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### Searching for Basinwide Solutions to Endangered Species Problems of the South Platte of Colorado

James S. Lochhead

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**SEARCHING FOR BASINWIDE SOLUTIONS TO  
ENDANGERED SPECIES PROBLEMS  
OF THE SOUTH PLATTE OF COLORADO**

**Submitted by  
James S. Lochhead  
Executive Director  
Colorado Department of Natural Resources**

**REGULATORY TAKINGS & RESOURCES:  
WHAT ARE THE CONSTITUTIONAL LIMITS?**

**Natural Resources Law Center  
University of Colorado  
School of Law  
Boulder, Colorado**

**June 13-15, 1994**

PRESENTATION OF  
JAMES S. LOCHHEAD  
EXECUTIVE DIRECTOR  
COLORADO DEPARTMENT OF NATURAL RESOURCES

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REGULATORY TAKINGS & RESOURCES:  
WHAT ARE THE CONSTITUTIONAL LIMITS?

MANAGEMENT APPROACHES TO ADDRESSING TAKINGS ISSUES

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UNIVERSITY OF COLORADO SCHOOL OF LAW  
NATURAL RESOURCES LAW CENTER  
AND THE  
BYRON R. WHITE CENTER FOR AMERICAN CONSTITUTIONAL STUDY

JUNE 15, 1994

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The debate over environmental regulatory takings revolves around the fundamental tension between property rights and government regulation. The debate goes to the core of our form of government. It is divisive--it makes for interesting argument, good politics, and expensive litigation. The debate needs to continue, but in the meantime, it is clear that there are real world problems with the way government is working, on the ground. The increasing complexity of our society, booming population growth, a deep federal deficit, and the need to restore damaged ecosystems to a functional level conspire to defeat our efforts. Our reaction has been to heap ever more layers of law and regulation into the effort.

In Colorado, as in many other states, takings legislation has been introduced in an apparent effort to lend "focus" to government regulators, by requiring them to specifically account for the takings implications in any action (defined broadly to include any administrative action, such as the issuance of permits and licenses, as well as the promulgation and enforcement of regulations). Ostensibly, this legislation attempts to provide a more comprehensible definition of what constitutes a taking, in reaction to concerns about the pervasive impact of government regulation. On closer analysis, this type of legislation reveals an attempt to shift the burden of proof, to make government prove that its actions do not constitute takings and thereby relieve the regulated community from that burden. More fundamentally, the takings movement is born of a general frustration with government bureaucracy, paperwork, laws, regulations, and interference with the day-to-day activities of business.

In the American West, the role of the federal government began a significant alteration, from that of a development catalyst to

that of a pervasive environmental regulator, beginning in the late 1960's and early 1970's. Historically, the federal government had sought to "open" the West to exploration, habitation, development, and, ultimately, exploitation. Obviously, that historical mandate is no longer relevant to the late twentieth century. As a result, the federal government has had to deal with the public relations problems associated with a 180-degree shift in position. The federal government is not just in the new posture of "regulator," but is charged by Congress with actually undoing and reversing the environmental damage that was done under the old policies. The Endangered Species Act is probably the foremost example of this type of remedial legislation.

Unfortunately, the imposition of nationwide standards does not sit well in the West. Moreover, such standards do not, in a practical sense, address the West's environmental diversity. In the West, actions, conflicts, and remedies have traditionally been undertaken in isolation from one other. Thus, individual federal agencies have taken nationwide standards, and applied them rigidly, and in isolation, to the individual. More often than not, the application of the standards do not account for the impact on the individual, the actual impact of the individual action on the natural environment, or the cumulative impact of other factors and individual actions on that same environment.

In other words, the application of the nationwide standard is not put into proper context, at an individual or ecosystem level. Presumably, the generic standard was developed because of a general threat to a given piece of the environment, by a general set of individual actions. However, the application of the standard in the individual circumstance is not always considered in relation to the effect of other actions of that individual (which may be harmful or beneficial), or the activities of others, on the particular ecosystem. Moreover, the generic standard can not account for the fact that some habitats are simply more critical than others in the maintenance of local and regional ecosystems. The standard is applied, and the regulation occurs, regardless of whether the standard even has relevance to the particular situation. The regulation may even be applied without regard for or consideration of the regulatory authority and actions of other state and federal agencies, and different agency actions may be applied in a linear fashion. The individual may need to clear a series of regulatory hurdles, to find that eventual approval is conditioned on conflicting or cumulative requirements that may not bear any relevance to the particular action or ecosystem, or that the proposed action is denied by the last agency in the line.

Obviously, this leads to a great deal of frustration with the process of regulation, and with the lack of context into which individual regulatory actions may be placed. It may be directed at

the federal government, or at particular laws or agencies. However, in my view, that frustration, which has been manifested by proposed takings and federal mandate legislation, is a call for government, at all levels, to get its act together.

From the perspective of the environmental community, the existence of nationwide regulations is equally frustrating to the ultimate goals of the development of sustainable economies and the restoration of damaged ecosystems. No one can be sure that a comprehensive analysis is being undertaken of a particular administrative action, in the broader context. Moreover, the imposition of regulatory control may not have a restorative effect. It merely stops further damage.

For their part, government regulators have become increasingly aware that individual actions need to be put into proper context, both from the perspective of complex ecological interactions, and the framework of regulatory authority. Throughout the United States, governments are beginning efforts to find "partnership" solutions to complex regulatory problems. The state of Colorado has for several years made an effort to focus on broad-based, multi-jurisdictional initiatives, which directly involve the regulated community, to identify problems and reach solutions consistent with the protection of property rights and the operation of state law.

These initiatives can have a number of effects that will resolve or at least focus the takings debate. First, the regulated community can become educated that a particular set of environmental problems actually do exist, and that the activities of that community have contributed to those problems. Second, general restorative actions at the ecosystem level can be developed and agreed upon between all levels of involved government and the regulated and environmental communities. Individual permit or regulatory actions by any government agency can reflect the same broad analytical underpinning. Therefore, individual regulated parties do not feel they are being singled out, are confident that their regulatory burden is proportionate to the level of their impact on the ecosystem, and have security in the assurance that some new agency will not impose additional burdens. The environmental community can develop an understanding of the capabilities of the regulated community, and can develop confidence that problems are being approached holistically. Third, processes and red tape can be minimized, resulting in greater government efficiency. There will be fewer challenges to administrative actions, because all parties have buy in. In other words, government action is put into the proper context.

With these general thoughts in mind, I would like to focus on a specific example of how the state of Colorado has approached a

particularly broad and contentious issue: Forest Service permitting and endangered species act issues in the South Platte River Basin.

#### **ENDANGERED SPECIES ISSUES IN THE CENTRAL SOUTH PLATTE RIVER**

Since 1988, Colorado has been involved in the development and implementation of a recovery plan for endangered fish species in the Colorado River Basin. This plan is undertaken on the basis of a cooperative agreement between the Department of Interior, the states of Colorado, Wyoming and Utah. The program itself involves representatives of other federal agencies, water users, power customers and environmental organizations. Its basis is the development of programs that can recover the listed species to the point of delisting, and which can serve as the reasonable and prudent alternative for the depletion impacts to the species and their habitat, of historic and new water projects, up to the full development allowed to Colorado under interstate compact.

A serious endangered species problem exists as well in the Platte River Basin, in the Big Bend area of the South Platte River in Nebraska, below Kingsley Dam. (Kingsley Dam is the impoundment facility for Lake McConaughy, a reservoir of well over one million acre feet.) The area serves as habitat for at least three federally listed species, including: the whooping crane, interior least tern, and piping plover. The U.S. Fish and Wildlife Service is of the opinion that water depletions have been one of the factors adversely affecting this habitat. Historically, the habitat was characterized by broad sandbars and no vegetation. Today, the river's banks, together with brush and cottonwoods, encroach toward the center of the channel.

The operators of Kingsley Dam have been seeking renewal of their Federal Energy Regulatory license for the facility, and are concerned about the effect of consultation on that relicensing between FERC and the U.S. Fish and Wildlife Service, under Section 7 of the Endangered Species Act. Likewise, all actions in the Platte Basin with a federal nexus in Colorado and Wyoming will involve similar consultations such as those that were recently completed for the Front Range water facilities. In these consultations, Colorado water users have charged that:

- ◆ More water than historically is being delivered at the Colorado-Nebraska state line, due to importations of water from the Colorado River drainage;
- ◆ There is a lack of any established 1:1 connection between a depletion in Colorado and an impact on the habitat in Central Nebraska some 300 miles away; and

- ◆ There is a lack of administration of tributary well development in Nebraska, which means that any water delivered by Colorado water users for the habitat will be taken by Nebraska wells before it even gets to the habitat.

In light of these concerns and to ensure an efficient and fair framework to address future consultations, last fall, Governor Romer proposed to the governors of Wyoming and Nebraska, and to Secretary of Interior Bruce Babbitt, that a three state-federal government agreement be made to develop a basin-wide recovery plan. The program would be based on the model of the Upper Colorado River effort, and would identify and implement habitat and flow objectives so as to conserve the listed species, protect their habitat, and prevent the listing of other species in the future. Importantly, the program would serve as a basinwide framework for the consultation process under Section 7 of the Endangered Species Act.

After some six months of negotiations, an agreement was executed on June 9, 1994, by Governor Romer and Secretary Babbitt. The signatures of Governors Nelson and Sullivan followed shortly. The agreement commits the states and the federal government to a process, in which each is an equal partner, to develop a recovery program. That process will involve the full spectrum of interested parties, including federal and state agencies, water users, and environmental organizations. It has the potential to focus efforts of all affected parties toward the ultimate solution to the endangered species dilemma: recovery. As a result, it hopefully defuses the takings debate.

#### **FOREST SERVICE BYPASS FLOW ISSUES**

The state of Colorado spent approximately a year in litigation with the U.S. Forest Service, in state water court, over the issue of whether the Forest Service had reserved water rights associated with the Arapahoe-Roosevelt National Forest for channel maintenance purposes. After the expenditure of some \$10 million in litigation costs, the state and local water user groups prevailed. The fear of these groups was that the Forest Service would use its reserved water rights claims to usurp (or "take") portions of state decreed water rights associated with water facilities on Forest Service lands.

As this litigation proceeded towards its conclusion, several Forest Service permits for water diversion facilities on forest lands came up for renewal. The Forest Service has been in the process of analyzing what conditions, including the imposition of bypass flow requirements, it may impose on the reissuance of those



permits. Thus, the very same confrontational scenario has been set up between the water users and the federal government, over whether the federal government may, by regulatory action, "take" a portion of a state decreed and created property right.

Seven permits are involved, but throughout the state of Colorado some 800 permits are in place for facilities on forest lands. This first round of permit renewals will, therefore, set a standard for future permitting processes. The state of Colorado is seeking ways to address both the immediate and the broad permitting issues.

The seven permits are held by the cities of Boulder, Ft. Collins, Greeley, and Loveland, the Water Supply and Storage Company, and Public Service Company. They expired three years ago but have been extended through July 31, 1994, to allow time to complete required environmental impact documents. Permits are issued and will be renewed by the Forest Service under the Federal Land Management and Planning Act (FLPMA). The National Forest Management Act (NFMA) directs the Forest Service to ensure that special use permits conform with forest management plans which prescribe broad direction and guidelines for the management of National Forest Lands. Issuance or renewal of special use permits must also comply with the federal Endangered Species Act (ESA).

The facilities under review are located high in the National Forest. They have been in existence, in some cases, for over 100 years, before the national forest was designated. The question of what permit conditions should be imposed relates to the habitat impact of winter operations at these facilities, and whether water should be bypassed at each facility to maintain winter habitat. The Forest Service has considered an option that would impose winter bypass requirements so as to maintain a criteria of 40 percent of "aquatic habitat potential" immediately below each and every facility.

These facilities are not easily accessible in the winter, and in many cases, would require retrofitting to allow for winter bypasses. In some cases, winter bypasses may be impossible. More importantly, the imposition of bypass requirements reduces the water supply for municipal entities. The state and the Congressional delegation have at various times intervened on behalf of the facility owners to attempt to reach a compromise solution. The ingredients were all in place for another round of confrontational litigation between public agencies.

In frustration, the Colorado legislature authorized the expenditure of \$4 million by state agencies, for litigation in support of facility owners against the Forest Service, in the event that is necessary. However, the legislature also authorized the

state to spend up to \$100,000 as a match to federal funds for identifying cooperative options to bypass flow requirements.

In the meantime, the Colorado Department of Natural Resources has been working closely with the facility owners to identify options for the operation of water facilities in a way that will meet habitat needs, without adversely affecting yield or increasing the cost to the facility owners. The facility owners have directed their attorneys and engineers to develop management options that would achieve this goal. The state Division of Wildlife, State Engineer, and the Colorado Water Conservation Board all have been involved in the effort.

In this effort, the state and facility owners have not looked simply at the individual stream reaches on which the facilities are located. They have stepped back, and have taken a broader, watershed-level view. What they came up with were proposals to jointly manage their facilities, among themselves. For example, a joint operations plan developed for the Poudre River would put more water through a fifty mile reach of river in the winter than would have been there through the imposition of bypass requirements at each facility. Moreover, although certain short stream segments will remain dry in the winter, the plan addresses the more critical and biologically productive and diverse reaches of river. Therefore, the plan has the right habitat priorities. Finally, the plan would allow for these operations without affecting the water yield of any of the facility owners, or increasing the cost of water delivery.

In the Boulder Creek watershed, where two of the remaining three facilities are located, the City of Boulder has donated senior water rights to the State's instream flow program to maintain flows in North and Middle Boulder creeks. The terms of the donation would allow Boulder to make use of this water under emergency or drought conditions. Additionally, Boulder has the ability to lease its instream water to farmers lower in the watershed to ensure maximum use.

The Poudre and Boulder watershed examples provide good models for how aquatic habitats can be protected without impacting water rights.

The state and facility owners await the decision of the Forest Service, which is due as soon as next week. A positive response from the Forest Service will be a strong signal that the cooperative and comprehensive development of approaches to environmental regulation by federal, state, and local governments can be a viable alternative to the takings debate.

With regard to the hundreds of other permits that will have to

be addressed in Colorado, I have written to the Regional Forester, Elizabeth Estill, suggesting the development of a broad, cooperative, interagency framework for the processing of these permits, using in part the money authorized by the Colorado Legislature. The effort would involve the state, Forest Service, the EPA and the U.S. Fish and Wildlife Service, in a study which would:

1. Identify logical groupings of permits, based on criteria such as date of renewal, type of permit and location;
2. Assess the appropriate habitat, on a watershed or landscape level, affected by the activities authorized by the respective permit groupings;
3. Identify, on a watershed or landscape level, the threats to the particular identified habitat by the activities authorized by the relevant permit groupings; and
4. Identify possible opportunities for joint operation between permittees, management alternatives or other permit conditions which would eliminate or mitigate the identified threats, hopefully without adversely affecting water system yield or significantly increasing costs to the permittees.

This would be a multi-jurisdictional approach, at a watershed level, to permitting decisions. It could be undertaken with all relevant federal agencies, and with the input and cooperation of water users and the environmental community. Through a respect for and an understanding of the property rights involved, the relevant habitats, and the regulatory authorities and goals of the various governmental agencies, a process might be developed that will avoid, or at least significantly narrow, the takings debate.

I believe the promise of these approaches is great. The state of Colorado has committed itself to these new approaches. With an equal level of commitment on the part of the federal agencies and interested parties, our public and private resources can be spent on positive and productive endeavors, rather than on destructive and divisive litigation.

June 10, 1994

Memorandum of Agreement for  
Central Platte River Basin Endangered Species Recovery Implementation Program

THIS MEMORANDUM OF AGREEMENT (MOA) IS ENTERED INTO BY THE UNITED STATES OF AMERICA, represented by the DEPARTMENT OF THE INTERIOR (INTERIOR); the STATE OF COLORADO (COLORADO); the STATE OF NEBRASKA (NEBRASKA); and the STATE OF WYOMING (WYOMING).

I. PURPOSE

The purpose of this MOA is to initiate the development of a mutually acceptable Platte River Basin Endangered Species Recovery Implementation Program (Program) that would help conserve and recover federally listed species associated with the Platte River Basin in Nebraska upstream of the confluence with the Loup River; help protect designated critical habitat for such species; and help prevent the need to list more basin associated species pursuant to the Endangered Species Act (Act). The signatories' intent is that the Program, when developed and approved by all the signatories, will provide reasonable and prudent alternatives to avoid the likelihood of jeopardy to federally listed species and to offset any adverse modifications to designated critical habitat so existing water projects in the basin subject to section 7 consultation under the Act can continue to operate and receive any required permits, licenses, funding, or other approvals and be in compliance with the Act and so existing federal projects can be in compliance with the Act. The Program will also address the potential development of future water projects within the basin. The signatories to this MOA intend that these objectives will be achieved through a proactive, cooperative, basinwide Program that includes equal status for all signatories in the formulation and implementation of the Program; specific and realistic mileposts for Program implementation; and a fair, reasonable, proportionate, and agreed upon assignment of responsibilities for the provision, acquisition, maintenance, restoration, and protection of water and land habitat as key elements. With the concurrence of the signatories, other Federal agencies and representatives of the environmental and water user communities will be invited to participate in development of the Program.

II. NO DELEGATION OR ABROGATION

All signatories to this MOA recognize that they each have statutory responsibilities that cannot be delegated, and that this MOA does not and is not intended to abrogate any of their statutory responsibilities.

### III. PLATTE RIVER BASIN HABITAT REQUIREMENTS AND FLOW RECOMMENDATIONS

Execution of this MOA shall not be interpreted as concurrence by the States with previously stated terrestrial requirements or the central Platte River flow recommendations prepared by the Fish and Wildlife Service (Service). The signatories acknowledge that an early and ongoing function of Program development is unanimous concurrence on habitat and flow objectives that are both realistically attainable and sufficient in order for the Program to serve as the reasonable and prudent alternative for section 7 consultations. If the Service decides that any increase in such terrestrial requirements or flow recommendations is needed while the MOA is in effect, it shall discuss such increases with the signatories to this MOA, make public the scientific bases for any such increases, provide an opportunity for comment, and give such comments due consideration before final action. If any of the signatories determines that concurrence cannot be achieved on such increases, it may terminate this MOA. Nothing in this Memorandum of Agreement shall in any way diminish or otherwise affect the ability of the signatories to advocate their respective positions in the relicensing of Kingsley Dam and related facilities.

### IV. EFFECT ON EXISTING WATER PROJECTS SUBJECT TO CONSULTATION DURING THE TERM OF THIS MOA

Several existing basin water projects are now or will be subject to consultation under section 7 of the Act during the term of this MOA. With the consent of an affected project operator, the Fish and Wildlife Service will consider this MOA and progress made in Program development as the principle basis for reasonable and prudent alternatives in any biological opinion concerning such project during the term of this MOA. The Service shall provide signatories to this MOA with copies of all draft (if the federal action agency does not object), and final biological opinions issued in the Platte River Basin while this MOA is in effect. For all existing projects for which section 7 consultation occurs during the term of this MOA, the Service will evaluate and treat such projects in a similar manner except to the extent the Service determines such treatment to be inconsistent with Section 7 of the Act and explains such inconsistency to the project operator and the signatories to this MOA. If any of the signatories conclude that the Service is not treating all such projects in a similar manner and has not adequately justified such differential treatment, it may terminate this MOA. After the Program has been developed and agreed to by all the signatories, the Service will view the implementation of the Program as "new information" that would serve as the basis for reinstitution of consultation on such projects.

### V. CONSISTENCY WITH APPLICABLE LAW

This MOA is subject to all applicable Federal and State law and nothing herein shall be construed to alter, amend, or affect existing law.

## VI. SUBJECT TO APPROPRIATION

Availability of funds necessary to carry out this MOA is subject to appropriations by Federal and State governments.

## VII. EFFECTIVE DATE AND DURATION

This MOA is effective upon execution by the signatories and, unless terminated by one of the signatories in accordance with Article III or IV, will remain in effect for one year. It is the goal of the signatories to make substantial progress in developing the Program in the first year including concurrence on the habitat and flow objectives. The signatories may extend this MOA by mutual agreement if they believe it to be necessary and beneficial.

United States of America, Department of the Interior

By: [Signature] Date: June 10, 1994

State of Colorado

By: [Signature] Date: June 10, 1994

State of Nebraska

By: [Signature] Date: June 13, 1994

State of Wyoming

By: [Signature] Date: June 13, 1994

# STATE OF COLORADO

## EXECUTIVE CHAMBERS

136 State Capitol  
Denver, Colorado 80203-1792  
Phone (303) 866-2471



Roy Romer  
Governor

May 6, 1994

The Honorable Don Ament  
Chairman  
Members, Senate Agriculture, Natural Resources and Energy  
Committee  
State Capitol

The Honorable Bill Jerke  
Chairman  
Members, House Agriculture, Livestock and Natural  
Resources Committee

Dear Chairman Ament, Chairman Jerke, and Members of the  
Committees:

Recently, Regional Forester Elizabeth Estill appeared before your committees and provided testimony on issues related to the renewal of U.S. Forest Service permits for water diversion facilities located in the Arapahoe/Roosevelt National Forest. The present permit renewal process potentially affects the water supply of Boulder, Fort Collins, and Greeley, Water Supply and Storage Company, and the hydroelectric generating capacity of Loveland and Public Service Company of Colorado. At the same time, water diversions within the forest affect important riparian and aquatic habitat, both here in Colorado, and for endangered species in Nebraska.

The Forest Service is scheduled to make an initial decision concerning re-issuance of permits for these water facilities by May 31, 1994. The Colorado Department of Natural Resources has been working closely with water facility owners, with the Forest Service, the Department of the Interior, the states of Nebraska and Wyoming, and representatives from the conservation community to develop a broad mechanism that addresses not only the present controversy, but all those that could follow if steps are not taken now to anticipate and forestall future conflicts.



Because these issues are not yet resolved and partly in response to the testimony of Regional Forester Estill, the Legislature is considering the establishment of a \$4 million litigation fund, under which the Colorado Water Conservation Board (CWCB), at its discretion, would be able to intervene in any litigation that might be initiated by any of these permittees in support of Colorado water users. The Legislature is also considering authorizing the expenditure of up to \$100,000 from the CWCB Construction Fund, on a matching basis, to conduct studies with the Forest Service on opportunities for integrated basin-wide management strategies by water users to meet habitat needs through improved water project operations that will not adversely impact project yields or costs.

A basin-wide, watershed approach, pursued through a cooperative management framework, is preferable to the imposition of direct regulatory authority on a site-by-site basis. It is also preferable to possible litigation. A broader watershed approach is better able to account for the unique habitat requirements of individual stream reaches. It is also a more flexible approach that allows for innovative water resource management and provides opportunities for water users to work together cooperatively to protect system yield. In the long run, this approach also avoids additional environmental degradation, by maximizing the use of existing facilities and forestalling the need to build new facilities.

In the context of the current permits before the Forest Service, the Department of Natural Resources has worked with water users in the development of a joint management agreement for the Poudre River Basin which would place significant quantities of water into the most important reaches of stream habitat. This effort has been undertaken in conjunction with the State Engineer's Office, which has reviewed and is supportive of the management concepts included within the joint management agreement. This effort has also been undertaken in conjunction with the Colorado Division of Wildlife, which is currently reviewing this agreement from a biological standpoint. In short, I believe this proposal represents a regional cooperative approach, on a watershed level, to address overall ecosystem needs. It also addresses the important needs of water facility owners. It mirrors a comparable effort by the city of Boulder to manage its

House and Senate Ag Committees  
May 6, 1994  
Page 3

water rights in the Boulder Creek Basin for instream flows, human consumption, and irrigation. Federal officials should remain flexible in their analysis of this proposal.

The Department of Natural Resources is also preparing to work with the Forest Service and water users in developing an overall watershed approach to the Forest Service's consideration of other, future permits. Funds made available to the CWCB by the Legislature for study purposes will be most helpful to this effort. If the water users, Forest Service, and state are all committed to common goals, I am confident that positive results can be achieved.

With regard to endangered species issues on the South Platte River, the Department of Natural Resources is working closely with the Department of Interior and the states of Wyoming and Nebraska toward the development of a basin-wide recovery plan for these species. We anticipate that the State's commitment to develop and implement this recovery plan, along with some short-term activities undertaken by the water facility owners, will fulfill the regulatory requirements of the Endangered Species Act.

The state is working actively and aggressively with local and federal interests toward the resolution of these issues. I very much appreciate the cooperation of the water users in this effort. We will continue to keep the Legislature closely apprised on these matters, which are of utmost importance to both the economy and environment of this state.

Sincerely,

A handwritten signature in black ink, appearing to read "Roy Romer", with a long horizontal line extending to the right.

Roy Romer  
Governor

# STATE OF COLORADO

## OFFICE OF THE EXECUTIVE DIRECTOR

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DEPARTMENT OF  
NATURAL  
RESOURCES

May 12, 1994

Elizabeth Estill  
Regional Forester  
U.S. Forest Service  
P.O. Box 25127  
Denver, CO 80225

Roy Romer  
Governor

James S. Lochhead  
Executive Director

Ronald W. Cattany  
Deputy Director

**Re: Alternative process to address issues surrounding Forest Service by-pass flows**

Dear Elizabeth:

The Colorado Legislature has now passed two pieces of legislation to address possible actions by the Forest Service on permits for water facilities located on Forest lands. The first piece of legislation authorizes the Colorado Water Conservation Board (CWCB) to expend up to \$4 million on litigation through the Colorado Attorney General's office in support of any lawsuits filed by facility owners who challenge the imposition of permit conditions which reduce water yield or materially increase the cost of the yield of existing facilities located on Forest lands. The second piece of legislation authorizes the CWCB to spend up to \$100,000 on a matching basis with the Forest Service, for studies of modifications in water facilities operations available to water users in a watershed context, that would improve habitat without adversely affecting water facility yield or costs. I have enclosed the relevant sections of these bills as passed by the Legislature.

I have also enclosed a copy of a letter from Governor Romer to the leadership of the House and Senate committees before which you recently testified. As Governor Romer's letter indicates, the Department of Natural Resources has undertaken significant efforts with permittees whose permits are now under review to develop cooperative joint management agreements that are hydrologically supportable and biologically beneficial, and which are also consistent with state law.

I hope you can agree that a cooperative watershed-based approach, such as that which the Department of Natural Resources has been working to support, is a productive use of the limited resources of the state, the federal government, and the permittees. Such an approach is preferable to the rigid application of numerical criteria on a permit-by-permit, site-by-site basis made without an overall assessment of the watershed ecosystem. Certainly, such an

Elizabeth Estill -- Forest Service By-pass Flow Issues  
May 12, 1994  
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approach is preferable to the confrontation and litigation which is sure to result if such a rigid application of criteria is made.

I therefore invite the Forest Service to join with the state in developing a foundation upon which ecologically sound watershed-based permitting decisions for existing water facilities can be made, consistent with the need to preserve the ability of the owners of these water systems to rely on and use the water supplies provided by these facilities.

Governor Romer and I recognize and fully support the need to maintain healthy aquatic and riparian ecosystems. But as you know, ecosystems do not respect jurisdictional boundaries. That is why local, state, and federal governments should work together with water users and the environmental community to define and achieve broader ecosystem goals.

The legislation I have attached outlines two alternative paths-- cooperation or litigation. If litigation can be avoided, I am certain that there are responsible members of the water, recreational, and environmental communities in Colorado who are ready and willing to work together with you to optimize the protection and use of our aquatic resources, and that substantial environmental gains can be achieved without sacrificing important water supplies. The State of Colorado is committed to this goal, and I hope that you are as well.

If you are willing to consider joining the effort I have outlined, I propose that we meet soon to explore how a broad-based watershed planning process could be undertaken. I propose as well that Ralph Morgenweck and Bill Yellowtail be included to represent the interests of the Fish and Wildlife Service and the Environmental Protection Agency.


I hope that, together, we can construct an effective, cooperative process and partnership to address these important issues. I look forward to your response.

Very truly yours,



James S. Lochhead  
Executive Director

cc: Ralph Morgenweck, USF&WS  
William Yellowtail, US EPA



United States  
Department of  
Agriculture

Forest  
Service

Rocky  
Mountain  
Region

P.O. Box 25127  
Lakewood, CO 80225-0127  
Delivery: 740 Simms St.  
Golden, CO 80401

Reply to: 2720

Date: MAY 20 1994

James S. Lochhead  
Executive Director  
Department of Natural Resources  
State of Colorado  
1313 Sherman Street, Room 718  
Denver, Colorado 80203

Dear Jim:

Thank you for your May 12 letter.

The Colorado Legislature has authorized the Colorado Water Conservation Board (CWCB) to spend up to \$100,000 for studies of modifications in water facilities operations to improve "watershed" habitat "without adversely affecting water facility yield or costs." I have requested funds to assess existing watershed conditions and monitor effects of existing and future water facility operations and the health of these watersheds. As you know, we need to be mindful of the Federal Advisory Committee Act implications of collaborative efforts and so would be unable to give our funds to the CWCB; however, I believe that we can maximize the expenditure of these limited funds by designing separate studies that complement and supplement each other. The Regional schedule for amendment of Forest Land and Resource Management Plans make it timely to undertake such evaluations as well as other evaluations of watershed health and aquatic needs, and we intend to appropriately consult with the CWCB, other State and Federal agencies, scientists, academics, and representatives of environmental groups.

Until such time as additional data confirms or suggests modification, we will continue to provide a safety net for watershed health by applying current Forest Plan standards on a stream-reach basis for renewal of water facility permits -- including those now pending on the Arapaho-Roosevelt National Forests. If users with pending applications want their permits to incorporate the results of new studies, they could consider volunteering resource protection flows and/or working collaboratively to schedule releases as interim permit terms and conditions.

I appreciate your continuing efforts to find a solution to the issues raised by renewal of water facility special-use permits on the Arapaho-Roosevelt National Forest. The Forest Service looks forward to a productive working relationship with the DNR that will result in a healthy environment for the people of Colorado.

Sincerely,



ELIZABETH ESTILL  
Regional Forester

cc: Forest Supervisor  Gaining for the Land and Serving People

FS-6200-28b(4/88)

# STATE OF COLORADO

## OFFICE OF THE EXECUTIVE DIRECTOR

Department of Natural Resources  
1313 Sherman Street, Room 718  
Denver, Colorado 80203  
Phone: (303) 866-3311  
TDD: (303) 866-3543  
FAX: (303) 866-2115



DEPARTMENT OF  
NATURAL  
RESOURCES

Roy Romer  
Governor

James S. Lochhead  
Executive Director

Ronald W. Cattany  
Deputy Director

June 6, 1994

Elizabeth Estill  
Regional Forester  
Rocky Mountain Region  
P.O. Box 25127  
Lakewood, CO 80225-0127

**Re: 2720; ALTERNATIVE PROCESS TO ADDRESS ISSUES SURROUNDING FOREST SERVICE BYPASS FLOWS**

Dear Elizabeth:

Thanks for your response to my letter of May 12, 1994. By your response, I am concerned that I did not clearly communicate my proposal to you.

First, I would not propose that the Forest Service provide funds directly to the Colorado Water Conservation Board. Rather, my proposal is that state funding and federal funding be used in a joint cooperative effort to develop a framework for the processing of Forest Service permits on a statewide basis. Obviously, we need to comply with federal law in doing so, and I do not seek to dilute jurisdictional authority. However, I do believe federal, state and local agencies can exercise their authorities in a more coordinated and cooperative fashion. Although the scope of such an effort is certainly open for discussion, my thoughts are that an initial study have the following goals:

1. The identification of logical groupings of permits, based on criteria such as date of renewal, type of permit and location.
2. An assessment of the appropriate habitat, on a watershed or landscape level, affected by the activities authorized by the respective permit groupings.
3. An identification, on a watershed or landscape level, of the threats to the particular identified habitat by the activities authorized by the relevant permit groupings.
4. An initial conceptual level identification of possible opportunities for joint operation between permittees, management alternatives or other permit conditions which would

eliminate or mitigate the identified threats, including the use of the state's instream flow program for flow enforcement. The overriding goal of this effort would be to preserve or enhance habitat, consistent with state and federal law, without decreasing water system yield or significantly increasing costs to permittees.

As I mentioned in my previous letter, the participation of the EPA and Fish and Wildlife Service as partners in this study would be ideal.

It seems to me such a framework offers several advantages:

1. It encourages a multi-jurisdictional approach to permitting decisions on a broad habitat level.
2. It identifies and addresses specific threats to particular habitats as opposed to simply imposing permit-by-permit bypass requirements which may or may not address those threats.
3. The study would be undertaken under the premise that joint management opportunities would serve to preserve the yield of existing facilities and not increase the cost of operation to existing permittees. This is consistent with the idea that a reduction in historic yield of the water delivery facility may result in new habitat degradation as a result of the development of alternative supplies.
4. Such an approach breaks down barriers, and encourages cooperation between state, local and federal governments.
5. Such an approach involves all relevant federal agencies, upfront, in the process. This results in a more comprehensive approach to permitting decisions, a sense of security among the water user community, and is likely to increase confidence within the environmental community that a comprehensive analysis has been undertaken.

I believe the concepts suggested in this approach are supported by a broad range of policies adopted by the federal administration. Nevertheless, it seems to me this initiative breaks considerable new ground in promoting government efficiency and the concept of habitat-based management consistent with the preservation of state law and the preservation of system yield.

Therefore, I would like to renew my invitation to you, Ralph Morgenweck and Bill Yellowtail to meet with me to discuss how we might approach such an initiative.

The record which has been submitted to the Forest Service in

Elizabeth Estill  
June 6, 1994  
Page 3

support of the pending permit renewals in the Arapaho Roosevelt National Forest was developed under the cooperative watershed-based approach which I have outlined above. I believe that record, and the proposed operational plans submitted by the permittees, is consistent with the existing Forest Service plan. These permittees have brought considerable expertise, and assets, to the table in a good faith attempt to address habitat concerns on a watershed level. We would like to establish a framework for a similar process statewide. I encourage you to review these existing permits in light of our continued desire to work proactively with you.

Again, thank you for maintaining our dialogue on these important issues. I look forward to working with you.

Very truly yours,

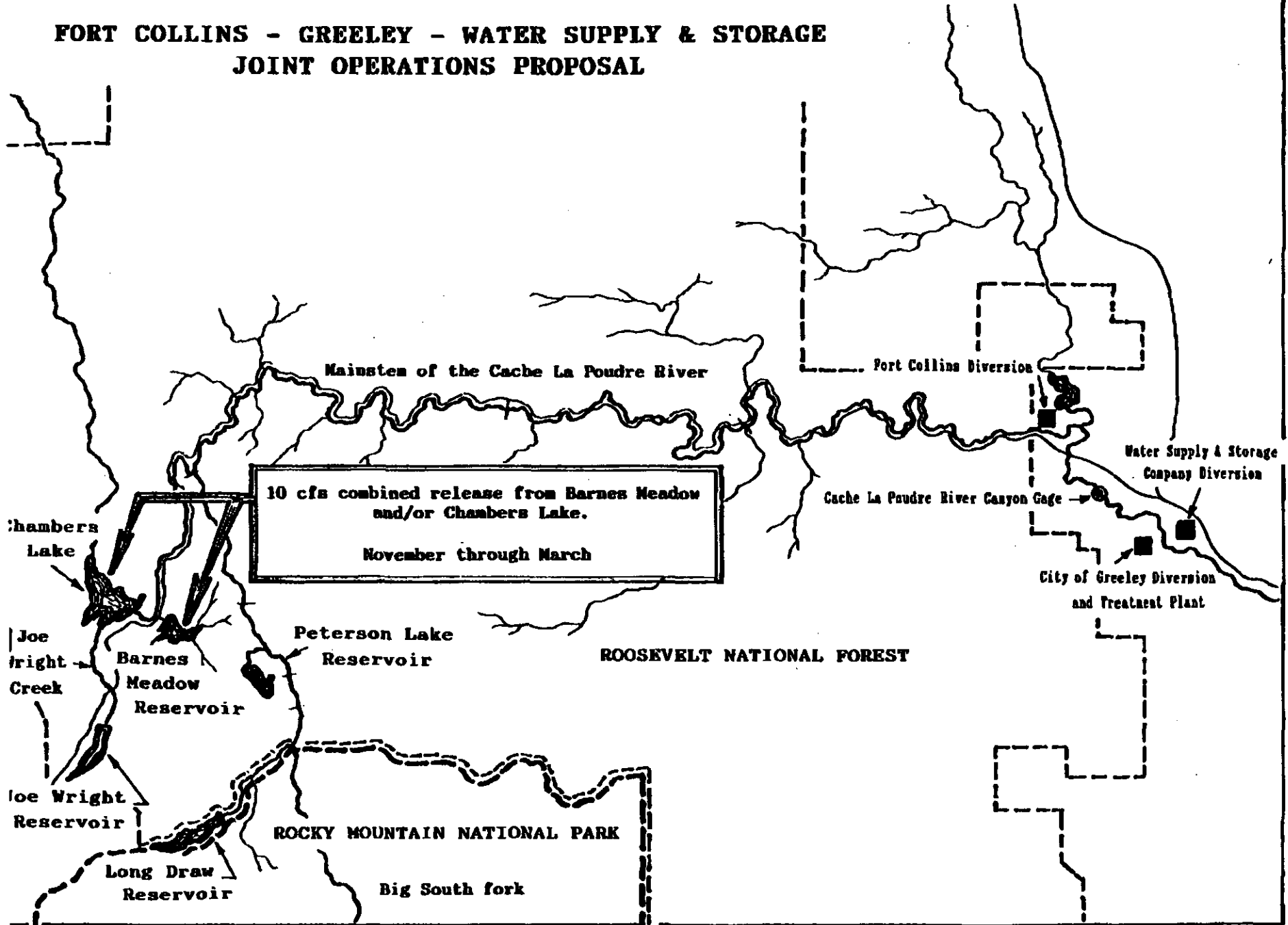


James S. Lochhead  
Executive Director

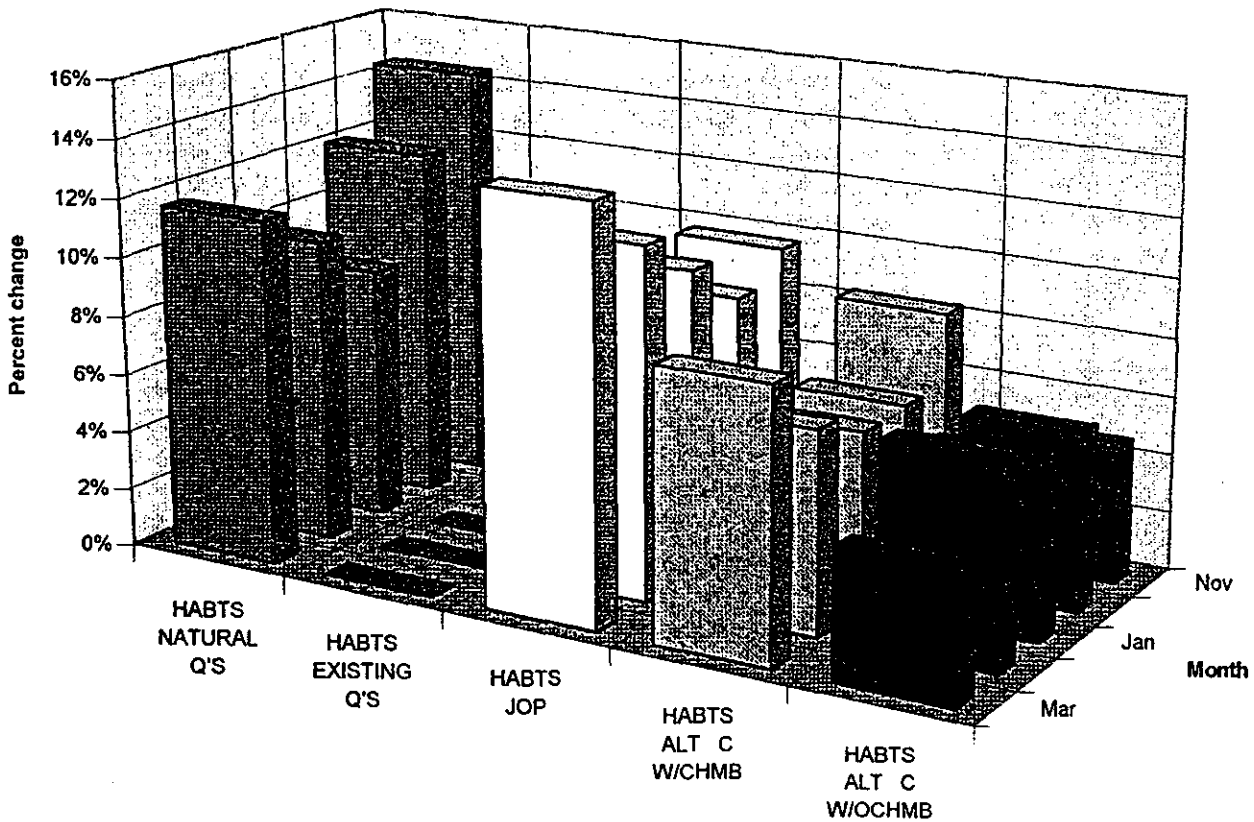
cc: Governor Romer  
Assistant Secretary James Lyons  
Forest Service Chief Jack Ward Thomas  
Senator Ben Nighthorse Campbell  
Senator Hank Brown  
State Senator Don Ament  
State Representative Bill Jerke  
William Yellowtail  
Ralph Morgenweck



# FORT COLLINS - GREELEY - WATER SUPPLY & STORAGE JOINT OPERATIONS PROPOSAL



**Percent change in habitat from existing habitat for Brown Trout Juvenile for average year**



Comparison of Joint Operations with natural, existing and USFS recommended bypass flows.

HABTS NATURAL Q's = Natural flows

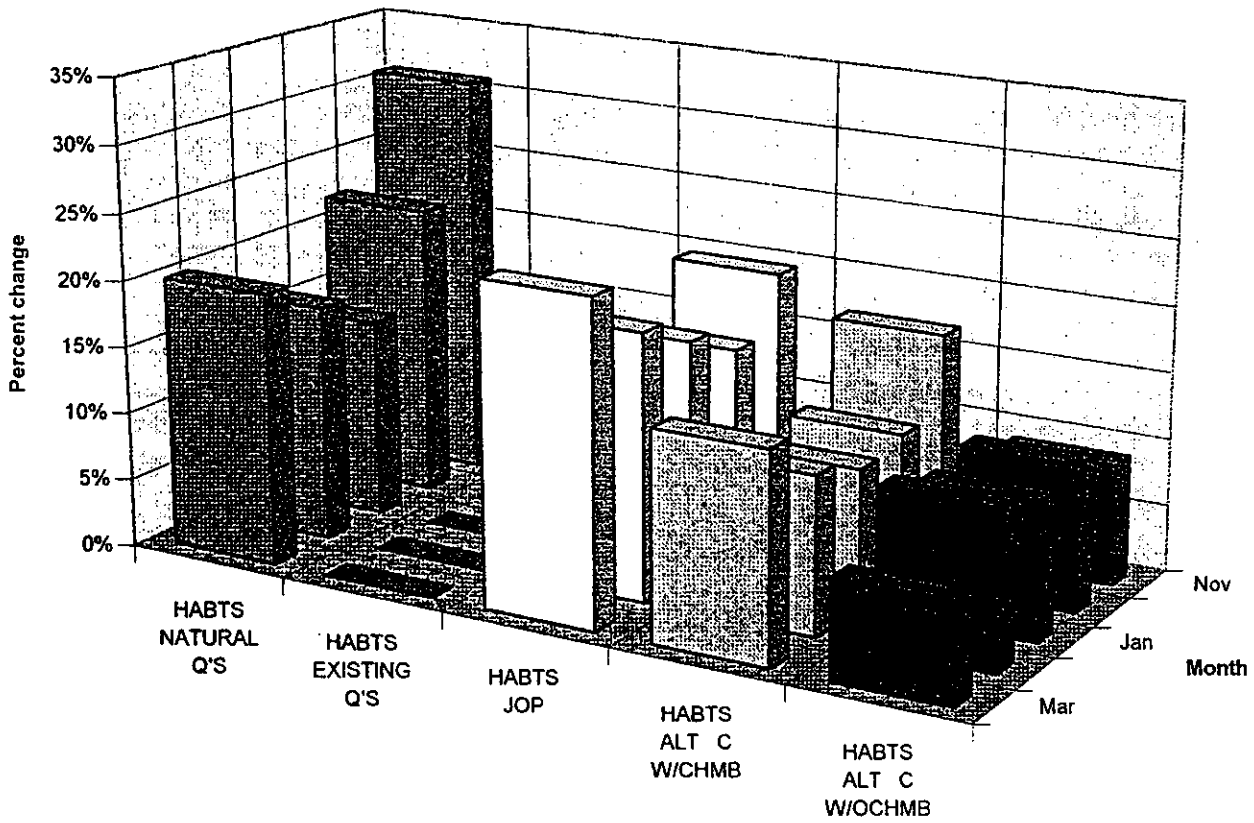
HABTS EXISTING Q's = Existing (baseline conditions)

HABTS JOP = Joint Operations

HABTS ALT C W/CHMB = USFS recommended flows with Chambers Lake

HABTS ALT C W/OCHMB = USFS recommended flows without Chambers Lake

**Percent change in habitat from existing habitat for Brown Trout Adult in average year**



Comparison of Joint Operations with natural, existing and USFS recommended bypass flows.

HABTS NATURAL Q's = Natural flows

HABTS EXISTING Q's = Existing (baseline conditions)

HABTS JOP = Joint Operations

HABTS ALT C W/CHMB = USFS recommended flows with Chambers Lake

HABTS ALT C W/OCHMB = USFS recommended flows without Chambers Lake

# DIVISION OF WILDLIFE

AN EQUAL OPPORTUNITY EMPLOYER



For Wildlife -  
For People

Perry D. Olson, Director  
606 Broadway  
Denver, Colorado 80216  
Telephone: (303) 297-1192

May 24, 1994

Mr. Skip Underwood  
Arapaho--Roosevelt National Forest  
240 West Prospect Avenue  
Fort Collins, Colorado 80521

Dear Mr. Underwood:

Recently, staff of the Colorado Division of Wildlife have participated in a process facilitated by the Colorado Department of Natural Resources to review and evaluate alternatives for management of river flow in the Cache La Poudre River basin. The process has specifically sought to compare, on the one hand, bypass flows that may be required of water storage facilities located on the Forest land as a condition of renewal for Forest Service special use permits, and on the other hand, a Joint Operations Plan submitted as an alternative by the cities of Ft. Collins and Greeley, and the Water Supply and Storage Company.

As described to CDOW staff by the facility owners, this Joint Operations Plan (Plan) would entail a constant release of 10 cubic feet per second (cfs) from Barnes Meadow and Chambers Lake reservoirs from November through March to enhance flows in Joe Wright Creek and in the mainstem of the Poudre River below Joe Wright Creek to Poudre Park. CDOW further understands this steady 10 cfs release will be available in approximately nine years out of ten, and that the facility owners are willing to adjust the Plan to maximize aquatic habitat and recreation benefits consistent with their ability to make use of or store released water. In an average year, we understand that the facility owners can make use of or store through a crediting system about 3000 acre-feet of water over and above direct diversion rights. CDOW intends to work with the facility owners to refine this operations plan over time.

In the course of the facilitated process, five hydrologic scenarios, including Joint Operations and two variants on the bypass flow requirements, were developed for each of nine stream segments on the Poudre River and its tributaries. Trout habitat analysis was then conducted using these hydrologic scenarios, and then summed by stream segments the total Poudre Basin above Poudre Park.

DEPARTMENT OF NATURAL RESOURCES, James S. Lochhead, Executive Director  
WILDLIFE COMMISSION, Thomas M. Eve, Chairman • Louis F. Swift, Vice-Chairman • Arnold Salazar, Secretary  
Jesse Langston Boyd, Jr., Member • Eldon W. Cooper, Member • Rebecca L. Frank, Member  
William R. Hegberg, Member • Mark LeValley, Member

After thorough review of the trout habitat analysis, the CDOW has concluded that the Joint Operations Plan will produce conditions of total fishery habitat in the Cache La Poudre River basin above Poudre Park which are equal to or slightly more favorable than by-pass flows identified by the Forest Service in draft environmental documents. It is also clear that both the plan flows and by-pass flows represent a significant improvement in trout habitat over that which occurs under currently existing conditions. In reaching this conclusion, the Division fully recognizes that certain reaches of stream in the Poudre basin would continue to be dewatered during winter months under the plan in exchange for enhancement of winter flows to other river reaches, primarily the mainstem Cache La Poudre River below the confluence of Joe Wright Creek.

The recently completed habitat analysis suggests that losses of trout habitat in Joe Wright Creek below Joe Wright Reservoir and La Poudre Pass Creek below Long Draw Reservoir will be recovered in portions of the mainstem river extending downstream for 43 miles. Loss of trout habitat in Joe Wright Creek and La Poudre Pass Creek represents less than one-half of one percent of the total trout habitat in the Poudre River Basin above Poudre Park. Winter releases of water from Joint Operations Reservoirs would positively impact trout habitat in the mainstem which comprises 95 percent of total trout habitat in the upper Poudre basin above Poudre Park. Moreover, habitat analysis indicates that enhancement of November - March trout habitat for the entire upper basin through the Joint Operations Plan could range from 2 to 17 percent over suggested by-pass flows, depending on month, trout lifestage, and flow alternative. This enhancement would largely come in the form of additional pool habitat for adult trout during critical winter months, thereby increasing opportunities for winter survival.

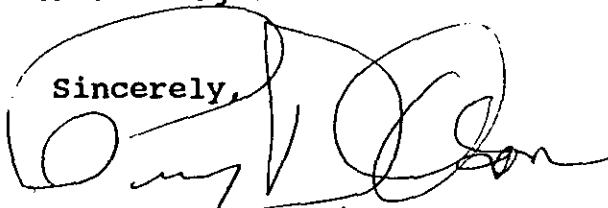
Additionally, Division biologists believe that benefits to benthic invertebrate and riparian systems could accrue under flows released by the Joint Operations Plan.

The Division of Wildlife manages aquatic habitat and fishing recreation opportunities to meet the needs of a broad and diverse public in the context of many other historical water uses. We believe the Joint Operations Plan strives to achieve a meaningful balance between improving flow conditions and aquatic habitat on the one hand, and maintaining reasonable historical water use by human populations on the other. CDOW thus views the Plan as a reasonable and effective alternative approach to flow management and to the maintenance of broad based fishery habitat within the Cache La Poudre River basin.

Mr. Skip Underwood  
Page 3  
May 24, 1994

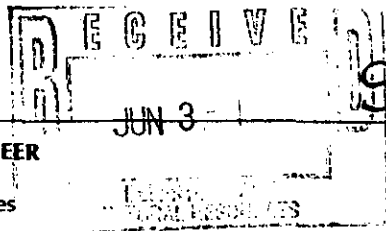
Please do not hesitate to contact me regarding these important issues. If your staff have any questions, please direct them to Mr. Walt Graul in CDOW's Northeast Regional Office at Area Code (303) 484-2836.

Sincerely,

A handwritten signature in black ink, appearing to read "Perry Olson", written over a circular stamp or mark.

Perry Olson  
Director

xc: Wildlife Commission  
Jim Lochhead  
Chuck Lile  
Elizabeth Estill  
Walt Graul  
Eddie Kochman  
Steve Puttmann  
Jay Skinner



# STATE OF COLORADO

**OFFICE OF THE STATE ENGINEER**  
Division of Water Resources  
Department of Natural Resources  
1313 Sherman Street, Room 818  
Denver, Colorado 80203  
Phone (303) 866-3581  
FAX (303) 866-3589



Roy Romer  
Governor

James S. Lochhead  
Executive Director

Hal D. Simpson  
State Engineer

June 2, 1994

Mr. Skip Underwood  
Arapahoe-Roosevelt National Forest  
240 West Prospect Avenue  
Fort Collins, CO 80521

Dear Mr. Underwood:

Over the past few weeks some of our staff have been involved in the process regarding the re-issuance of special use permits for several entities that have storage facilities located within the forest in the Poudre River basin. The entities have proposed a joint operations plan involving releases of water from some of their facilities to enhance river flows as an alternative to other options, including the option of requiring by-pass flows through their facilities during winter months. The joint operations plan involves the release of about 3,000 acre-feet of water at the rate of 10 cfs to the Poudre River from November through March each year. It is our understanding that such releases would improve the overall fishery habitat within the Poudre basin since the releases from the reservoirs would occur at critical times and benefit a large part of the fishery. We also agree concerning the hydrology and runoff projections utilized by the various parties involved in the development of the plan.

The Division of Water Resources has reviewed the joint operations plan as presented by the water users in the Poudre basin and feels that such a plan has benefits to the habitat and to water users. Operation of the plan would not cause problems with water rights administration since the operation involves releases of stored water to decreed uses at downstream locations. also, any releases from Joe Wright Reservoir to temporary storage in Chambers Lake Reservoir for subsequent wintertime releases to the river can be accounted for using normal water accounting techniques. In contrast, the requirement of by-pass flows will most likely result in the loss of valuable water resources to the entities involved since they would lose their right to store and utilize those waters if passed. Because the proposed joint operations plan balances the needs of the basin fishery habitat and preserves valuable water rights, the Division of Water Resources considers the plan to be a reasonable alternative to the requirement to by-pass water through the facilities in question.

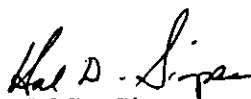
Mr. Skip Underwood  
June 2, 1994

Page 2

We believe this plan would allow the storage facilities to continue to utilize their water rights to achieve storage objectives established many years ago while also allowing the National Forest to maximize multiple use objectives established at the time the forest was authorized.

Please feel free to contact me regarding these issues if there are any concerns or questions that you have. Also, you can contact Alan Berryman or Shawn Hoff regarding specific questions about the administration of the waters in the Poudre basin.

Sincerely,

  
Hal D. Simpson  
State Engineer

HDS/ma

cc: James Lochhead, Executive Director  
Doug Robotham  
Chuck Lile, Director, CWCB  
Alan Berryman, Div. Eng.



**N E W S R E L E A S E**



**HANK  
BROWN**  
U.S. SENATOR FOR COLORADO

For Immediate Release  
February 23, 1994

Contact: Christa  
Jennifer  
(202) 224-0344

**BROWN: EPA LETTER "SMOKING GUN" IN CLINTON'S WAR ON THE WEST**

WASHINGTON, D.C. - U.S. Sen. Hank Brown (R-Colo.) today said an Environmental Protection Agency (EPA) letter concerning reservoirs that serve Fort Collins, Boulder, Greeley and Loveland is a blatant attempt to steal Colorado's water by ignoring existing water rights.

"This is the smoking gun in the federal government's efforts to take Colorado's water," Brown said. "All along the government has assured us that they have no intention of taking water rights, but this EPA letter is a clear roadmap for stealing Colorado's water. It gives the Forest Service guidance on how to do it and even describes how much to take."

The letter from EPA Regional Administrator William P. Yellowtail states that the Forest Service can use provisions of the Federal Land Policy Management Act to deny the renewal of permits for the Boulder Hydro Gravity line, the Joe Wright Reservoir and the Long Draw Reservoir until the cities forfeit 4 billion gallons per day of water mostly used for drinking.

"This really puts the fat in the fire," Brown said. "Minimum stream flow is an appropriate concern which I have supported. But the government ought to do that by buying water rights -- not stealing them."

In 1973, as a state senator, Brown was an original cosponsor of Colorado's first instream flow law. He also was chief sponsor of legislation in 1986, while serving in the U.S. House of Representatives, designating a portion of the Cache La Poudre as Colorado's only wild and scenic river.

"If the EPA really proceeds to completely ignore the requirements of existing law, they will affect virtually every city and farmer in the state," Brown said. "Our cities will have to go to court to protect our rights."

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**MEMORANDUM**

**THIS IS NOT A  
LEGAL OPINION**

April 20, 1994

**TO:**

**FROM:** Legislative Council Staff

**SUBJECT:** Constitutional Takings of Private Property

This memorandum responds to your request for information on the issue of takings of private property by governmental agencies. The memorandum is divided into three sections: an introduction; a section addressing relevant case law; and a section addressing takings legislation in the states.

**INTRODUCTION**

The Fifth Amendment to the United States Constitution states that "no person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." Under this "takings clause," courts allow two distinct types of suits regarding private property.

**Condemnation** is the exercise by a federal, state, or local government of its power of eminent domain in a suit filed by the government against a owner of the private property to be taken. A **taking action**, by contrast, is a suit by a property holder claiming that government actions have effectively, if not formally, taken the property . . . by restricting its use. A taking suit asks that the government . . . compensate the property owner, just as when government formally condemns.<sup>1</sup>

When government physically invades property or sets it aside for public use under the power of eminent domain, the action is legally considered a taking and requires compensation.<sup>2</sup> On the other hand, when government exercises its police power and restricts the use of property, a "regulatory taking," whether the property is taken in the Fifth Amendment sense is not easy to determine. In recent decades, with the advent of land-use and environmental regulation, landowners have increasingly sued governments for regulatory takings to recover loss of any market value of their property.

The next section of this memorandum outlines, in chronological order, a selection of significant Supreme Court and U.S. District Court cases which have established some of the

precedents on which current takings decisions are based. That discussion provides an overview of a limited number of legal concepts and terminology relevant to takings issues (and points out that in takings cases, sometimes the property owner wins and sometimes the government wins). The list below is a synopsis of those concepts presented in the discussion of federal court decisions.

1. Courts look at the "balancing of public benefit against private loss": a corollary is that government action should "substantially advance a legitimate government interest."
2. Each case is an individual case, examined on an ad hoc basis.
3. Diminution of value in property, per se, does not constitute a taking -- but if all economically viable use of the property is eliminated by government action, the owner has a better chance of winning a takings case.
4. The Court has never announced a specific threshold for loss of property value before a taking can be found.
5. The extent to which a government action interferes with "reasonable investment-back expectations" will be considered.
6. The Court examines property rights as a whole -- the "bundle of rights" -- not just the "strand" affected by the government action.
7. The Court has no set formula for determining when "justice and fairness" requires compensation or what "just" compensation is.
8. Elimination of the "highest and best use" of property does not, per se, constitute a taking.
9. Property owners need to pursue all legal economic uses of property before suing for a taking: the issue of property loss should be "ripe" before suing.
10. Generally, exceptions to takings findings are made for "nuisances" -- a use of property or course of conduct that interferes with the legal rights of others by causing harm or annoyance.
11. A "temporary taking" can occur, requiring compensation for the period of taking.
12. A "rational nexus" should exist between the government action and the loss of property rights.

## FEDERAL COURT DECISIONS IN TAKINGS CASES

(1922) *Pennsylvania Coal Co. v. Mahon*. In perhaps the most historically important taking decision, the Supreme Court extended taking actions from government appropriations and physical invasions of property to the regulation of property use.<sup>3</sup> A state law had barred any underground mining which could cause subsidence of surface streets or buildings, even though coal mining companies had retained the mineral rights when the surface was sold, and the surface property owners had previously waived any right to underground support. Because the state law applied only where the surface estate owner was different from the mineral estate owner, the Court decided that the law benefited a narrow private interest rather than a broad public one.<sup>4</sup> The Court also found that although the law served a valid public purpose, constitutionally, the state should buy the mining company's property interest. Since the state law did not authorize compensation, the law was struck down. Justice Holmes, writing for the majority, said, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>5</sup> (The issue of "too far" remains a consideration in takings cases today.)

(1978) *Penn Central Transportation Company v. New York City*. The Supreme Court offered an economic theory of regulatory takings law, stating that three factors determine if a taking occurs: (1) the character of the governmental action; (2) the economic impact of the regulation; and (3) the extent to which the regulation interferes with "reasonable investment-back expectations."<sup>6</sup> The case involved a landmark preservation designation that prevented the owners from adding additional floors above Penn Central Station. The Court focused on the value of the owners' property as a whole — the "bundle of rights" — not just on the air rights that had allegedly been taken, and determined that an owner must be denied all reasonable use of a property for a taking to occur. The court analyzed the past uses of the property to see if the owners could continue those uses.

Justice Brennan, writing for the majority, declared that "taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."<sup>7</sup> The court focused on the ability of the landowners to enjoy a "reasonable return" on their investment and the right to use their land for purposes consistent with the public interest.

(1979) *Kaiser Aetna v. United States*. The Supreme Court has also considered whether a sufficient relationship exists between needs created by a project and the type of access required. In this case, the state of Hawaii demanded that public access be granted from a bay to a private pond that had been dredged to create a marina connected to the bay. The Hawaii Court of Appeals stated that the pond was subject to the navigational requirements of the federal government, thus giving the public right to access. The Supreme Court, however, held that the state's attempt to create a public right of access to the marina went "so far beyond ordinary regulation or improvement for navigation involved in typical riparian condemnation cases as to amount to a taking requiring just compensation."<sup>8</sup> Alluding to previous takings decisions, the

Court further stated that it had generally been unable to develop any "set formula" for determining when "justice and fairness" required that economic injuries caused by government action be compensated. Rather, the Court observed that it had historically examined the takings cases on an ad hoc basis.<sup>9</sup>

**(1979) *William C. Haas & Co. v. City and County of San Francisco.*** The decision by a California federal court in this case held that elimination of the "highest and best use" of a property does not constitute a taking. The court upheld a local zoning regulation that reduced the height of a future high-rise building from 400 to 300 feet, despite a diminution in speculative value from \$2 million to \$100,000.<sup>10</sup> The court cited the public benefit of less neighborhood congestion, solar access for neighbors, and preserving aesthetic values to the city as a whole.

**(1980) *Agins v. City of Tibourn.*** This land use case, often related to the *Penn Central* case, supported the theory that regulatory taking occurs if (1) they do not substantially advance a legitimate government interest, or (2) government controls eliminate all economically viable use of the land.<sup>11</sup> After the plaintiffs had acquired five acres of unimproved land in Tiburon, California for residential development, the city adopted zoning ordinances that limited the plaintiffs to building one to five single-family residences and to open-space uses of the property. Without submitting a development plan under the ordinances, the owners filed suit, asking money damages for a taking.

The Supreme Court denied the appeal for three main reasons. First, the court decided that the ordinances substantially advanced the legitimate goal of discouraging premature and unnecessary conversion of open-space to urban uses and were proper uses of the city's police power. Second, the benefits of the city's police power that the owners shared must be considered along with any diminution in market value that the owners might suffer. Third, since the owners were free to pursue "reasonable investment-backed expectations" by submitting a development plan to the city, the ordinances were not a taking.<sup>12</sup> The case was not "ripe" for a law suit.

**(1986) *Mcdonald, Sommer & Frates v. Yolo County.*** A property owner filed a claim for monetary damages for "inverse condemnation" (compensation for property when condemnation proceedings have not been instituted) because the county planning commission rejected a subdivision plan. The owner alleged that the commission denied the applicant the entire economic use of the property, other than agricultural land, for the purpose of providing a public, open-space buffer. The commission found several reasons why the owner's subdivision plan was not consistent with zoning regulations. The Supreme Court declared that no inverse condemnation had occurred. Until the owner was denied a development application under allowable uses, the case was not "ripe" for a law suit. Also, the Court could not determine whether compensation was "just" until it knew what compensation state or local government would provide. In practice, this has meant that denial of a property owner's *ideal* development proposal may not be sufficient grounds for a takings claim, when scaled-down versions might be approved.<sup>13</sup>

(1987) *Keystone Bituminous Coal Association. v. DeBenedictis*. In a case similar to *Pennsylvania Coal*, a group of coal companies sued when Pennsylvania again enacted a mining subsidence act to protect the public against surface subsidence from underground mining. The law required that coal operators leave 50 percent of the coal beneath public buildings, homes, and cemeteries in place to support the surface.<sup>14</sup> After rejecting the mining companies argument that it focus on the restricted portion of their property, the Court found that the law did not create an unconstitutional taking on its face because the legislation did not make the mining of certain coal commercially impracticable. The restricted portion represented only one "strand" in a larger "bundle of rights" associated with the coal company's property as a whole. In denying the takings claim, the Court found that a reasonable use remained in the estate. The subsidence act was also a legitimate exercise of the state's police power to prevent actions that were tantamount to public nuisances. (This decision has been referred to as the "nuisance exception": certain regulations, when they prevent nuisances or harm to the public health and safety, are exempt from the Fifth Amendment prohibition on takings.<sup>15</sup>)

(1987) *First English Evangelical Lutheran Church v. County of Los Angeles*. In this case, floodplain regulations prevented a church from rebuilding structures in a campground for handicapped children after a flood had destroyed the camp. The church alleged that the regulations had denied all use of their property and sued for monetary damages for inverse condemnation. Prior to the decision in this case, in most jurisdictions, the only remedy for the over-regulation of land was to rescind the regulation, but that action left the plaintiff without compensation.<sup>16</sup>

In this case, the Court did not determine whether a taking had occurred, but determined that a "temporary taking" that denies the landowner *all use* of the property is not different from a permanent taking, and that compensation is required for the period that the taking is in effect. In other words, if a taking is indeed found by a court and the regulation is rescinded, the government owes the landowner compensation for the period when the regulation was in effect. (Ironically, this case was remanded to the state appeals court and the church lost because the public necessity of protecting human lives was found to outweigh the economic impact on the landowner.)

(1987) *Nollan v. California Coastal Commission*. This case addressed the growing practice by governments of requiring "exactions," or conditions, from developers to offset the cost of government projects for public benefit. As a condition for a permit to expand a home, The Coastal Commission required that a beachfront homeowner allow the public to cross the owner's property along the beach to allow access between two public beaches. The Commission decided that the Nollan's new house would obstruct visual access to the beach, and the public access across the beach was a tradeoff.

The Court held that development exactions are valid and would be upheld — even if the exaction amounted to a permanent physical occupation of land or a prohibition on development — if these exactions substantially further valid public interests and respond to problems created by the new development.<sup>17</sup> The Court required that a "rational nexus," however, exist between

the landowner's development and the government purpose for the taking of property rights. The exaction in this case was struck down because the Court determined it was a classic right-of-way easement requirement that was not reasonably related to the development.

**(1992) *Lucas v. South Carolina Coastal Council.*** In 1986, David Lucas bought two lots on a South Carolina barrier island for residential development, which was legal at the time. In 1988, South Carolina enacted the Beachfront Management Act, barring Lucas from building any permanent housing on the lots. After the state Supreme Court ruled that Lucas could not be compensated because building on the lots would be hazardous to public safety, Lucas appealed to the U.S. Supreme Court.

The Supreme Court agreed that government regulation of land that eliminates *all* economic use is "*per se* a taking," even when the regulation is enacted for public safety, and requires compensation under the Fifth Amendment.<sup>18</sup> Nonetheless, the Court recognized that total economic loss is an "extraordinary circumstance." A second ruling was more abstract. The Court remanded the case to the state Supreme Court, requiring that court to determine "whether and to what degree the state's common laws [of property and nuisance] have accorded legal recognition and protection<sup>16</sup> the particular interest in land" that has been affected by the restriction.<sup>19</sup> In other words, if Lucas wanted to exercise an interest in the property which was legal under the state's history of nuisance law when he bought the land, then his Fifth Amendment rights were violated by the new restriction. Some legal scholars interpret this ruling as a narrowing of the "nuisance exception" in takings law.

The South Carolina Supreme Court subsequently concluded that nothing in common law prevented Lucas from building houses on the property. In consideration of the mounting attorney's fees, the state eventually settled out of court by purchasing Lucas's lots for \$1.575 million.

**(1993) *Concrete Pipe and Products v. Construction Laborers Pension Trust.*** In this non-land use case, Concrete Pipe sued the pension trust because withdrawal from the trust would cost 46 percent of Concrete Pipe's pension investment. The Supreme Court reaffirmed three principles of takings jurisprudence: 1) the ad hoc nature of each takings case, 2) that property in question must be viewed as a whole, and 3) that "diminution in the value of property, however serious, is insufficient to demonstrate a taking."<sup>20</sup> Concrete Pipe lost the case.

**(1994) *Florence Dolan v. City of Tigard.*** This ruling for this case, heard by the Supreme Court on March 23, 1994, will be announced in June. As a condition for a permit to expand a hardware store, the City of Tigard, Oregon, required the owner to build a bicycle path along a creek behind the store and to dedicate adjacent land as greenway. The conditions were required to mitigate increased traffic and water runoff causes by the expanded store. The case raises fundamental questions about the constitutionality of land-use regulation.

## STATE TAKINGS LEGISLATION

Provided below are (1) a brief chronology of recent state takings legislation, and (2) summaries of legislation that have recently been enacted in the states concerning the taking of property by state agencies.

### Takings Chronology

- 1992 – In 1992, Washington, Delaware and Arizona enacted takings legislation.
- 1993 – Thirty-two states considered takings measures in 1993. Of these states, two enacted takings laws (Indiana and Utah); the Governors of three states vetoed takings bills (Florida, Idaho, Missouri), and; three states established takings study commissions (Florida, Rhode Island, Virginia).
- 1994 – State legislatures are currently considering 56 takings measures.

### State Legislation

Provided below are summaries of the takings bills enacted in Indiana, Utah, Washington, Delaware and Arizona.

**Indiana.** The Indiana General Assembly adopted House Bill 1646 at its 1993 session to amend Indiana statutes concerning administrative rules. The bill requires the attorney general of Indiana to review every proposed rule for legality.

- In the review, the attorney general is required to consider whether the adopted rule may constitute the taking of private property without just compensation to an owner.
- If the attorney general determines in the course of the review that a rule may constitute a taking of private property, then the attorney general is required to advise the agency head and the governor of this fact. Indiana statute grants the attorney general 45 days to either approve or disapprove a proposed rule.

**Utah.** The Utah legislature enacted the Private Property Protection Act in 1993. This statute:

- requires state agencies to compensate property owners for actions that substantially interfere with, or result in a constitutional-taking of private property;
- requires agencies to create guidelines to determine if there is a taking;



- provides for an assessment to be made before the action is taken; and
- provides for emergencies when health and safety are at issue.

*Washington.* The Washington legislature passed House Bill 1025 at a special session in 1991. A portion of the bill addressed takings of private property. The statute:

- required that the Washington attorney general establish, before October 1, 1991, a process to enable state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that the actions would not result in an unconstitutional taking of private property;
- requires that the attorney general review and update the process at least on an annual basis to maintain consistency with changes in case law;
- requires state agencies and certain local governments to use the process established by the attorney general;
- requires that the attorney general in consultation with the Washington state bar association develop a continuing education course to implement the new law; and
- states that the process used by government agencies be protected by attorney/client privilege.

*Delaware.* In 1992, Delaware enacted a bill relating to assessment of whether or not rules and regulations established by state agencies may result in a taking of private property. This statute:

- requires attorney general review of rules and regulations for potential taking of private property; and
- defines "taking of private property."

*Arizona.* The Arizona Private Property Rights Protection Act was enacted in 1992. This statute:

- defines "constitutional taking";

- instructs the Arizona attorney general to adopt guidelines to assist state agencies in the identification of governmental actions that have constitutional taking implications;
- requires state agencies to prepare assessments of the constitutional taking implications of their actions, to identify alternatives that may reduce the impact on private property owners, and to estimate the financial cost to the state for compensation; and
- requires that prior to taking an action with constitutional-taking implications, an agency must submit a copy of the assessment to the governor and to the joint legislative budget committee.

This law is subject to a voter referendum at the November 1994 Arizona general election. Therefor, the law may or may not take effect depending on the outcome of the election.

For further information contact Clyda Stafford or  
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## CASE CITATIONS

Citations are listed below in the order that the cases appear in the text.

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## ENDNOTES

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13. *Supreme Court Reporter*, 477 U.S. 340 (1986), p. 2566.
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