presentation and analysis of alternative options to the proposed plan and activities.
- A description of the activities resulting from the performance and implementation of the proposed plan. This part to be mainly of a descriptive nature.
- Specification and assessment of the future impacts anticipated and forecasted—resulting from the implementation of the development plan and its activities. This open-ended requirement allows for the presentation and examination of the widest scope of impacts. Sequentially, there is also a requirement for a description of the necessary mitigating measures to prevent the negative impacts.
- The final part to be included in every EIA is the presentation of the findings of the EIA study and its outcomes and

proposals to be included in the documents of the actual plan. This provision, if properly implemented, constitutes the substantial and true contribution of the EIA process to environmentally sound planning and development.

The government expressed a worldwide growing concern for the need to consider environmental impacts within the development process

EIA Preparation and Submission Procedures

According to the regulations, the EIA should be prepared in accordance with specifically-tailored guidelines established by the relevant PB committee, and based on

the Environmental Advisor's proposal. The guidelines are aimed to ensure that the EIA is properly prepared and contains the relevant data and information. This is of particular importance, bearing in mind that the EIA is prepared and submitted by the developer.

The Director General of Ministry of the Environment (MOE) (previously Director of EPS) was appointed as the Environmental Advisor for the purpose of the EIAR, and is performing his duty through the Environmental Planning Department (EPD) of the MOE. The regulations set up the timing for the submission of the EIA: together with the planning documents when the EIA is explicitly required, or at any other stage of the plans preparation, prior to its final approval. This allows also for an EIA request at the later stage of deposition of a plan for public objection.

Finally, the responsibility for examining and evaluating the EIA lies with the relevant PBC, which is not to approve a plan submitted with an EIA, "unless it has reviewed all details of the EIA and has decided upon the findings and instructions to be included in the provision of the plan as an outcome of the EIA."

EIAR Implementation

Factual Notes

According to information given by the EPD of the MOE, since the entry into force of the EIAR in 1982 until the end of 1991, 84 EIAs have been submitted to PBC and received at the EPD for check up and evaluation. During the same period, the EPD prepared on the request of PBC 154 sets of guidelines.

The plans which required the preparation of EIA concerned mainly the following: seaport and marinas, sites for tourism, recreation and sports, mining activities, energy production plants, various industrial plants, solid waste disposal sites, roads and parking lots. Guidelines have also been prepared and issued on plans for airports and land-fields, water and wastewater treatment plants and for railroads, but these plans have not yet been submitted.

Operational Notes

The above-stated numbers reveal a moderate picture of implementation. It did not create an "overflow" and did not obstruct the PB process, as the critics warned. This moderate picture may well be attributed to the character of the EIA system, being basically a discretionary

system, especially as concerns the request for EIA.

This picture may change now, as a result of a 1992 Amendment to the PBL that nominated representatives of the MOE as members of the District PBCs. This membership should affect, *inter alia*, the quantity and quality of EIA-related decision-making on these committees.

It is worth noting in this context another existing practice: to require the preparation and submission of an EIA under the provisions of a specific plan, not directly within the EIAR process. This is the case, for example, in most road construction planning. For some reason, these plans were not included implicitly in the EIAR. This was remedied at a later stage, while amending the NPB Roads Masterplan to include an obligatory request for the preparation of EIA, regarding road planning and building.

Court Litigation

Unlike the American experience, there has been very little court litigation on EIA matters in Israel. Two recent cases might be of interest and worth mentioning:

One recent high Court of Justice case, known as the *Kfar Hanashi Case* (B.G.Z. (High Court of Justice) 2324/91, The

the adjacent Jordan River environment. The petitioners challenged the PBCs for not following the proper procedures in reaching their decisions to approve the plan, and alternatively claiming that the decisions were unreasonable because they did not consider properly the destructive aspects of the proposed plan, neglecting to give the proper weight to considerations such as the special status of the Jordan River as a national asset and the damage to tourism and to the view and environment of this special site.

The court did not accept these arguments. As a matter of fact, it established that all the required procedures had been followed, including: discussions by all relevant PBCs, a detailed EIA was prepared and submitted to the DPBC, necessary mitigation measures were recommended and incorporated in the plan, and objections from many persons and bodies have been heard by the DPBC.

As a matter of law, the court stated that the question to be examined in such a case is not what the Court would have decided in those circumstances (hinting, perhaps, at its dissatisfaction with the decision), but whether the decision is reasonable according to the rules and criteria established in Administrative Law. Finally, the court reiterated in detail all the mitigating measures that were incorporated in the plan and emphasized that these measures should be scrupulously implemented.

Another recent High Court of Justice case involving environmental and EIA questions is known as *The Voice of America Case* (B.G.Z. (High Court of Justice) 3476/90, *The Society for the Protection of Nature and Others v. The NPBC and Others* (not yet published)). In this case, the petitioners challenged a decision of the NPBC to approve the location and construction of a huge radio transmission station designed to improve the quality of the Voice of America's (VOA) broadcasting services to the Asiatic Russian Republics in the *Arava* Area. The *Arava* Area is a desert-type prairie located in the southeastern part of the country, with only a few scattered small agricultural settlements. The supporters of the VOA plan emphasized its potential economic value as a trigger to introduce development and jobs to the *Arava* Area. The opponents were concerned about the environmental impacts of the project — the station's radiation dangers to human beings and to numerous migratory birds that fly along the *Arava* Area.

In this case the court ruled for the petitioners, mainly on the grounds that the

...the Israeli EIA system is integrated in the land-use planning and building process and applies to physical development activities, public and private...

planning and EIA processes were lacking and incomplete. The court established that the EIA has not properly investigated the radiation and thermal effects of the station on the migratory birds and their navigational mechanism, and therefore the NPBC is lacking sufficient information needed for reaching a proper decision.

Another claim accepted by the court was the failure of the EIA to deal with the effects of the VOA station on the location of a nearby Israel Defense Army firing zone, the probability of having to shift its location and the various environmental effects of such a change.

On these grounds and on another strictly administrative default of the process, the High Court of Justice decided to uphold the petitioners' claim and request that a further study was needed on the above-mentioned subject matters, in order to furnish the NPBC with the appropriate information required for reaching a well-founded decision. It seems that in this case the court took a further step from its strictly administrative procedural approach (as demonstrated in the previous case), while refraining from a substantial judgement and not directly interfering with the competent authority.

Observations on the American and European Experience

Both American and Israeli legal systems apply the EIA idea and procedure as a tool of environmental management aimed at identifying and preventing environmental adverse effects of development activities. Nevertheless, different legal and conceptual

Unlike the American experience, there has been very little court litigation on EIA matters in Israel.

Movement for the Quality of Government in Israel and Other v. The NPBC and Other (not yet published)) dealt with a petition against the approval of a plan regarding the building of a hydroelectric plant to supply the needs of a small adjacent kibbutz. The plan entailed diverting the natural flow of part of the Jordan River, at a wildlife area, north of the Lake of Galilee, in order to create an artificial waterfall for the hydroelectric system.

The case was petitioned on the grounds that the project would cause severe and irreversible damage to the natural ecology of

approaches characterize the two systems—the American being based on a statement of the National Environmental Policy Act, while the Israeli is based in regulations under the Planning and Building Law. Subsequently, the Israeli EIA system is integrated in the land-use planning and building process and applies to physical development activities, public and private, while the American EIS system is an

based on well elaborated and properly presented information is bound to lead to better understanding of circumstances and consequences, and result in a better decision.

Applying this assumption in light of the American experience and bearing in mind the above-mentioned *Kfar Hanashi* case, may drive to a conclusion regarding the need of further “action-forcing procedures.”

provisions which guarantee the involvement of the public—individuals, groups and organizations—in almost all stages of the EIA process. These provisions also provide for the disclosure of information to the public, to serve the functions of offering the public adequate notice of future development activities and their environmental consequences and of mitigating measures, as well as of informing and ensuring the public that the decision-making process was properly conducted. Although existing in the Israeli PB process, and applying also to the EIA process, public participation is limited to certain stages in the PB procedure and cannot fully serve its goals. Further consideration of ways and methods to increase effective citizens’ participation in the EIA system within the PB process, is recommended.

- Finally, without impairing the EIA system as an integral part of the PB process, its effectiveness and its invaluable contribution to the environmentally sound development of Israel, it is well understood that this process is limited to land-use planning decisionmaking.



A typical Arava landscape in the southeast of the Negev Desert, where construction on the controversial Voice of America transmission station is planned.

independent self-supporting system, covering a broad range of federal actions, physical and non-physical, including “every recommendation or report on proposals for legislation”

An academic attempt to retroactively apply the wording of NEPA and the “procedural test” to the Israeli situation after a decade’s experience in implementing the EIAR demonstrates that from the legal as well as practical perspectives it may be considered a “success story.” There is no doubt that the EIA system in Israel has been truly embodied as an integral part of the well-established PB process, which controls most of Israel’s land-use and development activities. Furthermore, there is no evidence, as some critics have been warning and threatening, that the implementation of the EIA system has created “bulks of unnecessary paper work” or caused extra delays in the PB process, or that it prevented in any way project development.

On the other hand, it may well be assumed that a decision-making process

In spite of some obvious advantages of flexibility and efficiency of the Israeli EIAs discretionary approach, a reconsideration of this approach may be needed and is hereby recommended. This is aimed at introducing additional criteria regarding specific problems within the implementation process of EIAs, to include:

- Improved techniques to identify activities requiring EIA, taking into account the above-described *screening* of impacts and *significance* determination processes; and an adequate study of reasonably defined and analyzed *alternatives*. Such additional criteria may also include an explicit request for specific subject matters, such as the inclusion of *socio-economic* consideration, *risk assessment* study and *cost-benefit* analysis.
- A further consideration on improving and expanding *public participation* in the EIA process. The American and the European EIA legislation include

Completing a decade of successful implementation, the Israeli EIA system may just be ripe for new ideas and changes.

Searching for a complementary system to introduce and apply EIA procedures to decision-making processes and activities other than land-use (such as the issuing of certain permits, for example) may introduce a provocative and challenging idea, worthy of a careful study and consideration, as the American and — to some extent — European experience demonstrate its applicability. Completing a decade of successful implementation, the Israeli EIA system may just be ripe for these new ideas and changes.

Recent Publications

Recent Publications and Materials of the Natural Resources Law Center

For sales within Colorado, please add 6.66% sales tax. Contact the Center for a full list of publications.

NRLC Policy Papers

- PP01 "America's Waters: A New Era of Sustainability," Dec. 1992. \$10.

Books

- BK06 *Controlling Water Use: The Unfinished Business of Water Quality Protection*, David H. Getches, Lawrence J. MacDonnell, Teresa A. Rice, 1991, \$22.
- BK05 *Instream Flow Protection in the West*, Lawrence J. MacDonnell, Teresa A. Rice, and Steven J. Shupe, eds., 1989, \$20
- BK04 *Proceedings of the Sino-American Conference on Environmental Law, Beijing, 1987*, 1989, \$12
- BK03 *Water and the American West: Essays in Honor of Raphael J. Moses*, David H. Getches, ed. 1988, \$15

Conference Materials - Notebooks and Audiotapes

These materials are certified for Home Study CLE credit by the Colorado Board of Continuing Legal and Judicial Education.

- HT02 "Natural Resources Litigation: Ethical Considerations in Discovery," Nov. 1992, audiotape and outlines, \$15. One CLE ethics credit.
- HT01 "Oil & Gas Development: Conflict Over Surface and Mineral Rights," Oct. 1992, audiotape and outlines, \$15.
- CF13 *Groundwater Law, Hydrology and Policy in the 1990s*, 569 page notebook of outlines from 3-day conference, June, 1992, \$75; cassette tapes of speakers' presentations, 3 days, \$150. Includes one hour of ethics credit.
- CF12 *Innovation in Western Water Law and Management*, 569 page notebook of outlines from 3-day conference, June, 1991, \$60; cassette tapes of speakers' presentations, 3 days, \$150.
- CF11 *Moving the West's Water to New Uses: Winners & Losers*, 550 page notebook of outlines from 3-day conference, June, 1990, \$60; cassette tapes of speakers' presentations, 3 days, \$150.

Research Reports

- RR09 "Recreation Use Limits and Allocation on the Lower Deschutes," Sarah Bates, 76 pgs. 1991. \$8.
- RR08 "Facilitating Voluntary Transfers of Bureau of Reclamation-Supplied Water," Lawrence J. MacDonnell and others, Vol. I, 132 pgs. (\$10) & Vol. II, 346 pgs. (\$15), or both volumes for \$22, 1991.

- RR07 "Wetlands Protection and Water Rights," MacDonnell, Nelson & Bloomquist, a Report to EPA Region VIII, 1990, 50 pgs. \$8.
- RR06 "The Water Transfer Process as a Management Option for Meeting Changing Water Demands," Lawrence J. MacDonnell and others, Vol. I, 70 pgs. (\$10) & Vol. II, 391 pgs. (\$15), or both volumes for \$22, 1990.
- RR6A "Transfers of Water Use in Colorado," MacDonnell, Howe & Rice, 1990 (chapter 3 from Vol. II above) 52 pgs. \$5.
- RR05 "Water Allocation During Drought in Arizona and Southern California: Legal and Institutional Responses," David H. Getches, 1990, 101 pgs. \$15.

NRLC Western Lands Policy Papers Series

- WL01 "The Western Public Lands: An Introduction," Sarah Bates, 1992. 72 pgs. \$8.

NRLC Western Water Policy

Discussion Series Papers

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- DP03 "Water & the Cities of the Southwest," John Folk-Williams, 14 pgs., 1990, Series No. 3, \$6.
- DP04 "Water Rights Decisions in Western States: Upgrading the System for the 21st Century," Steven J. Shupe, 18 pgs., 1990. Series No. 4, \$6.
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Center Offers Colorado Water Law 3-Volume Set by George Vranesh

These sets, originally \$285, were donated to the Center by George Vranesh and are now available for only \$95. "The comprehensive three-volume set provides an exceptionally thorough and useful reference on virtually all aspects of Colorado water law. . . . [L]egal precedent on many important issues often is first established in this state. . . . Thus Mr. Vranesh's treatise is likely to have appeal to anyone closely concerned with water law."

- MacDonnell, 1988.

To order the 3-volume set or for more information, please call write, or fax the Center. Checks should be payable to the University of Colorado.

Babbitt Visits Law School: Discusses U.S. Environmental Agenda

Bruce Babbitt, former Governor of Arizona and contender for the Democratic presidential nomination in 1988, told a Law School audience that efforts to diminish the Endangered Species Act and to redefine wetlands are part of a continuing struggle between the idea of "responsible stewardship" of the planet and "the untrammelled right to destroy anything, anywhere, anytime."

Governor Babbitt, who is president of the non-partisan League of Conservation Voters, visited the Law School for two days, and presented the annual Raphael J. Moses Natural Resources lecture on October 29. He urged that people vote a conservation

agenda regardless of political party. "It's about whether the human species has the self control, the willingness to live lightly on this planet."

The lectureship was founded to honor Ray Moses, a CU Law graduate of 1937, and a founding partner of the Boulder law firm, Moses, Wittemyer, Harrison, & Woodruff. During the remainder of his visit, Governor Babbitt spoke to law students at a brown bag discussion and in a public lands seminar, met with local water attorneys at a breakfast sponsored by the Law School, and presented a faculty colloquium on international trade and the environment.

Regional Forester to Speak January 20

Elizabeth Estill, the new Regional Forester for Region 2, the Rocky Mountain Region, of the Forest Service, will speak at a brown bag lunch program on Wednesday, January 20th, at noon, at Fleming Law Building, University of Colorado School of Law, in the Courtroom. The topic will be the new direction of the Forest Service towards ecosystem management, and what this means for Region 2.

We'd Like to Hear From You!

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The Natural Resources Law Center

The Natural Resources Law Center was established at the University of Colorado School of Law in the fall of 1982. Its primary goal is to promote the wise use of natural resources through improved understanding of natural resources issues. The Center pursues this goal through three program areas: research, public education, and visitors.

Resource Law Notes is a free newsletter of the Center, published three times a year — fall, winter, and spring.

The Natural Resources Law Center Staff

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Calendar


Hot Topics Lunch Series

Wed. Jan. 20: "New Directions Toward Ecosystem Management in the U.S. Forest Service," Elizabeth Estill, new Regional Forester

Fri. Jan. 29: "Standing in Environmental Litigation following *Lujan v. Defenders of Wildlife*," Dean Gene R. Nichol. noon, Hershner Room, One Norwest Bank Center, Denver. Charge for lunch and registration.

Fri. Feb. 26: "Municipal Water Suppliers," with Boulder County Bar.

June 14-16: "Water Organizations in a Changing West," annual NRLC water conference.

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Resource Law Notes

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