Guest Editorial

Water Policy at the Crossroads

by JAMES S. LOCHHEAD, EXECUTIVE DIRECTOR
COLORADO DEPARTMENT OF NATURAL RESOURCES

Government, and particularly natural resource and water policy, is at important crossroads. In our increasingly complex society, it seems that virtually no issue can be decided upon or resolved in isolation from other issues. We are confronted, therefore, with decision-making gridlock, as the interconnections between problems threaten to overwhelm institutions that were formulated in simpler times to respond to discretely defined issues.

As new realities outstrip old institutions, there is growing frustration with government, and especially the federal government. "Takings" legislation was introduced in the Legislature this year, and legislative resolutions were adopted protesting federal involvement in state affairs. The increasing use of constitutional referendums threatens the thoughtful development of public policy by elected representatives.

At the same time, many Coloradans are also asking for responsible governmental regulation. Although the state's economy is booming, growth pressures throughout the state are carving up pristine mountain valleys. Communities struggle with how to develop the appropriate combinations of regulations and incentives to allow development, but direct it in an appropriate way that preserves open space, agricultural economies, and the community values that make Colorado a special place. Gas drilling activities create clashes with farmers, and concerns about pollution of water wells. Those concerns have led to a strengthening of the Oil and Gas Conservation Commission, and the formation of a task group to address the issue of state legislation relating to surface damages. In the wake of Summitville, the state has strengthened its laws regarding bonding and reclamation of certain mines.

Many Coloradans are actually calling for increased federal regulatory presence in the management of our state's water resources. Many others, of course, believe an increased federal regulatory presence in Colorado Continues on Page 4

REGULATORY TAKINGS - "WHY ALL THE FUSS?"

by James W. Sanderson

The Fifth Amendment to the United States Constitution contains the words "nor shall private property be taken for public use, without just compensation." Traditionally this meant the government had to pay if it wanted to build a highway on a person's property. In recent years, the courts have also made the government pay when it restricted a person's use of property to the point of leaving it essentially without value. The courts are becoming deluged with cases by property owners who were prohibited from building on wetlands and beachfronts or who had to dedicate public access over property to rivers or beaches.

Some may object to the application of this constitutional provision to prevent the government from regulating one's property to the point that it has been taken. I submit that we should be grateful the courts are vigorously applying this constitutional protection. These are times of limited dollars for government spending on discretionary programs. Yet "the public" clamors for more open space and recreational access.

The clash between doing the "public good" and an individual's right to own and make reasonable use of his property is exactly why we have the Fifth Amendment. Without the Fifth Amendment the growing assault on property owners would go unchecked. Just as the First Amendment has constrained those who would limit our guarantee of free speech in the interest of practical needs, the Fifth Amendment must protect the property owner.

Our founding fathers were pretty smart. They relentlessly pursued the goals of freedom and individual liberty. While they created our version of democracy, there was embodied in their efforts a recognition that pure democracy may not equate with freedom. Fifty-one percent control can result in the tyranny of the majority. The constitution, replete with checks and balances, recognizes that the majority must exercise restraint.

The Fifth Amendment embodies the recognition that private property is essential to freedom. I would submit that freedom of speech is less valuable to one without property certainly not valueless and clearly important. But without "means," that is without a means of support independent from the government, one lacks true freedom. Economic freedom, freedom of speech, liberty, and property rights are inter-dependent.

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RICHARD D. "DICK" MACRAVEY

Richard D. "Dick" MacRavey, 63, is in his fifteenth year as Secretary and Executive Director of the Colorado Water Congress. MacRavey is no stranger to Colorado. He served three years as Executive Director to the Larimer-Weld COG and seven years as Executive Director of the Colorado Municipal League. During his tenure with the Larimer-Weld COG, he was responsible for developing and guiding the early stages of the Larimer-Weld "208" Water Quality Management Planning effort.

In 1970, MacRavey served as Chairman of the Colorado Good Government Committee for the promotion of the State Constitutional Amendments One (Governor's Cabinet), Two (State Affairs), Three (Budget, State Affairs, Federal Affairs), Four (Wildlands, Wilderness, Resolutions). He has recently become a land owner representative on the North Park Habitat Partnership Program.

MacRavey is married, and he and his wife, Frances, have two daughters.

DOUG KEMPER

Doug Kemper, 38, of Aurora, was elected CWC President in January. Doug is the Manager of Water Resources for the City of Aurora. He is in charge of raw water operations, water resources planning, and one of the largest agricultural revegetation projects in the nation. He is now in his eighth year with the city. Prior to working with Aurora, he worked five years as a consulting engineer chiefly with Rocky Mountain Consultants, Inc.

He is currently serving his third term on the Board of Directors of the Colorado Water Congress and has been active on most of this organization's special and standing committees.

Douglas Kemper has a Bachelor's Degree from the University of Colorado in Civil Engineering/Water Resources and a Bachelor's Degree from Vanderbilt University in Environmental and Water Resources Engineering. He is a registered Professional Engineer.

Doug and his wife recently built a new home on 3.5 acres in unincorporated Adams County where they live with their two children.

JIM HOKIT

Jim Hokin, 52, of Montrose, was elected CWC Vice President in January. Jim has lived in Montrose since 1969 and has worked for the Uncompahgre Valley Water Users Association since 1973. In 1980, he became General Manager responsible for the overall operation of the Project.

He has served on the CWC Board of Directors since 1981. Jim is a member of the Colorado River Water Users Association and the Four States Irrigation Council for which he served as president in 1988. During the past seven years, he has served on the Economic Development Council and he is also a board member of the Montrose County Chamber of Commerce.

Jim and his wife Betty have three adult children.

NEAL JAQUET

Neil Jaquet, 47, of Golden, was elected CWC Treasurer in 1993. Neil is the Manager of Water Resources Development for Coors Brewing Company. He is in charge of water rights and facilities development to supply this Colorado brewer with an uninterrupted supply of water. He is serving on numerous ditch company boards of directors. He is serving his second term on the CWC Board of Directors and has been active on several committees.

Jaquet holds Master's degrees in ground water geology and water resources management from the University of Wisconsin - Madison. He is completing his Master's of Business Administration at the University of Denver. He served in the U.S. Army during the Vietnam era.

Neil and his wife, Donna, live in unincorporated Jefferson County with their two children.

EDWARD E. "ED" POKORNEY

Edward E. "Ed" Pokorney, 50, was elected CWC Assistant Treasurer in January. Ed is Director of Planning for the Denver Water Department. He joined the Water Department in 1982, and was most recently Manager of Intergovernmental/Public Relations. In addition, he participates with the following groups: National Water Resources Association (Board Member); NWRA A Municipal Caucus (Chairman); Colorado Water Utility Legislative Committee; and many Colorado Water Congress Committees.

Pokorney holds a Ph.D. from the University of Missouri. After completion of his academic efforts, he served in the U.S. Air Force as a Captain. Post Air Force activity included helping found the Colorado Forum, an organization of corporate chief executive officers involved in public policy issues.

Ed is married, and he and his wife, Elizabeth, have two daughters.

ROBERT O. BURR

CWC immediate Past President Bob Burr, 57, of Walden was born and raised on a ranch in Jackson County and went on to attend Oklahoma State University where he received a Bachelor of Science degree in Animal Husbandry. He is co-owner and manager of a family ranch operation which has been in the family since the 1920's. He served in the Wyoming air National Guard from 1958 to 1964.

Bob serves as Director of the North Park Stockowners, the Jackson County Water conservancy District (of which he is also Secretary-Treasurer), and the North Platt-Laramie River Basin. He is also a member, and Chairman of the Water Committee, of Colorado Cattlemens Association. Bob has served on numerous Colorado Water Congress Committees (Management & Budget, State Affairs, Federal Affairs, Waterways, Wilderness, Resolutions). He has recently become a land owner representative on the North Park Habitat Partnership Program.

Bob is married, and he and his wife, Frances, have two daughters.

COLORADO WATER RIGHTS

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Colorado Water Congress
1390 Logan Street, Suite 312
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Phone (303) 837-0812
Fax (303) 837-1607

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RICHARD D. "DICK" MACRAVEY

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The reservoir site mentioned in the settlement agreement was the "Azure Reservoir and Power Project" located on the mainstem of the Colorado River in Lower Gore Canyon. The costs of permitting, design, and development of Azure were to be entirely the Sub-district's with the River District as project co-applicant and eventual reservoir owner and operator. The maximum feasible capacity of Azure was originally anticipated to be 28,000 to 30,000 acre feet of stor-

age, if protective barriers could be constructed cost-effectively to protect the D. & R. G. Railroad tracks which paralleled the Colorado River at the dam site. These facilities were later determined not to be feasible. With power considerations precluding much of the intended benefits of stored water for Western Colorado users and adverse economics, the co-applicants determined Azure was not an appropriate reservoir site.

In 1985, all parties agreed that the Azure Project would not be built and the Colorado River District would assume the Sub-district's remaining obligations under the Conservancy District Act in return for $10.2 million. At this time, a reservoir at Rock Creek was envisioned.

As part of the NEPA process, a reservoir on Muddy Creek near Kremmling in Grand County was identified and evaluated as an alternative in the Draft Environmental Impact Statement. In 1988, the Forest Service and BLM jointly issued a Supplemental Draft EIS reporting the preferred alternative was a 60,000 acre foot reservoir at Muddy Creek, north of Kremmling. A Final Environmental Impact Statement was published in February 1990.

FINANCING

With increased costs of permitting and environmental mitigation requirements, the Sub-district's $10.2 million payment was no longer sufficient to cover the full costs of reservoir development. Therefore, in 1987 the River District and the Denver Water Department entered into a lease agreement which would provide the River District with the additional revenues necessary to finance construction of a reservoir at either Rock Creek or Muddy Creek. In return, Denver would receive a 25 year lease on water from the chosen reservoir. The 25 year lease would provide Denver with water until Two Forks was constructed. Denver's proposed use of water from the new reservoir would be as substitution water for years in which Dillon would otherwise be required to release water to the senior Green Mountain Reservoir.

In 1990, the Colorado General assembly authorized the Colorado Water Conservation Board to loan a maximum of $20 million to the River District to construct Wolford Mountain Reservoir at Muddy Creek. Denver's lease payments would provide the repayment revenues for this loan.

By 1992, the $10.2 million payment from the Sub-

 district and subsequent interest was approximately $16 million. The estimated cost of the Wolford Mountain Reservoir was (and is) $47 million. Therefore, the River District required an additional $11 - 12 million from other sources before construction could commence. The River District actively pursued revenue bond financing for this balance. However, several unresolved legal actions and the looming passage of Amendment 1 threatened to delay bond financing and construction. If construction were delayed, costs and interest rates were likely to escalate significantly.

At the April 1992 meeting of the River District Board, Chips Barry, then New Manager of the Denver Water Department, proposed to increase the amount of Denver's 25 year lease payments and provide greater upfront payments to the River District. These increased payments would be sufficient to eliminate the River District's need for bond financing. Further, Denver would provide from its West Slope water resources permanent water supplies to meet current demands in Grand County. In return, Denver proposed it obtain a permanent 40% interest in the storible water in Wolford Mountain Reservoir following the initial 25 year lease period. Denver's 40% interest after the 25 year lease period would remain limited to use for substitution.

The Board of the River District was faced with a decision that distilled to: The West Slope could own 60% of a 60,000 acre foot reservoir or 100% of a reservoir that would likely not be built. At its regular July 1992 meeting, the River District Board approved these amendments to provide a permanent solution to water supply constraints on both the West and East Slopes and to clear the way for construction of Wolford Mountain Reservoir.
Continued from Page 1.

Water Policy at the Crossroads

...is a matter of particular alarming prospect. In spite of our focus on the federal government, it may not even be the federal government who is our worst "enemy." Battles have raged, and will continue to rage, both within our state and with our neighboring states, have cost millions of dollars while arguably not furthering anyone’s interest. Speculative development proposals and in-state litigation have caused as much controversy and cost as much money, as any "federal intervention on state’s rights." In the meantime, Nebraska, Kansas, New Mexico, Texas, California, and Nevada all salivate at the prospect of more Colorado water to down stream. We do, however, have a choice about whether we can control our water supply. We can act like the courts, and give up control of our water forever. We can act like the federal government, and declare war on the West. We can pass anti-government legislation, stripping our state agencies of any authority. We can pass constitutional referendums and micro-managing government. We can attempt to construct huge water projects using federal money. We can assert our rights to use our property however we want, without regard to the consequences to the environment or our neighbors. We can be the result of such actions. Will they protect and use our water? Will they keep the feds out of our lives? Front Range in particular, is very good at "doing things right," without overly restrictive government and competition among our water users and with our sister-states. There is a better way. There are opportunities to break with the past. In Colorado, we are already making progress with a basin-wide plan, which is being implemented throughout the state that will protect the yield of existing water projects, put more water to beneficial use, and preserve our water entitlements for future rational growth and development. These alternatives will be consistent with our goals of preserving the environment. Moreover, we can achieve these results in a way that meets local needs and in response to local concerns. We can work with the federal government without overly restrictive governmental regulations, and in a spirit of cooperation. We can meet the goals of federal regulation on our own terms. It will not be easy. The issues are complex, and there are substantial values at stake. And yet, the alternative is so dangerous, so destructive, that there is really no viable alternative. All of the progress Colorado must make a firm resolve to work together for the benefit of our Colorado community: to protect the yield and cost of water and to preserve the social, economic, open space and environmental values of agriculture; to provide reasonable assurance of water for urban growth; and to preserve our water entitlements for future development at the same time and in the locations as are economically justified and environmentally feasible.

It is clear that all of this cannot be achieved through government regulation, either federal or state. Government should not be imposed through the "cookie cutter" approach. Therefore, federal and state government needs to become more responsive, flexible, open, and communicative to the changing needs and concerns of the state. We know that in a country as diverse as the United States, national regulations can not meet all local needs. Neither can state regulations in a state as large as Colorado. We must make a firm resolve to work together for the benefit of our Colorado community: to protect the yield and cost of water and to preserve our water entitlements for future development at the same time and in the locations as are economically justified and environmentally feasible. We must treat human dimensions, on a regional level, as unique.

One of my priorities as Executive Director of the Department of Natural Resources will be to do what I can to make the Department and its Divisions more responsive to local needs and concerns. I will be travelling throughout the state on a regular basis, to meet with county commissioners, city councils, water users organizations, and, other interest groups. My first such trip was to the Yampa River Valley. I was very encouraged to see the regional partnerships that have developed in the Yampa River. I believe that there is more opportunity for cooperation on the many significant issues in that area. If asked by local interests, the Department will be available to assist in implementing a regional vision for how the Yampa River can be developed. The Department will, develop, manage, and protect their areas.

There are many ongoing examples of how we can work together. In the South Platte River Basin, water users face the challenge of new permit conditions being imposed by the Forest Service, and the prospect of intensive regulation under the Endangered Species Act. With regard to the permit issues, permittees have been engaged in cooperative and productive discussions with the Department towards the development of management agreements that will enhance stream conditions and riparian habitat. The full analysis of region-wide intervention on state's rights." In the meantime, Nebraska, Kansas, New Mexico, Texas, California, and Nevada all salivate at the prospect of more Colorado water flowing downstream.

The increasing use of constitutional referendums threatens the thoughtful development of public policy by elected officials.

Speculative development proposals and in-state litigation have caused as much controversy, and cost as much money, as any "federal intervention on state’s rights." In the meantime, Nebraska, Kansas, New Mexico, Texas, California, and Nevada all salivate at the prospect of more Colorado water flowing downstream.

The Division of Wildlife has adopted a non-native stocking policy designed to avoid conflicts between the recovery of native species and the stocking of non-native species. The development of the RIRPAP provides an implementation schedule and proposed budget for measures necessary to avoid conflicts between the stocking of non-native species and the recovery of native species. The program represents a model partnership between state and federal governments, water users, environmental groups, and power customers. The key element missing from the Upper Basin and San Juan Basin Recovery Programs is an adequate funding mechanism to assure the long-term viability of these efforts. The Division of Natural Resources is planning to continue cooperation with the Forest Service in establishing an Upper Basin collaborative initiative to develop a basin-wide solution to the end of the state’s entitlement. This plan continues to make progress. The Colorado Water Plan continues to push for an agreement with the Forest Service on the many significant issues in the area. If asked by local interests, the Department will be available to assist in implementing a regional vision for the future rational growth and development. These alternative referendums and other interest groups. Toward that end, Governor Romer has met with interest groups in the basin, and will be forming a basin-wide commission to achieve consensus and coordination on these important issues.

The partnerships formed in the Upper Arkansas Basin are an example of how we can work together to resolve conflicts. A similar effort is underway in the Clear Creek Basin.

On the Front Range, the Governor established the Front Range Water Forum, consisting of many of the major water providers in the Front Range area. This forum has met to analyze and refine proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs. As a result of regional sharing and conjunctive use proposals, on the technical level, for the sharing of water as a way of lowering water-use costs.
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In the debate which swirls around regulatory takings, one can see a classic case of the potential for abuse in a pure democracy where a majority rules. The government (the majority) attempts to limit one’s use of property without paying for that limitation. This incurs the same ultimate use of one’s property without having to pay for it. That creates the “rub.” It is the Fifth Amendment which steps in to put limits on what the majority (the government) can do in limiting a person’s use of property.

THE EVOLUTION OF REGULATORY TAKINGS

The U. S. Supreme Court’s most recent opinion on regulatory takings was the 1992 case of Lucas v. South Carolina Coastal Commission.5 Plaintiff Lucas sued because legislation amending the South Carolina Coastal Zone Management Act of 1972, passed subsequent to his acquisition of beachfront property, prevented him from developing two lots situated along the South Carolina coast. This high court case primarily focused on the tension between the rights of property owners and what many see as broader societal goals such as protecting or providing public access to areas with high public amenity or “发展目标” for governmental action, and many cases and other subject still in the judicial system focus on the issue of whether the property owners will be compensated for their losses during the quest by the majority to achieve the “public interest.”

It is important to keep in mind what the Fifth Amendment guarantees. It provides that private property shall not be taken for public use, without just compensation. The amendment was not intended to preclude taking of private property for public purposes, but to secure compensation in the form of an adequate price for the property taken. This protection extends to property owned by states and local units of government even though obviously dedicated to a public purpose.6

While early takings cases involved condemnation of government appropriated private property for public uses, the regulatory takings concept has extended the physical appropriation or taking by the government of a citizen’s property beyond actual entry onto and possession of a citizen’s property. The concept now includes the notion that governmental regulation can indirectly preclude one’s use and enjoyment of property.7 A “regulatory taking” results from governmental regulation that interferes with a property owner’s economic interests to such a degree that even though the government does not physically take the property, the property is deprived of use such that one would have been compensated had he continued to use it.8 The takings claim is not available to enjoin an alleged taking of private property for a public use, duty authorized by law, when the claimed deprivation of the property can be brought about the sovereign subsequent to a taking. Ruckelhaus v. Monsanto Company, 467 U.S. 986, 1016 (1984) [citation omitted].

The general policy that takings claims against the federal government must be brought in the Claims Court was articulated by the U. S. Supreme Court in the case of United States v. Riverside Bayview Homes, Inc.9 In a case where a landowner sued to overturn a Section 404 dredge and fill permit decision affecting wetlands, the landowner also complained that the federal agency had unconstitutionally taken the property. The Supreme Court stated:

We have held that, in general, “[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duty authorized by law, when the claimed deprivation of the property can be brought about the sovereign subsequent to a taking.”

The clause does not explicitly begin its treatment of the “public interest” in words. In fact, the clause does not explicitly begin with any words, but is simply the recognition that regulatory takings are the subject of the legal analysis. The clause states:

The clause [Lucas v. South Carolina Coastal Commission] and many others still in the judicial system focus the issue of whether the property owners will be paid for their losses during the quest by the majority to achieve the “public interest.”

A case to watch is one involving a partial regulatory taking (i.e., less than all of the plaintiff’s property could not be developed due to wetlands). The plaintiff was denied a Section 404 permit to develop 11.5 acres of 51 acres remaining from a 250 acre tract in New Jersey. The case is entitled Loveladies Harbor v. United States,9 and involves a property owner who the Claims Court ruled had been compensated for denial of a Section 404 permit. It has been embroiled in the U.S. Claims Court system for nearly ten years and it now sits in the Federal Circuit Court (the appeals court created to hear Claims Court appeals) following arguments, en banc, on February 10, 1994 (Docket No. 91-5050). It promises to be a major pronouncement of the entire Appellate Court. Its eventual outcome may also be important to water right’s owners who frequently face regulatory or permitting demands to by-pass a portion of a water rights yield. Agencies like to argue that as long as the owner has some yield left, there has not been a taking. It belies the fact that taking an acre-foot of water yield is not different from taking the corner of a piece of property on which to site a highway interchange.

In an effort to enunciate some policy on the subject of regulatory takings, Senator James Rizzuto introduced SB94-1994. As this article goes to print, its fate is not known. It has generated vigorous debate in the General Assembly. State agencies wonder what actions the bill may curtail. Those seeking unfettered ability to regulate the use of property fear it will impede that agenda. Property owners are grateful that “the line needs to be drawn” on what is acceptable. Many owners lack the resources to sue for a taking and need some help in protecting their interests.


PRIVATE PROPERTY FACES MANY ASSAULTS

The decade of the 1990’s may prove to be one in which the Fifth Amendment is tested in many ways. The “public interest” fill peck political arena is being advanced on many fronts. Of course, there are the “Feds,” whose actions to protect wetlands and endangered species have spawned the claims court litigation referenced above. There are also the acts of the State and local governments such as those struck down in the Lucas v. South Carolina Coastal Commission. Finally, in Colorado, we see proponents of initiated measures asking the voters to approve amendments to the Colorado Constitution which raise takings questions.

FEDERAL ASSAULTS ON WESTERN WATER RIGHTS

Failures by the United States to impose minimum stream flows on federal lands dating back to the 1970s, U. S. v. New Mexico, 438 U.S. 696, 99 S.Ct. 3012 (1978), and continuing to today through the federal government’s efforts to advance reserve water rights claims on behalf of the United States are falling short of the underlying game plan. Millions of dollars have been spent by taxpayers in Colorado to fight off these efforts to secure the water in Greetley.10 The United States eventually decided to not prosecute its appeal in Colorado, at least at this time.

Having failed in its efforts to secure these rights in water court, the federal agencies can now be expected to step up their efforts to impose minimum stream flows at every turn. Northern Colorado communities have faced demands for involvement in the renewal of their right-of-way applications for long-existing water diverting facilities. The U.S. Forest Service wants increased stream flows within the National Forest. In addition, recent draft biological opinions under the Endangered Species Act relating to historic depletions on the Colorado River and especially recently on the San Juan River. The Water Rights Forum proposed that historic depletion levels be made-up downstream so water which has been used by Colorado cities and farmers for up to 100 years could be in the streams to benefit endangered fish and birds. The U.S. Fish and Wildlife Service does not want to pay for this water. It essentially seeks “atone” for alleged historical impacts to threatened and endangered species which utilize the Platte River in Nebraska, from the historic impacts from the use water rights lawfully created years ago for the benefit of the human settlement in Colorado.

ASSAULTS VIA THE BALLOT BOX

It is not only the federal government which at times attempts to obtain the property of Coloradans without having to pay for it. The regulatory takings subject is brought into focus by those who seek to amend the Colorado Constitution. They are initiated amendments being advanced under the procedures provided for initiative processes in Colorado.

The Proposed Initiative on W.T.E.R. would enable the Colorado Constitution to impose conditions on final conditional water right decrees entered on and after January 1, 1995 for out-of-basin water use. Given the time delay which often occurs between the formation of the intent to appropriate and the entry of a final decree, the measure, if approved, could have takings implications. Since the water rights made subject to voter approval can have the status of property, the districts involved may have to compensate water rights owners who sue based on the diminished value of the property right if an out-of-basin water use is not approved by the voters.

Opponents of a Proposed Initiative On Water Rights To Amend the Colorado Constitution To Adopt And Defend A Public Trust Doctrine with respect to the waters in Colorado argue its adoption will have takings implications. Clearly, the implications of such an adoption are not well understood. Hopefully, if the measure makes the ballot, its implications will be illuminated by the public debate on the initiative.

Finally, a ballot proposal is working its way towards the voters that would allow the People of Colorado new access to the water which flows through other recreational activities. The takings ramifications are intriguing. What the proposal would allow would be continued on Page 8
Colorado Water Congress
36th Annual Convention

Opening General Session: L to R. Department of Natural Resources Executive Director Ron Sutlive, Attorney General Gale Norton, CWC Vice President Doug Kampaer and NVWCA Executive Vice President Tom Donnelly.

The debate on "Have the Pea's Declared War on the World?" held everyone's interest. L to R. David Robbins, Maggie Fox and Greg Hobbs.

Left: Rits Perrin, Director, Arizona Department of Water Resources, spoke on "The CAP Dream in Changing Western Water Policy".

Above: Chuck Green, Editor of the Editorial Pages, The Denver Post, addressed the Friday Luncheon on "Where Are Our Leaders". In addition, Mr. Green did a "This is Your Life Fred Anderson".


Some people go all out to please! Very action.

A smile was worth a thousand words.

Check Green cracked up the head table at the Friday Luncheon.

The Colorado Water Conservation Board exhibit.

One of those informal briefings where the real business gets accomplished.

The Thursday PM General Session dealt with the Feds.

One of the many Concurrent Workshops that were well attended.
Sanderson: Regulatory Takings — "Why All The Fuss?"

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the Constitution of Colorado to be amended so that criminal trespass would not be charged against anyone who stays within the water outlines of any non-navigable stream. The current law in Colorado is that the premises that are protected by criminal trespass laws include the bottom of all bodies of water if fee title to the bottom has been passed through normal conveyance procedures. Therefore, under current law, if a rafter or fisherman gets out of a boat and touches the bottom of a stream, he/she is potentially guilty of trespass if he/she touches the bottom on private property. The ramifications of the Constitutional amendment being proposed would make it unlawful to charge a person with criminal trespass as long as they touch the water.

There are currently many miles of stream in Colorado that have private property on both sides and the underlying land held in fee ownership. There is a significant value associated with the current power to prevent access to the land which is less alongside and underneath the flowing body of water, and that access to the flowing body of water can be denied by enforcing the trespass laws, even if the current statute allows recreational users to float by without being convicted of trespass. If a constitutional amendment passes, "state action" will deprive the owners of such land of that value. Should this measure pass, there can be no doubt that something of "value" will have been "taken" by "state action."

THE FUTURE

As foreshadowing what the future may be, a couple of things seem likely. The intensity of the debate over regulatory takings will increase as the environmental and social agenda of the Clinton Administration unfolds and the limitations on new government spending are realized. Congress is now stating federal tax increases will be needed to cover national health care reforms where will money come from for wetlands purchases? In Constitutional Amendments, limits in Amendment I are predicted to severely restrict funding without voter approval.

These pressures will enhance the temptation to achieve public purposes by limiting private property use without paying for it. Have we even heard a pundit speculate that the government will declare that the spare bedroom many people have should be available for meeting the homelessness crisis. I do not believe the pendulum will swing that far. I believe it is already swinging in the opposite direction.

The legacy of the Lucas case means that courts will take less account of legitimate state interests in regulating and more account of a loss in an owner's property value resulting from that government action. In the final analysis, the legacy of Lucas is that, when compared to the decades of the 1960s and 1970s, more property owners will be compensated for regulatory takings.

If a constitutional amendment passes, "state action" will deprive the owners of such land of that value. Should this measure pass, there can be no doubt that something of "value" will have been "taken" by "state action."

112 S.Ct. 2866 (1992) ("Lucas").
3 See, e.g., United States v. Carmack, 329 U.S. 230, 242 (1946). ("[W]hen the Federal Government . . . takes for a public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes the State's right to just compensation for the taking of the property."").
4 California v. United States, 395 U.S. 626, 623 - 625 (9th Cir. 1969). ("[T]he Fifth Amendment protects the property interest of the State from appropriation by the United States without just compensation."").
5 This is true even when the property has been dedicated by the State for public use.
6 See, e.g., United States v. Causby, 328 U.S. 256 (1946). (government planes flying low over a chicken farm constituted a compensable physical invasion that impressed snow drifts. By the mid-February, skeleton crews resumed work on concrete form construction, along with delivery, installation and welding of the eight foot diameter concrete conduit. The conduit was fully encased in two to three feet of concrete during late March and early April.
Following the conduit completion, the multi-level outlet tower was constructed, as was one of the three tower bridge piers. In addition, excavation was started on the chute for the service spillway. Stripping of the overburden from the east abutment of the dam was started. As its April meeting the River District Board awarded the contract for relocation of U.S. Highway 40 to Lawrence Construction of Lineton. By the end of April, over 25% of the dam construction was complete.
In addition to actual dam construction, Blattner & Sons began work on the wetlands mitigation areas downstream of the dam site. Over 420 acres of wetlands will be created or enhanced by a series of surface and subsurface irrigation in replacement for the estimated 290 acres of existing wetlands which will be inundated by the reservoir. Conservation measures to protect a species of milkvetch listed as endangered were initiated prior to commencement of construction. Other mitigation, including big game habitat enhancement and creation of a recreation area will commence this summer. In conjunction with the Colorado Division of Wildlife, the River District is responsible for creation of a fishing area in and below the reservoir. Additionally, up to 3,000 acre feet of water will be released from the reservoir for the benefit of the endangered fish of the Upper Colorado River.

WOLFORD MOUNTAIN RESERVOIR
BACKGROUND AND PROGRESS

Aspinal Water Leader of the Year Award

This award, established in 1980, is presented to that person who has demonstrated leadership and management skills in the water development, protection and preservation of the water of the State of Colorado. The award need not necessarily be an hydraulic project. Individuals may be any person who has demonstrated an outstanding leadership role in the Colorado water development, protection and management field.

Individuals interested in applying for the Aspinal Water Leader of the Year Award should request an application form the Colorado Water Development Commission office in Denver. The deadline for filing an application is August 1, 1994.

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Glenn G. Saunders &
John U. Carlson Legal Scholarship

In recognition of the contributions made by the late Glenn G. Saunders and the late John U. Carlson, the CWC Board of Directors has established the Glenn G. Saunders & John U. Carlson Legal Scholarship. This scholarship will be awarded to either a law student or associate of a Colorado law firm. The recipient will receive a full scholarship to the Annual CWC Colorado Water Law Seminar to be held on September 29 - 30, 1994 at the Holiday Inn - Northglenn, 1 - 25 & 120th Avenue, Northglenn, Colorado.

Individuals interested in applying for the Glenn G. Saunders & John U. Carlson Legal Scholarship should request an application form the Colorado Water Development Commission office in Denver. The deadline for filing an application is January 1, 1994.

GREGG G. SAUNDERS &
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8 Colorado Water Rights
The first-ever Colorado Legislative Water Festival was held on Thursday, April 21st in the House Hearing Rooms of the Colorado State Capitol Building. The event was sponsored by the Senate and House Agriculture & Natural Resources Committees, the Water and School Lands Interim Committee, and the Central Colorado Water Conservancy District. The purpose of the Legislative Water Festival was to provide legislators the opportunity to learn about water in Colorado from elementary and high school students, and water groups. Over 300 people attended.

Three activities were held in the House Hearing Rooms. Carl Crookham, teacher at Zuni Alternative High School in Denver had several at-risk teenagers from Denver teaching about local surface water quality, water history, and water lore. Scott Elementary School 5th graders from Greeley competed against teams of legislators in a Water Wizards competition regarding Colorado water facts. Legislative Water Wizards included State Representatives Bill Jerke, R - LaSalle, Bob Shoemaker, D - Canon City, Pat Sullivan, R - Greeley, Bob Eisenach, D - Fort Morgan, Lewis Enz, R - Hooper, and Bud Mollenberg, R - Kirk, and State Senators Joan Johnson, D - Denver, and Elsie Lacy, R - Aurora. And finally, a game regarding Colorado water allocation was developed for the festival by Brian Werner of the Northern Colorado Water Conservancy District and Chris Treese of the Colorado River Water Conservation District. A Colorado grown lunch was provided by Bette Blinde and the Colorado Foundation for Agriculture. Several exhibits were also scattered about the Capitol basement.

Governor Roy Romer proclaimed April 21st as "Water Education Day" in Colorado in honor of the first-time event. Senator Don Ament and Representative Bill Jerke were instrumental in organizing the Legislative Water Festival, and it would not have occurred without their strong support.

LARRY D. SIMPSON
ENGINEERING SCHOLARSHIP

In recognition of the contributions made by Larry D. Simpson, the CWC Board of Directors has established the Larry D. Simpson Engineering Scholarship. This scholarship will be awarded to either an engineering student or a non-partner of a Colorado engineering firm. The recipient will receive a full scholarship to the Annual CWC Water Law Seminar to be held on September 29-30, 1994 at the Holiday Inn - Northglenn, I-25 & 120th Avenue, Northglenn, Colorado. Individuals interested in applying for the Larry D. Simpson Engineering Scholarship should request an application form from the Colorado Water Congress office in Denver. The deadline for filing an application is July 1, 1994.
DENVER ATTORNEY EUGENE MEGYESY
APPOINTED HONORARY CONSUL
BY REPUBLIC OF HUNGARY

Denver, March 14, 1994 — Denver attorney Eugene F. Megyesy, Jr. was sworn in as Honorary Consul for the Republic of Hungary in ceremonies held at 5:30 p.m., Monday, March 14, 1994 at the Governor's Mansion, 8th Avenue and Logan Street.

Pal Tar, Hungarian ambassador to the United States, conducted the swearing in ceremonies, and U.S. District Judge John Kane served as master of ceremonies.

The new consulate in Denver serves the states of Colorado, Wyoming and Utah. Megyesy's responsibilities include the promotion and development of commercial, economic, cultural, scientific and tourist relations between the Republic of Hungary, the United States and the three-state region.

Prior to opening the Denver office, Hungary established consulates in Seattle, San Francisco, Houston, Miami and Cleveland.

"The timing of this ceremony is really significant for me since March 15th is a Hungarian national holiday. The date commemorates the 1848 revolution by Hungarians against the ruling Hapsburgs of Austria and the holiday continues to symbolize Hungary's independence," said Megyesy.

He escaped from Hungary in 1956 with his parents during the uprising against the Soviet Union. A fifth generation attorney, Megyesy represents corporate and municipal clients on environmental matters. He is president of the Hungarian Club of Colorado, past chairman of the Colorado Bar Association's Environmental Section, a Trustee of the all Souls School Fund, and the Nature Conservancy.

Last year Megyesy was instrumental in getting the Denver Water Board to donate and ship 10-ton water purifiers to his native country to improve drinking water quality at 10 treatment plants in Hungary. He frequently consults with the Hungarian Minister for the Environment and has represented American companies conducting business with Hungary.

He formerly served as assistant regional counsel, U.S. Environment Protection Agency, and as assistant attorney general, Colorado Attorney General's Office.

He received his Juris Doctor degree in 1972 from the University of Denver and his bachelor of arts degree in 1967 from the University of Tulsa. He is fluent in Hungarian and German and served in the U.S. Army with a tour of duty in Vietnam from 1969 to 1971.

BILLY HORNBY JOURNALIST SCHOLARSHIP

In recognition of the contributions made by Bill Hornby to balanced reporting on water issues, the CWC Board of Directors has established the Bill Hornby Journalism Scholarship.

This scholarship will be awarded to either a journalism student or a reporter of a news media organization. The recipient will receive a full scholarship to the Annual CWC Colorado Water Law Seminar to be held on September 29 - 30, 1994 at the Holiday Inn Northglenn, 1 - 25 & 120th Avenue, Northglenn, Colorado.

Individuals interested in applying for the Bill Hornby Journalism Scholarship should request an application form from the Colorado Water Congress office in Denver. The deadline for filing an application is July 1, 1994.

BORESEN SCHOLARSHIP

The late Ed Boresen, CWC President in 1983, has been honored by the CWC Board of Directors with the establishment of a scholarship in his name to the Annual CWC Colorado Water Law Seminar to be held on September 29 - 30, 1994 at the Holiday Inn Northglenn, 1 - 25 & 120th Avenue, Northglenn, Colorado.

The recipient of this annual scholarship should be an active member of the agriculture community who desires to provide leadership on behalf of agriculture in water matters. The scholarship waives the $500 registration fee for the recipient.

Individuals interested in applying for the Boresen Scholarship should request an application form from the Colorado Water Congress office in Denver. The deadline for filing an application is July 1, 1994.
1993 CWC Membership Report

This report is intended to bring the membership up-to-date with Colorado Water Congress activities for calendar year 1993. No organization, it should be noted, will have a meaningful impact on issues of concern, unless its membership is involved and asserting itself. Also, special thanks is expressed to the members of the General Assembly and the Executive Branch for they have listened to CWC’s concerns and acted in a positive and helpful manner.

CWC notes the following in terms of highlights:
1. Eight of ten water bills introduced in the State Legislature and supported by CWC were enacted into law;
2. All six of the water bills opposed by CWC were killed;
3. Continued the major effort (as a CWC Special Project) to address the issues in the U.S. Fish & Wildlife Service, Platte River and Colorado River Threatened and Endangered Species Studies;
4. Concluded legal intervention (in cooperation with the Colorado Municipal League) in the Environmental Defense Fund v. EPA lawsuit in the Federal District Court;
5. The continued effort (as a CWC Special Project) on the matter of passage of a Colorado Wilderness Act was rewarded with the President signing said Act in Denver on August 13, 1993;
6. Participated actively in the Colorado Water Education Foundation;
7. Participated in the establishment of the Water Quality Forum;
8. Conducted first ever CWC Annual Summer Convention in Fort Collins, July 7-8, 1993; and
9. Produced first and last “Melodrama” on “Should the Water Buffalo be Listed as an Endangered Species?”

The new water laws and resolutions supported by CWC were:

SB 130 - concerning the enterprise status of water activities of governmental entities for purposes of Section 20 of Article X of the State Constitution

SB 182 - concerning the regulation of biosolids under the “Colorado Water Quality Control Act”

SB 241 - concerning extension of the statutory provisions which created a presumption of no material injury to water rights or to any existing well for wells on residential sites which are used for specified limited purposes

SB 260 - concerning review by the State Engineer of plans for gravel pit subdivisions and making an appropriation in connection therewith

SJR 7 - concerning additions or modifications to and deletions from the project eligibility list of wastewater treatment system projects eligible for financial assistance from the Colorado Water Resources and Power Development Authority pursuant to Section 37-95-107.6, Colorado Revised Statutes

HB 1054 - concerning the elimination of the time limitation on any contract entered into by any metropolitan sewage disposal district

HB 1060 - concerning exceptions from the notice requirements of statutes governing applications to construct water wells outside designated basins

HB 1273 - concerning the Colorado Water Conservation Board Construction Fund, and making appropriations in connection therewith

None of the aforementioned events or bill enactments would have been possible without as already pointed out - dedicated involvement of CWC members. This involvement is translated into the following statistics as they relate to a number of CWC Board and Committee meetings:

- Board of Directors - 1/22/93, 2/11/93, 4/16/93, 10/22/93, 11/19/93 and 12/15/93.
- Management and Budget Committee - 2/10/93, 9/22/93, 11/19/93 and 12/15/93.
- State Affairs (Legislative) Committee - 1/20/93, 1/25/93, 2/8/93, 2/11/93, 2/15/93, 2/23/93, 4/19/93, 5/3/93 and 12/16/93.
- CWC Resolutions Committee - 1/20/93, 3/2/93, 4/12/93, 5/3/93, 8/31/93, 10/7/93, 11/17/93 and 12/15/93.

CWC sponsored meetings were another dimension of membership involvement activity and these were:
2. Workshop on Entering Species held June 17, 1993.
4. CWC Workshop on Legal Ethics in Water & Environmental Law held on October 19, 1993.
5. CWC Workshop on Water Conservancy/Conservation Districts held October 20, 1993.
8. CWC Workshop on Federal Environmental Laws held on November 9, 1993.
9. CWC Workshop on Legal Ethics in Water & Environmental Law held on November 9, 1993.

There were a number of other actions that enhanced and assisted greatly in making CWC more effective. These actions were:
1. Secured seven new sustaining members, 18 new individual and associate member during 1993.
2. Named Frank Milenski the 13th recipient of the “Wayne N. Aspinall Water Leader of the Year Award” at the 1993 CWC Annual Convention.
3. Published Colorado Water Laws Enacted in 1993 of Interest to Water Users (120 pages).

In regard to CWC’s written communication (newsletters), the following newsletters were published during 1993:

Again, Alice Kay and I are, indeed, proud and honored to be associated with such an outstanding and dedicated group of people as the CWC membership.

Dick MacRavey
Executive Director
You have undoubtedly heard the line: "I am from the Federal Government, and I am here to help you."

Well, we'll let you be the judge on this matter. We are going to quote from Lynne Newton's article titled, "Forester's rebuke riles legislators" that appeared in the May 4, 1994 The Capitol Reporter. Specifically, Ms. Newton's article was written as a result of a joint Senate and House Ag committee meeting when Elizabeth Estill, the Regional Forester with the U.S. Forest Service appeared and spoke at the joint meeting.

Estill was on hand to update the committees on the status of reissuing special-use water permits in the Arapaho Roosevelt National Forest.

Reading from prepared notes, she also asked members of both committees to consider "enlightened legislation" when dealing with water issues.

"Just what is 'enlightened legislation.'" asked Senator Dave Wattenberg, R - Walden.

Estill testified that the Forest Service is only doing its job—a job complicated by the National Environmental Policy Act, the National Forest Management Act and the Endangered Species Act.

"Compliance with three acts of Congress is something a federal agency does not take lightly and generally cannot be done very quickly," Estill said.

But, while outlining the process to the committee, she angered those for whom protection of state-held and privately owned water rights is crucial.

She asked the committee members if they were still in the Dark Ages, adding that it was time to get off "biological and water buffalo principles" and look at a broader approach to water issues.

"I appreciate you telling us how to run the state government," Representative Lewis Enz, R - Hooper, said to Estill at the end of the joint session.

Yessiree. We're from the Federal Government and we're here to help you.

July 8, 1994 — WORKSHOP ON FOREST SERVICE & WATER ISSUES — Holiday Inn - Northglenn, Northglenn, CO. This workshop is co-sponsored by the Colorado Municipal League and the Colorado Water Congress. The featured speaker will be U.S. Senator Hank Brown. For more information, contact the CWC office in Denver, CO: 303-837-0812, or the CML office (Geoff Wilson) in Denver, CO: 303-831-6411.

July 20 - 22, 1994 — COLORADO WATER WORKSHOP — Western State College, Aspinall-Wilson Center, Gunnison, CO. For more information, contact Western State College, Aspinall-Wilson Center in Gunnison, CO: 303-641-2238 or 303-943-7156.

August 3 - 5, 1994 — NWRA WESTERN WATER SEMINAR — Snow King Resort, Jackson Hole, WY. For more information, contact the NWRA office in Arlington, VA: 703-524-1544.

August 25 - 26, 1994 — CWC SUMMER CONVENTION — The Westin Resort at Vail, Vail, CO. For more information, contact the CWC office in Denver, CO: 303-837-0812.

September 29 - 30, 1994 — CWC COLORADO WATER LAW SEMINAR — Holiday Inn - Northglenn, Northglenn, CO. For more information, contact the CWC office in Denver, CO: 303-837-0812.

December 12 - 16, 1994 — NWRA ANNUAL CONFERENCE — Hyatt-Regency, New Orleans, LA. For more information contact the NWRA office in Arlington, VA: 703-524-1544.

January 26 - 27, 1995 — CWC 37th ANNUAL CONVENTION — Holiday Inn - Northglenn, Northglenn, CO. For more information, contact the CWC office in Denver, CO: 303-837-0812.

December 10 - 13, 1995 — NWRA ANNUAL CONFERENCE — Hilton Hawaiian Village, Honolulu, HI. For more information, contact the NWRA office in Arlington, VA: 703-524-1544.