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Fall 1999

Resource Law Notes Newsletter, no. 47, fall issue, 1999

University of Colorado Boulder. Natural Resources Law Center

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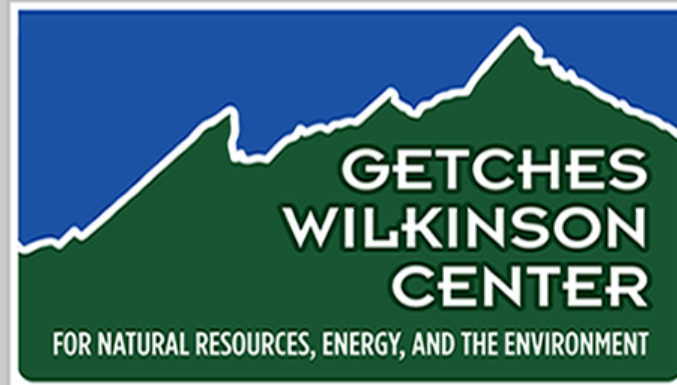
Citation Information

Resource Law Notes: The Newsletter of the Natural Resources Law Center, no. 47, fall issue, 1999
(Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).



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RESOURCE LAW NOTES, no. 47, fall issue, 1999 (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).

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RESOURCE LAW NOTES

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no. 47

Natural Resources Law Center

School of Law

University of Colorado at Boulder

Number 47

Fall Issue, 1999

STRATEGIES IN WESTERN WATER LAW AND POLICY:

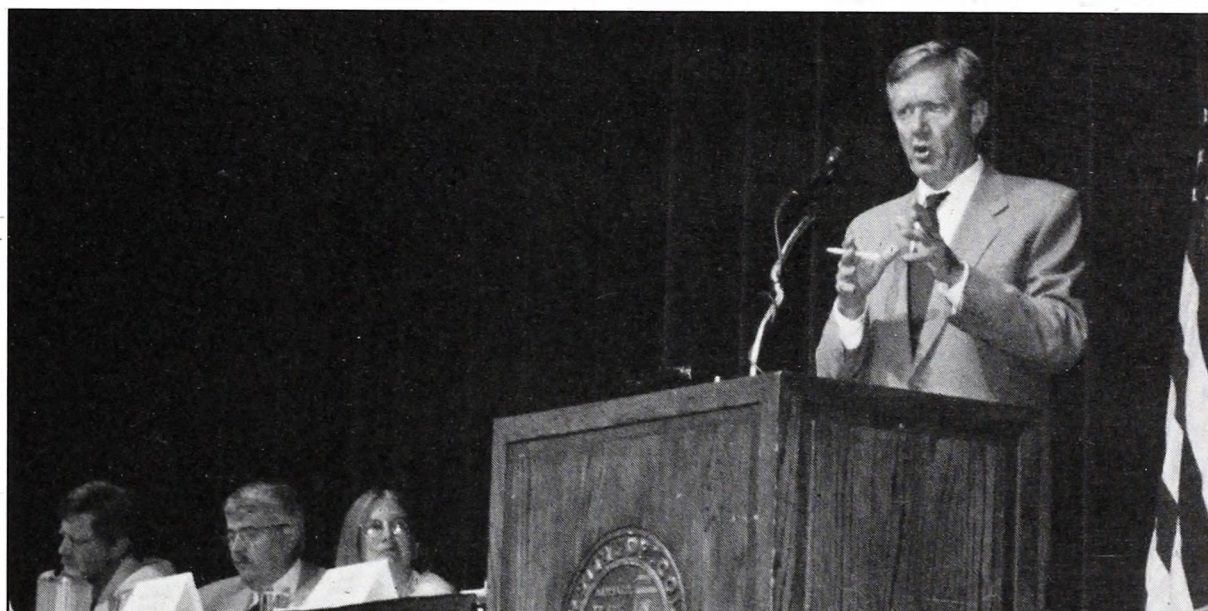
Courts, Coercion and Collaboration

Conference Summary

From June 8-11, the Natural Resources Law Center held its twentieth annual summer conference, entitled *Strategies in Western Water Law and Policy: Courts, Coercion and Collaboration*.

The conference began with a public forum on the Western Water Policy Review Advisory Commission's report "Water in the West" featuring Secretary of the Interior Bruce Babbitt. Other panel members were Denise Fort of the Advisory Commission, Craig Bell of the Western States Water Council, and author William DeBuys.

After a welcome address on Wednesday morning by NRLC Interim Director Kathryn Mutz, the first session of the conference got under way. The University of Colorado School of Law's Professor David Getches was the first speaker of the morning; Getches, along with Professor Jim Corbridge founded the summer conference series, which led to the creation of the Natural Resources Law Center. Getches summarized the major developments in western water law in the 1990s, including the protection of environmental values through the change in use or removal of dams and other "improvements". Also evident in the 1990s has been the increasing influence of



Interior Secretary Bruce Babbitt and WWPRA Commission panel

federal environmental laws on water allocation, basin-wide adjudications, and broader participation at all levels of decision making.

In the keynote address that followed, Patricia Beneke, Assistant Secretary for Water and Science, Department of the Interior, highlighted environmental restoration projects that the Department is currently undertaking in the Grand Canyon, the Platte River, the California Bay Delta, and the Florida Everglades. The intent of these projects is to protect these areas from further environmental harm, and to restore some of the natural values that were lost due to water development. Highlights of such efforts include releases of water from Glen Canyon Dam into the Grand Canyon to simulate unobstructed flows of the Colorado River, and removal of cement drainage canals in the Everglades, which has allowed the River of Grass to flow on its natural course.

In the afternoon, the conference turned to explore the first of three strategies in western water law and policy: contention in the courts. The first panel included three active participants in Colorado water cases. Judge Jonathan Hays of Water Division 1 focused his comments on current decisions and

practices in Colorado Water Courts, including both surface and groundwater issues and Justice Gregory Hobbs of the Colorado Supreme Court highlighted many of the changes that have occurred in Colorado Water Courts. Melinda Kassen of Trout Unlimited concluded the discussion from the perspective of an environmentalist who might practice in the Colorado water courts and provided her views on how these courts need to change.

The final two speakers of the "Courts" segment of the conference explored basin-wide adjudications. Ramsey Kropf, an alum of the University of Colorado School of Law, provided valuable background information on general western stream adjudications and a very practical perspective on what works and what doesn't. Reid Chambers, a veteran of three decades of work with tribes in water adjudications and water rights disputes, evaluated the system of basin-wide adjudications in terms of its dominant purpose-- to determine and quantify open-ended Indian and other federally reserved water rights in a state court forum that is presumably hospitable to state users. Chambers concluded with reflections on questions of finality of decisions, the rationality of resulting water allocations

Conference Statistics:

33 speakers

241 registrants representing:

- 17 states & the District of Columbia
- 57% from Colorado

Attendees consisted of:

- 33% federal government
- 19% state & local government
- 7% Indian Tribes
- 17% law firms
- 11% academics
- 12% non-profits
- 1% judiciary



Beneke highlights DOI water policy

and plausible alternatives to this expensive, time-consuming process.

The Snake River Basin Adjudication (SRBA) was addressed by three extremely knowledgeable attorneys with diverse backgrounds. Charles Wilkinson, Moses Lasky Professor at the University of Colorado School of Law and moderator of the session, provided a background for the speakers through his reflections on the Snake River.

Michael Gheleta, a trial attorney with the Environment and Natural Resources Division of the U.S. Department of Justice in Denver, covered the adjudication of Federal water rights in the basin. Over 62 percent of Idaho's land is under the control of four federal agencies (Forest Service, BLM, National Park Service, and Fish and Wildlife Service) and the federal government has filed over a third of the approximately 175,000 consumptive and non-consumptive claims in the adjudication. Peter Monson, Assistant Chief, Indian Resources Section of the Environment and Natural Resources Division followed discussing Indian water rights in the context of the SRBA. The claims asserted on behalf of the tribes include claims for consumptive uses on the reservations and non-consumptive claims on and off the reservations. Jeffrey Fereday, an attorney in private practice in Boise, addressed the concerns of private claimants and the nature of their claims as well as the procedures of the SRBA and unique elements of the Idaho process.

The changing face of coercion (command-and-control statutes) was the focus of the Thursday afternoon session, which began with a discussion of the Clinton Administration's Clean Water Action Plan (CWAP) by Sylvia Baca, the Acting Assistant Secretary of the Interior

for Land and Minerals Management. She explained that the CWAP contained three guiding principles: 1) it encourages coordination and reduces duplication among federal, state, and local agencies and tribal governments wherever possible, 2) it maximizes the participation of community groups and the public, placing particular emphasis on ensuring community access to information about water quality issues, and 3) it emphasizes innovative approaches to pollution control, including incentives, market-based mechanisms, and cooperative partnerships with landowners and other private parties. Baca stressed that the CWAP is not a final decision, but should be viewed as a blueprint for future action and that the goals of the CWAP will not be achieved without full public participation and broad public consensus on these contentious issues.

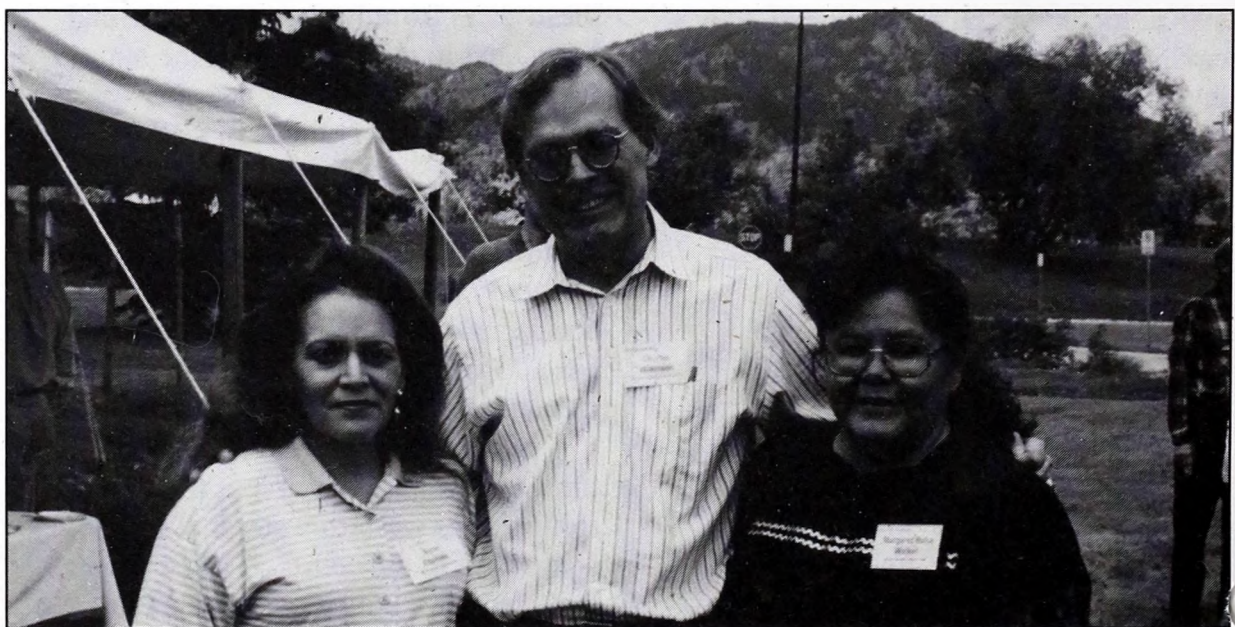
Bruce Zander, TMDL coordinator for Region 8 of the Environmental Protection Agency spoke next about the TMDL implementation process under 303(d) of the Clean Water Act. As of April 1999 there were about 45 legal actions in 34 states regarding either the implementation, adequacy, pace of development, or application of TMDLs. Zander also noted that the EPA was currently taking steps to improve the TMDL program by revising the TMDL program regulations guided by the recommendations of a Federal Advisory Committee. Proposed changes are scheduled for publication in the Federal Register this summer and after public review and comment final regulations will be published sometime in 2000.

Next David Holm, the Incoming President for the Association of State and

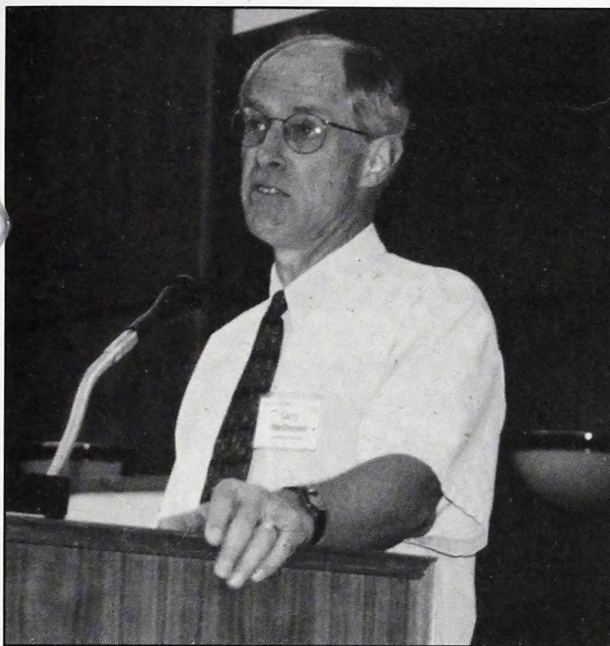
Interstate Water Pollution Control Administrators, gave the state perspective on the TMDL process. Holm noted that the states favor the current approach to dealing with nonpoint source pollution in concert with appropriate combinations of cost effective regulatory and voluntary approaches involving multiple stakeholders in watershed-based efforts. Holm also stressed the need for Federal agencies to utilize management measures which have been certified by the state water quality agency and to be consistent with updated state management plans.

The discussion turned to the Endangered Species Act (ESA) as Joseph Sax of Boalt School of Law, Berkeley, related and interpreted a harrowing dream. Sax stated that the general policy of the Babbitt administration towards resolving ESA issues has been to: 1) strive for negotiated solutions using a partnership approach amongst the United States, local governments and local users; 2) to make these agreements in the context of a large multi-species conservation strategy that gets ahead of the repeated crises that arise from isolated ESA consultations; 3) to provide incentives to water users that anticipate subsequent listings; 4) to build enough achievement into the program to serve as a cushion against future projects or activities; 5) to strive for recovery as opposed to simply avoid jeopardy, and 6) to look for creative solutions that avoid the most intractable prospects. Sax then evaluated achievement of these goals on the Snake River in Idaho, the Middle Rio Grande in New Mexico, and the Platte River in Colorado, Wyoming and Nebraska. He concluded that the picture is positive but mixed.

The final speaker for the afternoon



Wilkinson welcomes old friends to the conference



MacDonnell, Strong, and Leavitt explore value and limits of collaboration

was Mike Conner, Deputy Director of the Secretary of the Interior's Indian Water Rights Office. Conner discussed the federal government's role in Indian water rights settlement cases, noting that the federal government can provide resources for the tribes to reach a settlement agreement. He stressed the difficulties associated with negotiating Indian water rights settlements and the problems water users have with the federal government representing the Indian tribes in these complex and difficult negotiations.

The third day of the conference focused on the strategy of collaboration. The morning session focused on exploring the value and limits of such processes; the afternoon session examined issues on the Platte River. The morning's first presenter, Larry MacDonnell (former director of the Natural Resources Law Center and now head of the non-profit organization Stewardship Initiatives), offered a philosophical and historical description of "collaboration" in western water issues. While acknowledging some concerns and deficiencies of collaborative processes, MacDonnell offered a generally optimistic assessment of these efforts, arguing that they offer the potential for concentrating more minds, more information, and more creativity in problem-solving efforts.

John Folk-Williams of Public Decisions Network followed with an examination of river basin planning efforts currently under way in Texas pursuant to Senate Bill 1. As an experienced dispute resolution practitioner, Folk-Williams explored the mix of old and new ideas comprising the Texas approach,

commenting upon the practical advantages and disadvantages of multi-stakeholder practices.

Dan Luecke, Regional Director of the Environmental Defense Fund, followed with a review of the deficiencies in large-scale ecosystem restoration processes reliant upon collaborative processes (e.g., the Platte). According to Luecke, some of the most troubling characteristics of these collaborative processes include the lack of standardized rules of procedure, the difficulty of integrating the scientific process (especially an adaptive management approach) into collaborative decision-making processes, the costs and delays of collaboration, and the observation that many parties are unlikely to have adequate incentives to resolve problems.

The final speaker before lunch was Ted Strong, former Director of the Columbia River Intertribal Fish Commission. Strong, while drawing upon several years of practical experience in collaborative problem-solving efforts, returned the discussion to a larger context,



Luecke proselytizes on collaboration

commenting on the "timeless wisdom" of collaboration. His appeal for greater respect and civility in water issues clearly struck a chord with all attendees, especially those hardened by decades of adversarial, incremental, and often counterproductive conflict.

Following lunch, Utah Governor Michael Leavitt articulated the underlying philosophy behind the doctrine of *Enlibra*, recently endorsed by the Western Governors' Association. *Enlibra* - meaning "to move toward balance" - calls for a fundamental re-examination of patterns of natural resources problem-solving in the region, and encourages the greater use of voluntary processes, incentives, and creativity. Collaborative processes are a central element of this vision.

The final afternoon session began with a discussion by the Colorado Attorney General, Ken Salazar, and members of his staff on the current efforts of the state with respect to water planning, conservation, and multi-jurisdictional cooperation. The remainder of the afternoon took an in-depth look at the use of collaborative processes in the Platte River Watershed. Dale Strickland focused on the Platte River Endangered Species Partnership, a tri-state agreement among Colorado, Nebraska and Wyoming to resolve several interstate water disputes and simultaneously meet the water needs of endangered species on the Platte. Three speakers then examined concurrent *Nebraska v. Wyoming* litigation from both an historical and legal perspective.

Conference, continued on page 11

Vranesh's Colorado Water Law, Revised Edition

Edited by James N. Corbridge Jr. and
Teresa A. Rice

Vranesh's Colorado Water Law, Revised Edition is the second edition of the treatise written by the late George Vranesh, published in 1987. Both James N. Corbridge Jr. and Teresa A. Rice, editors of the revised edition, have extensive experience with Colorado water law. James N. Corbridge Jr. is professor of law at the University of Colorado at Boulder, specializing in natural resources and water law. Teresa A. Rice has 20 years of experience in the field of water law and has also taught water law at the University of Colorado School of Law and in the Honors Program at CU-Boulder.

Corbridge and Rice have consolidated the treatise from the massive three-volume original to one volume, greatly increasing the accessibility for users. The revised edition retains much of the historical detail of the original, but eliminates outdated material and much of the case quotations. The treatise has been updated to include important recent developments in the field, including Colorado and federal cases, changes in statutes, and analysis of emerging doctrines. The revised edition provides a comprehensive and accessible reference for everyone interested in Colorado water law.

Available in December 1999 from
University Press of Colorado, PO Box
849, Niwot, CO 80544. Tel: 303/530-
5337 or 1-800-268-6044. \$65.00.

From Reclamation to Sustainability: Water, Agriculture, and the Environment in the American West

Lawrence J. MacDonnell

The prior appropriation system of water law and the federal Reclamation program are best understood, asserts former Center director Larry MacDonnell, as expressions of a 19th century societal bargain: control of water in return for its development and economic use. In his new book, *From Reclamation to Sustainability*, MacDonnell tells the story of four places in the West - the Lower

Arkansas Valley and the Grand Valley of Colorado, the Truckee and Carson basins of California and Nevada, and the Yakima Basin of Washington. Settlement of these areas resulted in large part from the 19th century bargain.

As illustrated in the four stories, development of the West's water resources played an essential role in supporting settlement of what is now the fastest growing region in the United States. The human effort required to transform prairie and desert into productive agricultural cropland was extraordinary by any measure. Those still engaged in irrigated agriculture generally live modest lives under sometimes difficult conditions while producing the basic foods on which we all depend. We meet some of these people in the pages of the book.

Control of the West's limited water resources still remains largely in the hands of irrigated agriculture. Yet, as the West grows and changes, the reclamation vision that settled the West competes increasingly with an emerging vision of a sustainable West.

Most contemporary westerners, however, know nothing about the reclamation bargain. They take their own water needs for granted and are more interested in other values of water such as for recreation, aesthetics, and aquatic ecosystem support.

A self-described member of the "New West," MacDonnell urges wholesale changes in the way western water resources are now used. He cautions that those changes be made, however, in a manner that respects the continued importance of irrigated agriculture in the American West.

This book grew out of research MacDonnell started while director at the Natural Resources Law Center. Blending historical narrative with contemporary issues and technical knowledge with a style of writing accessible to the general reader, *From Reclamation to Sustainability* will appeal to anyone interested in water policy or Western history.

Available in October 1999 from
University Press of Colorado, PO Box
49, Niwot, CO 80544. Tel: 303/530-5337
or 1-800-268-6044. \$34.95.

Fire on the Plateau: Conflict and Endurance in the American Southwest

Charles F. Wilkinson

In *Fire on the Plateau*, Charles Wilkinson, a celebrated writer and distinguished professor of law at the University of Colorado, relates the powerful story of how, over the past thirty years, he has been drawn ever more deeply into the redrock country and Indian societies of the Colorado Plateau. Through his diverse personal experience, Wilkinson examines the history of the Plateau including the sometimes violent conflicts between indigenous populations and more recent settlers, the political machinations by industry and the legal establishment, the contentious disputes over resources and land use, and other defining moments that have shaped the region.

Throughout the book, Wilkinson strives to accurately convey tribal beliefs and perspectives. His work in the early 1970s as a staff attorney for the Native American Rights Fund brought him into close contact with Navaho and Hopi people.

In complement to his personal experiences, Wilkinson's background in the law and sense of history make it possible for him to bring the reader to critical moments of the Plateau's history. Readers witness the expulsion of the Utes from western Colorado and the Hopi's disadvantageous leasing of precious coal and water at the recommendation of their attorney, John Boyden, secretly on the Peabody Coal Co. payroll.

At the heart of this book lies, Wilkinson's affection and respect for Indians and his love of the land. *Fire on the Plateau*, is a thoughtful and insightful work recommended to anyone with an interest in the land and the people of the American Southwest.

Currently available in stores and from
Island Press, Dept. 2AU P.O. Box 7
Covelo, CA 95428 Tel: 1-800-828-1302.
\$24.95

CHANCELLOR'S LECTURE SERIES

This fall, the Center and the Center of the American West are cosponsoring a lecture series with the CU Chancellor. The Chancellor's Community Lecture Series will focus on issues of wilderness and environmental justice.

September 8th - Charles Wilkinson

October 6th - Gary Bryner

November 10th - Patricia Limerick

December 8th - Sarah Krakoff

In the first presentation of the series, Charles Wilkinson of the CU School of Law read from his new book, *Fire on the Plateau: Conflict and Endurance in the American Southwest*. In this book, Wilkinson relates the gripping and emotional story of his relationship with the redrock country and Indian societies of the Colorado Plateau. Wilkinson's growing friendship with American Indians and increasing understanding of their cultures, along with his longstanding scholarship and experiences on federal public lands, led him to delve into the complicated history of the region. Wilkinson examines that history and provides a compelling look at the epic events that have shaped the Colorado Plateau region and its inhabitants.

Gary Bryner, the director of the Natural Resources Law Center will speak about the American wilderness debate

currently before Congress. The debate centers on whether or not to designate new wilderness areas in the Western States and, indeed, how much of the nation's public lands should be set aside as wilderness. His presentation will explore answers to the critical questions which must be answered in order for the controversy surrounding wilderness designation to subside: How has the idea of wilderness evolved in the United States and how has wilderness law and policy changed over time? How should wilderness be defined and what areas are eligible for wilderness designation? What should be the goals of wilderness and how do the goals of human recreation and preservation of wild lands interact? How should wilderness preservation values interact with other public purposes, including extraction of mineral, timber, and other resources? And finally, what process should we use for making wilderness and who should be involved?

Patricia Limerick, of the Center of the American West, will explore the various attitudes that people of color, African American, Mexican American, Asian American, and Native American have held towards the natural environment. She observes that their views of nature have remained largely unexplored and unrecognized and that when it comes to the American

relationship to nature, people like Henry David Thoreau, John Muir, Aldo Leopold, and Edward Abbey along with other white writers and activists, have received the lion's share of attention from both scholars and the general public alike. Limerick will explore the idea that we can gain a richer and more realistic understanding of environmental affairs today by examining the attitudes and behavior towards nature of members of these diverse groups.

Sarah Krakoff, of the CU School of Law, will speak on American Indian environmental justice issues. Sarah, former director of the school's Indian Law Clinic, will explore the question of whether tribal exercises of sovereignty concerning environmental matters are inherently questions of environmental justice. In her exploration of this issue, Krakoff will provide an overview of the environmental justice movement and describe some of its central tenets. She will also speak about the origins, development, and current legal status of American Indian tribal sovereignty. She will provide some examples of tribal exercises of environmental authority and apply the tenets of environmental justice to discuss whether tribal sovereignty in the environmental context is inevitably a matter of environmental justice or not.

FALL HOT TOPICS PROGRAMS

Thursday, September 23, 1999

ENVIRONMENTAL BUYOUTS

For decades, taxpayers have been paying – in cash or land exchanges – to consolidate federal public lands for protection of natural resource values. Recent controversies over environmental buyouts have included Utah school trust lands within the Grand Staircase Escalante National Monument and Crown Butte's New World Mine near Yellowstone National Park as well as Colorado consolidations near Crested Butte and the West Elk Wilderness. Andy Wiessner, of the Western Land Group, Skip Underwood, Director for Physical Resources, Region 2 of the U.S. Forest Service, and L. Richard Bratton, Bratton & Mcclow, Gunnison, will provide their perspectives from first-hand experience.

Tuesday, October 26, 1999

PLUMBING ISSUES: RIPENESS, STANDING, EXHAUSTION and THE CONGRESSIONAL FLUSH

Every litigator has faced the preliminary issues of ripeness, standing and exhaustion in natural resources litigation. These days, even clearing these procedural hurdles and winning the case may just bring you face to face with a congressional appropriations rider that pulls the law out from under you. Two veterans of public lands litigation, Tom Lustig, Senior Staff Attorney with the National Wildlife Federation, and Connie Brooks of C.E. Brooks and Associates, PC, will share their views on recent cases decided on these threshold and often terminal issues.

Friday, December 10, 1999

ENVIRONMENTAL JUSTICE IN NATURAL RESOURCE DEVELOPMENT

Barry Hill, Director of the Environmental Protection Agency, Office of Environmental Justice, will discuss the role of environmental justice in federal actions regarding natural resource development and protection. This program is part of the Center's series of guest lectures on environmental justice issues. For more information about the series, please contact the Center.

Early registration for programs is \$13, plus \$5 for CLE credit. A box lunch is included. Call 303-492-1272 to register or for more information.

Center of the American West Survey: What Every Westerner Should Know...

The Center of the American West at the University of Colorado at Boulder is conducting a survey via their web site to gain a better understanding of how Westerners see themselves and the region in which they live. This survey will culminate in a book entitled *The Handbook for the New West*. Don't miss your chance to contribute to their project. Visit their web site at www.centerwest.org/western

This project has two broad goals. First, it is to help Westerners examine their relationship and place in this physical landscape, a place of rich diversity and large remaining natural areas that seem rugged yet are remarkably vulnerable. Second, it is to help Westerners examine their relationships with each other and with the cultural region in which they live, a region also rich in cultural diversity, including Native, Hispanic, Anglo, Black and Asian identities and traditions.

Via their web site, explore the information they offer on the West, including pages on Western trends in demography, economics and land use; projects on environment and culture in the West, as well as other Center of the American West projects, and links to other sites. Then complete the survey on "what every Westerner should know," what it means to be a "Westerner" and to live in the West, comment on Western issues and trends, and read a selection of comments from other Westerners. Answer such questions as, "What makes Westerners different?" and "What traditions would you like to see maintained or discarded?" You may also explore other topics and issues such as environment, public lands, community and economy, and respond to those which particularly affect or interest you.

This research project is headed by Bill Riebsame (303-492-6312) and Patty Limerick (303-492-5131), who are faculty at the University of Colorado's departments of Geography and History, respectively. The address of the Center of the American West is: Campus Box 234, Boulder, CO 80309, and they are physically located in the Hellems Arts and Sciences Building, Room 373. Their main telephone number is 303-492-4879.

Mark your calendars...

The Center of the American West, along with the Library of Congress will be holding a conference from June 14-16, 2000, in Washington, DC, entitled "**What Westerners Wish Easterners Knew.**" The conference will focus on Western American writing, the relationship between Eastern U.S. thinking and Western American life, and the points of view that many residents in the West would like to see more widely recognized by those in the East. Contact CAW for more details.

Upcoming NRLC Events

Fall 1999

The Center will continue to schedule speakers in its Environmental Justice series. This fall, these include Barry Hill for our December Hot Topics and three speakers in the Chancellor's Community Lecture Series (see page 5). Call or email us to add your name to the EJ mail or email list.

February 2000

John Leshy, Solicitor of the Department of the Interior will be the Center's Holme, Roberts and Owen Distinguished Visitor this spring. He will be visiting February 10-11, 2000. At least one public lecture/forum will be scheduled.

April 2000

The Center will be convening a workshop in conjunction with its environmental justice program in April. Participants will present their research to the public and have a chance to discuss it with other authors.

June 2000

Our June conference is in the early planning stage. Stay tuned for further information.

Coming to Grips with Growth in the West

The Center has recently initiated a series of investigations examining the nexus between population growth, demographic change, and natural resource impacts and preservation efforts. The focus of these studies is the "Interior West" (i.e., roughly from the Sierras to the Rockies), and particularly those regions with a high percentage of public lands and other areas with strong ties to natural resource values and activities. Major urban centers are not completely off the radar screen, but are primarily of interest in how they impact resources in more distant and rural areas.

This type of relationship is particularly obvious in an ongoing study examining issues of water supply management and reallocation in Colorado, long characterized by west slope "supply zones" and east slope "demand zones." Recreation and tourism uses of natural resources is another obvious point of linkage between major urban and rural (and small urban) sectors. Ongoing investigations are examining policy tools (of a legal, economic, and planning nature) that may be of relevance to communities struggling to mitigate the negative consequences of rapid growth, including public land "gateway" communities and towns balancing the transformation from traditional to emerging economies.

This line of inquiry is expected to be a long-term focus of the Center, as population growth and demographic change appear to be regional fixtures for the foreseeable future. It is the goal of the Center to ensure that the focus of policy-makers and other parties concerned about growth includes a consideration of rural issues, rather than just urban concerns, and issues of habitat protection and natural resources depletion, rather than simply issues of schools, crime, transportation, and urban parks. Arguably, it is the rural areas and small cities of the West that have the most at stake in the skilled management of growth, a challenge that has already proven overwhelming in many communities. Expect the first products of this research in Winter 1999/2000.

→ Comings and Goings →

The past few months have been quite busy for the doors of our Center. While we warmly greeted our new Director, Gary Bryner, and several research assistants and a student administrative assistant in August, we sadly bid adieu to Donna Peavy, our office manager, and Heidi Hall, our administrative assistant.

Although Donna had only been with us a little over a year, she did an outstanding job of reorganizing our bookkeeping system into a customized, streamlined and easy-to-use system. She was key to making the myriad arrangements for our June conference and kept a million details in check. Donna accomplished all of this while also performing other functions for the office, such as payroll, training new staff and supporting the professional staff. We wish Donna the best of luck in her new job in Nevada, where she has moved to be close to an ailing relative.

Heidi came on board in time to assist Donna with our conference preparation, including orchestrating the travel reimbursements for our 33 speakers. She utilized her desktop publishing skills to help create our conference notebook and to prepare other Center publications. Heidi has been much appreciated because she stepped up to the bar taking over every new challenge when Donna was away on extended leave. Unfortunately, since Heidi must support her student husband and two small children, she had no financial choice but to find a better paying job. We are truly jealous of her new employer, but wish Heidi the very best and thank her for her assistance.

While we search for replacements for Donna and Heidi, Sara Lee has

graciously offered her services to the Center. We were most fortunate to have Sara's excellent help during our summer conference, and she is glad to be working with familiar, friendly faces.

Recent Sightings...

Returning Administrative Assistant Jill Rikli and her new counterpart Mark Wedeven may be spotted on the NRLC premises conducting their assigned administrative duties. Jill, a Sophomore Linguistics major, has recently returned from spending the summer in China, where she served as an English teacher. Mark comes to the Center as a Freshman CU student from Washington. They are joined by Courtney Queen, a Junior Environmental Studies student who will serve as an intern this semester. Courtney is a Colorado native who spent the summer working for Eagle Valley Land Trust, and has come on board with a vested interest in environmental law. The Center will also have volunteer assistance from Cassie Safilian this fall. Cassie is a young conservationist from New Vista High School.

Research Assistants

Tara A. Ohler

Born and raised in a rural area outside of St. Louis, Missouri, I came to Colorado in the fall of 1993 with my sights set on a future in environmental law. I attended the University of Denver, during which time I expanded my goal to international environmental law and spent a semester studying in Moscow, Russia. With a Bachelor of Science in Environmental Science and minors in Russian and International Studies, I began

my studies at the University of Colorado School of Law in August 1997. In the summer of 1998 I held an externship position with EPA Region VIII in Denver. I began work at the NRLC in June 1999 and plan to continue until receiving a J.D. and Environmental Policy Certificate in May 2000.

Ian Kalmanowitz

Originally from upstate New York, I came to Colorado after I finished college at Binghamton University, where I majored in Environmental Policy and Administration as well Political Science. In college I found myself concentrating mainly on environmental planning and environmental impact assessment, with a large focus on transportation and sprawl issues. My career in Binghamton was highlighted by an internship with the New York State Department of Transportation, where I prepared environmental impact statements. In law school I have clerked for the Office of General Counsel, U.S.D.A. working on public lands issues, including R.S. 2477 right of way law and accompanying wilderness issues. In January of 1999 I started as a Research Assistant at the NRLC examining proposals for institutional change of the U.S. Forest Service. I will continue to work on that project and related issues throughout the coming school year.

Richard Mehren

Born and raised in southern California, I came to the University of Colorado at Boulder in 1992 where I earned my bachelor's degree in Political Science with a minor in Philosophy. After a few years of work in the "real world", I decided to

Comings and Goings, continued on page 11

☆ AWARDS ☆

Natural Resources Award

Congratulations to recent University of Colorado School of Law graduate Kevin J. Geiger, the 1999 recipient of the Natural Resources Award for outstanding scholarship and service in natural resources and environmental law. In addition to numerous other contributions, Kevin served as a member of the Search Committee for NRLC's new Director, Gary Bryner. Congrats Kevin!

Allott Scholarship

This year the Center will benefit from two recipients of the Welda and Gordon Allott Natural Resources Law Scholarship. Scholarship recipients are chosen based on demonstrated financial need and an interest in natural resources law. The recipients will serve as Research Assistants in the Center. This year's recipients are 3rd year law students David Smith and Chris Geiger.

Woodruff Internship

The Charles N. Woodruff Memorial Fund will again support a law student from a rural Colorado background with an interest in natural resources and an excellent academic record. This year's recipient is Tony Munoz from Delta, Colorado (see bio on page 11). Contributions to the Memorial Fund are always welcome and can be made through the Center.

Forestry Projects

Institutional Change in the Forest Service

The NRLC, supported by a grant from the Ford Foundation, is currently preparing a report analyzing various proposals for Institutional Change in the Forest Service. The study will be coordinated by research associates, Kathryn Mutz and Doug Kenney, with assistance from RA law students, Ian Kalmanowitz, Betsy Beaver, and Parke Godar.

Proposals for change in the Forest Service (USFS) arise from a variety of sources: from within the USFS itself, from government research groups, from universities, private institutes, community and national organizations, and from individuals. The impetus for the multiplicity of proposals now available seems to be the National Forest Management Act (NFMA) requirement that all forest plans be re-evaluated and revised every 15 years. For many forest plans, revision time is fast approaching. As a result, many interests are re-evaluating the USFS – its mission, its management emphases, its planning and implementation procedures, and its fiscal situation.

The report being prepared by the Center will focus on several major aspects of USFS structure and will analyze some of the major proposals for change in these areas. The analysis will incorporate a discussion of the proposals, an analysis of how they might be implemented under current law, and a discussion of theoretical and practical obstacles that might affect their implementation. Areas of study will include: federal land ownership and various divestment proposals; mission and management orientation – custodial, ecosystem management, and commodity/service production emphases; regulatory vs. legislative reforms; budgetary philosophy and reform; strategic planning and decision-making; and planning, assessment and adaptive management.

Most proposals for modifying or changing the USFS encompass a variety of the above topics. Among the organizations proposing major changes are: the USFS, the USDA Forest Service Committee of Scientists, the National Research Council, the Government Accounting Office, the Office of

Technology Assessment, the Congressional Research Service, the Western Governors' Association, the Heritage Foundation, the Thoreau Institute, the Political Economy Research Center, the Society of American Foresters, the Wilderness Society, and the Sierra Club. Legislative proposals to be analyzed include SB 1320 (introduced by Sen. Larry Craig, R-ID) and HR 1396 (introduced by Rep. Cynthia McKinney, D-GA). Proposals from individuals with diverse views, such as, David Foreman, Scott Silver, Dennis Teegarden, and Roger Sedjo will also be discussed in the report.

Initial analysis and organization of the material collected and studied has already been completed. Writing is underway, with a preliminary draft of the report to be completed this fall. When the report reaches draft stage, the Center will convene an advisory committee to examine the work and to recommend other proposals and themes for study.

The purpose of the advisory group is to insure that a wide range of proposals is identified and that a balanced analysis is provided. The advisory group will form the core group for a later expansion of the project. This phase of the project will include a dialog, perhaps in workshop format, on the substance of institutional change proposals; how such proposals might impact various interest groups; and how legal, political and practical obstacles to the implementation of beneficial changes might be overcome. Although this dialog would address issues with national implications, its emphasis may be on the Southwest, an area which embraces a diverse range of issues, cultures, and challenges to address.

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For information contact Thomas Brendler at tbrendler@igc.apc.org or 617-338-7821.

NFMA Conference Summary Available

The Center is again making available a compilation of papers presented at its public lands conference entitled, "The National Forest Management Act in a Changing Society 1976-1996," held in Boulder in September of 1996. The conference was co-sponsored with Oregon State University, Colorado State University, the Pinchot Institute for Conservation, and the Maxwell School of Citizenship and Public Affairs at Syracuse University.

The conference critically examined several key issues necessary to evaluate the success of this statute. The papers analyze the statute, based upon the expectations of its authors, as well as from the vantagepoint of current managers and citizens engaged in forming new kinds of relationships unimagined 20 years before.

A free copy of the compilation can be obtained by contacting the Center's publication desk (additional copies are now in stock) at 303-492-1272.

Innovations in Forestry Series

The Center recently published the 4th pamphlet in the Innovations in Forestry series. The pamphlet, entitled "Funding Forest Plans," discusses the relationship between the forest plans mandated by the National Forests Management Act, the agency's funding from Congress, and the management of the National Forests. The Forest Service depends on annual appropriations from Congress in order to implement its long-term plans. However, as many parties who deal with the forest plans know, the plans are often not implemented as written – one part of a plan may be over-funded while another is under-funded - or Congressional actions can result in goals for the agency that do not match those in the plans. One major reason for this failure to achieve on-the-ground management that fully tracks the plans is that the budgeting and appropriations processes are only indirectly related to the agency's long-term planning efforts.

The pamphlet concisely explains the budgeting process within the Forest Service, US Department of Agriculture, the Office of Management and Budget, and the President as well as the appropriations process in Congress and the allocation of appropriated funds within the agency. Finally, the piece discusses some of the problems within and between the processes and sources of alternative

Wolf Recovery in the Northern Rockies

By Roberta Klein¹

Introduction

The gray wolf (*Canis lupus*) is classified as an endangered species throughout most of the continental United States under the 1973 Endangered Species Act, 16 U.S.C. sec. 1531-43 (ESA). The gray wolf is classified as a threatened species under the ESA in Minnesota. The USFWS is considering delisting or reclassifying these—and other—wolves. The ESA requires the U.S. Fish and Wildlife Service (USFWS) to develop and implement recovery plans for the conservation and survival of endangered species. 16 U.S.C. sec. 1533(f)(1). Pursuant to this mandate, a plan has been developed to facilitate the recovery of gray wolf populations in each of three areas: northwestern Montana, central Idaho, and Yellowstone National Park. Recovery will be achieved when there are ten breeding pairs in each of these three areas for three successive years (USFWS 1994). To implement the plan, the federal government released twenty-nine gray wolves in central Idaho and Yellowstone in 1995, and thirty-seven in 1996. Further, the government is protecting and managing a wolf population in Montana that has naturally migrated from Canada.

Too often natural resource conflicts have been resolved in a "winner takes all" fashion, frequently through litigation. The Northern Rockies wolf recovery plan, in contrast, attempted to respond to opposing interests in the debate—in effect, to clarify and secure the common interest of the community. This community includes both the people living near locations where wolves have been reintroduced, as well as the national community. The interests of both parts of the community are important. Preserving endangered species contributes to the well-being of the general population. However, without the support of the local community, efforts to recover large predators may be blocked or undermined.

Background

In the 1800s, the indiscriminate killing of bison and other wildlife by trappers and settlers led to the depletion of wolves' prey, causing wolves to turn to livestock instead. At the behest of ranchers, the

killing of wolves became the official policy of the federal government in the early 1900s. Wolves were eradicated from the West by the 1930s. Protection of game and the eradication of wolves, however, led to a population explosion of elk in Yellowstone. New scientific discoveries about the beneficial role wolves play in helping control prey populations, as well as changes in management of elk in Yellowstone, led to calls for an end to predator control and preliminary discussions of wolf recovery in Yellowstone. The rise of the environmental movement in the 1960s and passage of the ESA in 1973 resulted in the latest policy calling for the recovery of the gray wolf in the Northern Rockies. Changes in policy in Canada allowed wolf numbers to grow, which led to wolves migrating on their own to Montana.

Description of Plan

The goal of the wolf recovery plan is to achieve wolf recovery in and around Yellowstone, central Idaho, and Montana by the year 2002. It authorizes the capture of wolves in southwestern Canada and their transport to Yellowstone and central Idaho for release. Natural (i.e. non-reintroduced) wolf populations in Montana are expected to recover at about the same time as those in Yellowstone and central Idaho (Brewster et al. 1995).

An informal purpose of the wolf recovery plan is to build local support as part of the effort to recover wolves (Fritts et al. 1995). It attempts to do so by classifying the reintroduced wolves as an "experimental nonessential population," a special designation under the ESA that allows rules to be promulgated for managing a reintroduced population. Under the rules promulgated, landowners may harass any wolf in a non-lethal manner at any time; livestock producers on private land may kill or injure any wolf caught in the act of killing, wounding, or biting livestock, provided such incidents are immediately reported and livestock freshly wounded or killed are evident. Governmental agencies may relocate or kill wolves that have attacked livestock. Land use restrictions are allowed to control intrusive human disturbance only

within one mile of active den sites between April 1 and June 30 and only on public lands; no land use restrictions are permitted after six or more breeding pairs are present in a recovery area outside of national parks or wildlife refuges. Nonselective control (poisons) may not be used to control predators in areas occupied by wolves. States and tribes may relocate wolves to other areas if wolf predation is negatively affecting local ungulate populations at unacceptable levels, as defined by the states and tribes. Unintentional, nonnegligent, and accidental taking by the public pursuant to otherwise lawful trapping or other recreational activities, or any taking in self defense or in defense of others, will not violate the ESA provided such incident is reported within 24 hours. Civil penalties for violating the ESA can range up to \$25,000 for each violation, while criminal penalties include fines of up to \$50,000 and imprisonment of up to one year, or both. So far only one person has been convicted of illegally killing a reintroduced wolf. He was sentenced to six months' imprisonment. As of the summer of 1998 there were between nine and ten unsolved wolf killings (Bangs pers. conv.).

The plan encourages (but does not require) state and tribal wildlife agencies to lead wolf management outside national parks and wildlife refuges by entering cooperative agreements with the USFWS. Wyoming, Montana, and Idaho have refused to participate in wolf management to date. The Nez Perce tribe of Idaho manages that state's wolves. The plan also requires monitoring until viable populations are established. The plan does not include a compensation fund for wolf-caused losses to livestock, although it encourages livestock producers to seek compensation from Defenders of Wildlife, a private environmental group with such a fund. Finally, the plan provides that after a minimum of ten breeding pairs are documented for three years in each of the three recovery areas, the gray wolf would be proposed for delisting (removal from the endangered species list). Monitoring would continue for five years. At that point the states and/or tribes would assume

¹ Roberta (Bobbie) Klein has a J.D. from the University of Wisconsin and an M.S. in Public Policy from the University of Colorado.

This paper is based on her 1998 Master thesis, and was authored specifically for *Resource Law Notes*. Due to publication delays on the part of the Natural Resources Law Center, some material may be slightly dated. All conclusions and findings herein are those of the author and not the Natural Resources Law Center.

sole authority for managing the wolves and the federal government's involvement would terminate unless wolves were relisted under the ESA.

Evaluation of plan

The following is an assessment of how well the plan has satisfied the major concerns raised by various members of the national and local communities:

- 1) recovering an endangered species;
- 2) restoring the wolf as a natural part of the ecosystem;
- 3) controlling problem wolves;
- 4) providing compensation for wolf depredation (and thereby reducing local opposition to the plan); and
- 5) not interfering with control of private property.

Progress with respect to the primary goal of recovering a population of gray wolves in the Northern Rockies is exceeding expectations. Wolf populations in the Northern Rockies have grown more quickly than expected due to higher reproduction rates and lower losses through death or emigration. For example, as of June 10, 1998, there are 109 wolves in ten groups or packs in Yellowstone (Yellowstone National Park 1998). The EIS projected that Yellowstone would have fifty-six wolves in six to eight packs by 1998 (USFWS 1994).

The two primary ecological reasons for restoring wolves to Yellowstone are as follows. "Restoring the wolf would return to the park the one mammal that is missing from its historical mix of animals. The wolves also would help to keep down naturally the park's high numbers of elk and bison, which in the absence of natural predators such as wolves have exploded in population, causing all kinds of management problems" (Barker 1993).

It appears too early to assess the success of the plan in controlling elk. While 98% of wolves' diet in 1997 and early 1998 consisted of elk, and wolves have been killing large numbers of elk, it remains to be seen whether a recovered wolf population will reduce mean elk numbers by 5-20% in the Yellowstone area, as scientists predicted (Fischer 1998; Boyce et al. 1992). One beneficial effect that has been documented, however, is that wolves are providing red meat throughout the entire year for many other species such as foxes, ravens, eagles, magpies, grizzlies, wolverines, and coyotes (Crabtree 1998).

The authority for controlling problem wolves stems from their designation as an experimental nonessential population. Despite the intent of the plan to give ranchers more control over problem wolves, ranchers have killed only two wolves pursuant to the experimental nonessential rules. Ranchers complain the requirements under the rules are too hard to meet. They may shoot wolves caught in the act of killing, wounding, or biting livestock, yet it is extremely rare to catch a wolf doing so. The rules also require that the killing of a wolf be reported within twenty-four hours; however, if there is no evidence of livestock freshly wounded or killed by wolves, the case may be referred for prosecution. Ranchers claim they cannot always find missing livestock, or by the time they do, the carcasses have been ravaged by scavengers and the government will not verify it as a wolf kill.

The rules also allow the federal government to control problem wolves, either by relocation or removal (killing). The government has actively controlled problem wolves under the rules.

The experimental nonessential designation's legality is in doubt. On December 12, 1997, the Wyoming federal district court held that the plan was unlawful because there was evidence that members or "part" of a natural wolf population existed or will exist in the areas where the experimental nonessential wolves were reintroduced. An experimental population must be "wholly separate geographically from nonexperimental populations of the same species." 16 U.S.C. 1539(j)(1). The court ordered that the reintroduced wolves be removed. An appeal of the decision is pending in the Tenth Circuit Court of Appeals.

Defenders of Wildlife's Wolf Compensation Trust Fund reimburses ranchers for verified livestock losses caused by wolves. Defenders paid ranchers a total of \$59,794 between 1987 and April 1998 for the loss of seventy-eight head of cattle and 192 sheep (Defenders of Wildlife Wolf Compensation Trust Website 1998). Some ranchers claim the fund does not fully compensate them for their losses. While the compensation program might not be changing ranchers' minds about wolf reintroduction, there is some evidence that it is promoting greater tolerance among local people for wolves.

The only restriction on private land resulting from wolf recovery is a prohibition against the use of two predator poisons. There has only been one instance where use of either poison was limited because of the presence of a wolf pack (Bangs pers. conv.).

Future Challenges

The wolf recovery plan has done a reasonably good job of responding to the concerns of various members of the local and national communities. However, although depredation has been low in the Northern Rockies, it is still a significant reason for continued opposition to wolves in the region. For example, Montana livestock producers report annual losses of about 80,000 cattle and 90,000 sheep to a wide variety of causes (Bangs 1998). Between 1987 and 1997 wolves killed a total of fifty-one cattle and forty-two sheep in Montana, an average of less than ten per year (Bangs 1998). Wolves in Montana caused .006% of all livestock losses and .03% of all livestock losses due to depredation. Effective control of depredating wolves is believed to reduce a hostile public's incentive to illegally kill wolves and therefore promotes wolf recovery (Bangs 1998).

On the other hand, if depredations increase and more wolves are "removed," their survival could be threatened. Assuming the wolves are not removed—as the Wyoming district court has ordered—a challenge for the future will be controlling depredation by wolves without allowing their numbers to decline below the minimum number necessary to keep their population viable. This challenge could prove more difficult as wolf numbers grow and management is turned over to the states after delisting.

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Comings and Goings, continued from page 7

pursue my legal career in environmental law and in 1997 I entered the University of Colorado School of Law. After surviving my first year of law school, my strong interest in environmental law led me to work as an intern with the United States Forest Service office of the General Counsel where I researched and analyzed legal issues facing the Rocky Mountain Region. In my spare time I enjoy travelling and backpacking throughout the Rocky Mountain west.

Tony Munoz

I was born and raised on the Western Slope in Delta, Colorado. I graduated from The Colorado College with a degree in Political Science with an emphasis on comparative political systems. During my college years, I made first contact with environmentalism and eco-terrorism, neither of which left a good taste in my mouth. I have reformed and have come to see the virtues of environmentalism and sustainable development. My principle reason for attending law school is to study water use and policy. The summer after my first year at law school was spent in the Colorado Attorney General's office and has only fueled my desire to practice in Colorado. I currently hold the position of Treasurer in the Latino Law Students Association and look forward to helping increase the diversity at the CU Law School. Additionally, this year I am extremely excited about working to provide immigration and naturalization workshops to immigrants in rural Colorado. My creative releases include watching the two-time defending World Champion Denver Broncos, sparring in

karate tournaments, and spending time with friends.

Megan Murphy

Born and raised in an agricultural community located in semi-arid eastern Washington, I was exposed early on to the pressures of creating an adequate water supply. It's a joke in my family that I keep "falling into water." Thus my attendance at law school is focused on learning more about water resources management. In college I wrote my senior thesis on the work of the Yakima River Watershed Council after a summer internship with that organization. Upon graduation from Claremont McKenna College with a major in the Environment, Economics, and Politics Program, I served as a deputy clerk for the Yakima County Superior Court where I was in charge of the daily filings for the basin-wide water rights adjudication. Some of the more enjoyable experiences I have had include a semester abroad in Tanzania studying wildlife ecology and conservation, spelunking in Jamaica on a quest to discover ancient primate remains, and fighting forest fires in the state of Washington.

Adam Peters

Born and raised outside of Albany, NY, I struck westward and earned a degree in Political Science and Environmental Studies at Washington University in St. Louis. Seeking a pleasant climate and more topographical diversity in which to continue my studies, I enrolled in the law school at CU and am devoting many credit hours to the University's nationally renowned environmental law program. I served at the NRLC in an administrative capacity over the summer and will continue on as a Research Assistant this fall working on the Forest Service institutional change project. Outside of school one might find me on a soccer pitch, a golf course, or hiking in the mountains.

Peter Nichols

Law School signifies my seventh professional career, although in many ways it's a logical extension of my continuing interest in water and natural resources issues. I intend to continue contributing to the resolution of the myriad water issues that face the arid West. Last semester I worked as a Research Assistant for the Center's El Paso Fellow on an acid-mine drainage

project, and have recently been engrossed researching water issues related to growth. I am Past-President of the Colorado Water Congress and Past-Chair of the Colorado Water Quality Control Commission. Earlier careers have included stints as a water resources consultant, corporate executive, government affairs manager for a multi-national oil company, lobbyist, socio-economic consultant specializing in natural resources development, and Senior Research Analyst for the Colorado Legislature. A political science-biology graduate of Colorado College, I also earned an MPA from CU. I am a passionate climber and occasional mountain guide, having ascended technical routes on six continents in many of the major mountain ranges of the world. I built my own house on the Roaring Fork River where I can fly fish from the deck and kayak from the beach.

Forestry, continued from page 8

funding. Anyone interested in the effective long-term management of our National Forests should have a basic understanding of these issues and become involved in this aspect of forest management.

Please contact the NRLC if you are interested in obtaining copies of the publication.

Conference, continued from page 3

Finally, Lee Rozaklis and David Hallford discussed the present and predicted water needs of the Front Range metropolitan areas and innovative ways to meet those needs without excessive dependence on imports of water from the West Slope. Hallford also addressed the issue of the increased need of the West Slope for water to meet its own development needs and ESA instream flow requirements.

Conference notebooks are available from the Center for \$75, or on CD-ROM for \$10, plus shipping and handling charges. A set of 13 video tapes of the entire conference is available for \$100, or videos of individual speakers can be purchased for \$10 each, plus shipping and handling charges. Inquiries should be addressed to: Natural Resources Law Center, Fleming Law, Campus Box 401, Boulder, Colorado 80309-0401, (303) 492-1272, fax: (303) 492-1297.

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This publication is a product of the Natural Resources Law Center, a research and public education program at the University of Colorado School of Law. The Center's primary goal is to promote a sustainable society through improved public understanding of environmental and natural resources issues.

Interpretations, recommendations, or conclusions in this Natural Resources Law Center publication are solely those of the authors and should not be attributed to the Center, the University of Colorado, the State of Colorado, or any of the organizations that support Natural Resources Law Center research.

Resource Law Notes is the Center's free newsletter, published three times a year.

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Resource Law Notes

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KF 5505 .A15 R47

no. 47

Resource law notes : the
newsletter of the Natural
Resources Law Center,
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Received on: 10-15-99

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