

Baselines

Fall 2007 (Issue 1)

THE NATURAL RESOURCES LAW CENTER NEWSLETTER

CLIMATE CHANGE AND NATIVE COMMUNITIES

Research report garners national attention



During his year as Research Fellow at the NRLC, Jonathan Hanna researched, edited and co-authored the report titled ***Native Communities and Climate Change: Protecting Tribal Resources as Part of National Climate Policy***. Funded by the Turner Foundation, this report examines how climate change is likely to affect Native American communities throughout the United States. "Native American communities are among the most vulnerable to a changing climate," observed Hanna, the principal researcher of the report. "The unfortunate irony is that the traditional lifestyles historically followed by tribes (and that continue to a large extent today) contribute very little to the climate change problem."

"Native American communities are among the most vulnerable to a changing climate."

The report looks at native communities in four different parts of the country — Alaska, the Pacific Northwest, the Southwest, and Florida. In each case, the report documents the unique impacts that climate change imposes on these communities. The report urges federal policymakers to recognize the special burdens facing tribes as they develop climate change mitigation and adaptation strategies. "The federal government must consider the special threats and disparate impacts faced by tribes," noted Colorado Law Professor Sarah Krakoff, a contributor to the report. "The federal trust responsibility requires the government to protect tribal land and resources and is rooted in the numerous treaties, statutes, executive orders, and judicial opinions recognizing the very tribal rights at risk from climate change. If the federal government fails to consider these issues at the outset, any plan to mitigate or adapt to the effects of climate change will be incomplete and vulnerable."

The Executive Summary and complete report can be found at:

<http://www.colorado.edu/law/centers/nrlc/pubs.htm>

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WHO WE ARE: The Natural Resources Law Center (NRLC) was founded in 1982 to inform and influence natural resource law and policy. The NRLC promotes intellectual discourse and identifies practical and effective solutions for issues through legal research, outreach, and education.

STAFF

Mark Squillace, *Professor of Law and Director of the NRLC*
Heidi Horten, *Program Manager & Special Assistant to the Director*
Douglas Kenney, *Sr. Research Associate*
Kathryn Mutz, *Sr. Research Associate*
Lauren Ris, *Red Lodge Clearinghouse Project Manager*
Leigh Anne DeWine, *Research Fellow*

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Red Lodge Clearinghouse Website Now Managed by NRLC

The Liz Claiborne and Art Ortenberg Foundation chose the NRLC to assume responsibility for the Red Lodge Clearinghouse website (www.redlodgeclearinghouse.org). The website was launched in the summer of 2003 after a meeting in Red Lodge, Montana on Collaborative Resource Management in the Interior West. The initial mission of this website was to be a "full support site for collaborative groups committed to resolving resource use conflicts throughout the interior west." With the transfer of the website to the NRLC, that mission will be broadened to encompass all aspects of natural resources law and policy.

The NRLC Welcomes New Staff



Lauren Ris

Lauren Ris has been selected as the Project Manager for the **Red Lodge Clearinghouse website**. Lauren has a Master's Degree in Natural Resource Policy and Conservation Biology from the School of Natural Resources and Environment at the University of Michigan. She has previously worked for state and federal government, in academia, and for the National Wildlife Federation. [For details, refer to <http://lawweb.colorado.edu/profiles/profile.jsp?id=278>].

Leigh Anne DeWine is the NRLC's **2007-2008 NRLC Research Fellow**. Leigh Anne has her JD from The George Washington University Law School and an MA in International Affairs from Johns Hopkins University School for Advanced International Studies. She will be joining the NRLC staff at the end of September.

Welcome to the NRLC's new newsletter — **Baselines!**

We plan to publish at least twice each year – in the Fall and Spring – to engage you, our readers and supporters, on the issues that we care about and to bring attention to the Center's important work. In this inaugural issue, Research Fellow Jon Hanna highlights the Center's recent study on the impacts of climate change on Native American tribes; Research Assistant Stu Gillespie summarizes the Center's outstanding 25th anniversary conference on *The Future of Natural Resources Law and Policy*; Research Assistant Ryan Knight describes a white paper on NEPA compliance in the forest planning process; and Research Assistants Jordan Lesser, Alison Flint, Sam Bacon, Jay Perry discuss their early efforts on a long-term project that will assess if Western states are following statutory and constitutional public interest standards in administering their water allocation programs.

The newsletter also presents a new project, spearheaded by Kathryn Mutz that will develop a public, on-line database of best management practices for oil and gas development. This work will be complemented by a study of the decision-making process for oil and gas development with recommendations for improving the process. Finally, Doug Kenney describes his wide-ranging work on water transfers, water demand management, and climate-related risk issues.

Even as this inaugural newsletter introduced you to Jon Hanna, 2006-2007 Research Fellow, he has moved on to the Big Apple, where he serves as law clerk to federal Judge Harold Baer, Jr. in the southern district of New York. We also recently bid adieu to Research Assistant Jordan Lesser who joined us this summer from Tulane University Law School in New Orleans. Thankfully, we have two wonderful new people who will enrich our staff. Lauren Ris is our first project manager for the Center's new Red Lodge Clearinghouse Project, and Leigh Anne DeWine joins as the 2007-2008 Research Fellow.

As the Center enters its 26th year, we hope to build on its rich legacy. Your constructive comments, ideas, and criticisms will help us immeasurably as we strive to make this Center — and the natural resources program at this law school — the best they can be.

I would love to hear from you. Contact me at:

mark.squillace@colorado.edu.

NRLC PEOPLE IN THE NEWS

NRLC Director **Mark Squillace** recently published an article titled "Rethinking the Great Lakes Compact" in the *Michigan State Law Review*, proposing an alternate framework for allocating water among the Basin states and Canadian provinces. Squillace's framework differs markedly from that proposed in a recently negotiated compact. Squillace would allocate a fair percentage of the available water supply (after taking account of ecological needs) to each State and Province and allow them to decide how best to use their share.

Squillace was invited to discuss his perspective at various radio stations in the Great Lakes region and was cited in the *Duluth News Tribune*. The article is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=960574

Director's Corner

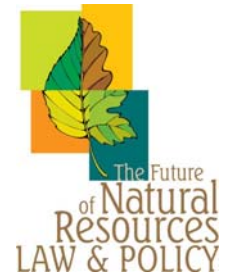


A BIG SUCCESS!

By Stu Gillespie, Research Assistant

The NRLC's 25th anniversary summer conference provided an opportunity for some of the best Natural Resources lawyers to discuss future trends in the field.

The conference focused on the larger, cross-cutting issues affecting natural resources policy. Initial discussions concerned the declining role of scientific resource management due to the increased inclusion of economic-cost benefit analysis and public participation in the decision-making process. The effectiveness of this approach was questioned particularly in the case of non-market goods such as the polar bear. Other participants promoted the importance of public participation and explained how meaningful engagement between an agency and the public can lead to superior decisions.



"A lot of the time, covering the environmental beat can feel like you're randomly swinging at stories as they come across the plate. The NRLC conferences have always been an inspiring way to think about the bigger undercurrents that run beneath it all. Thanks again for putting together such a great conference."

Matt Jenkins, Contributing Editor, *High Country News*

A full summary of the conference plus conference papers and presentations is available at:

<http://www.colorado.edu/law/centers/nrlc/summerconference/2007/index.htm>

The conference has also provided the Center with the opportunity to sponsor a new book titled *The Evolution of Natural Resources Law and Policy*. The book will be edited by former NRLC Director Larry MacDonnell and former Associate Director, Sarah Van De Wetering (Bates).

NRLC Board Members emeritus Clyde Martz (*front row left*) and John Sayre (*front row right*) took a tour of the new Wolf Law Building with Dean David Getches (*center*), CU alum Zach Miller, and NRLC Director Mark Squillace (*back row right and left, respectively*). John and Clyde are former partners at the Denver law firm of Davis, Graham, & Stubbs. Zach is a current partner at the firm. Clyde's and John's visit was timely as both are leaving Boulder this fall — Clyde to Albuquerque, New Mexico, and John to Bend, Oregon. They will be missed!

John is a 1948 graduate of the Colorado Law School. Clyde is a former Colorado Law School professor and the author of the first casebook on natural resources, *Cases and Materials on the Law of Natural Resources*, published in 1951.



NRLC RESEARCH

Center Begins Study on the Public Interest in Water Allocation

By Research Assistants Alison Flint, Sam Bacon, Jay Perry, and Jordan Lesser

During summer 2007, the NRLC embarked on a new project that focuses on the role of the public interest in western water law. The current laws of most western states recognize that water is a public resource and that the public interest must be considered during water resource use and allocation. However, in practice, most water rights are granted without considering the public interest implications. This project will analyze the extent to which each state complies with its obligation to protect the public interest.

Initial activities have involved an extensive review of the water laws in 13 western states, including an analysis of state water statutes, case law, permits issued by state water agencies, and water board decisions and adjudications. Upon completion of the state water law summaries, the NRLC will meet with state water officials to discuss state water allocation processes and will review actual decisions to see how the public interest has been addressed. A report and recommendations for reform will be developed to ensure that public interest values are taken into account where required by state law.



In July, the NRLC met in Cheyenne with the Wyoming State Engineer and other representatives of the Engineer's office, for a candid and enlightening discussion about how water allocation in Wyoming is handled in practice. From top left to bottom left: Sam Bacon, Mark Squillace, Alison Flint, Jay Perry.

Water Rights and Climate Change

By Doug Kenney, Senior Research Associate

In conjunction with the Western Water Assessment, the NRLC is investigating how administration of water rights is affected in those areas of the West that are experiencing earlier snowmelt and longer growing seasons as a product of climate change. The issues are: First, for rights defined in terms of specific calendar dates, how do water users and administrators adjust to the growing mismatch between hydrologic conditions and the timing specified in the right? Second, for those rights defined only as "seasonal" (most irrigation rights), does an earlier snowmelt and longer growing season increase the size (consumption) of a senior water right, and if so, how can administrators prevent this from unduly impacting junior rights?

The NRLC is interviewing water professionals for a report to be issued in summer 2008. If you have insights or thoughts on these issues, contact Doug Kenney at 303-492-1296, douglas.kenney@colorado.edu.

Residential Water-Demand Management

By Doug Kenney, Senior Research Associate

The NRLC continues work on a project with the City of Aurora in conjunction with the NOAA-funded Western Water Assessment. The focus is to evaluate the effectiveness of demand management strategies used by the City since 2002 to cope with drought-related water shortages. Aurora has used a combination of new water rate structures, higher prices, restrictions on outdoor lawn-watering, rebate programs and public education to significantly reduce summer residential water consumption, ensuring a safe level of reservoir storage. This study already has prompted inquiries from water managers and journalists from around the world—from Australia to the *Wall Street Journal*. Doug Kenney presented results at a conference in Tucson in August. See

- http://www.colorado.edu/resources/water_demand_and_conservation/
- the February 2008 issue of the *Journal of the American Water Resources Association*;
- the February/March 2007 issue of *Colorado Water*: http://www.colorado.edu/law/centers/nrlc/publications/Kenney_Colorado_Water_Feb_2007.pdf.

Oil & Gas Best Management Practices

By Kathryn Mutz, Senior Research Associate and Erin Eastvedt, Research Assistant

This project addresses the issue of how to balance development of natural resources with quality of life, wildlife populations and habitat, and other values.

Part 1 of this research involves development of a web-accessible database of Best Management Practices (BMPs) for oil and gas surface use. This component will be conducted with project partners: the Upper Green River Valley Coalition; the Colorado Energy Research Institute at Colorado School of Mines; the law firm of McDaniel, Baty, Miller, Agro & Robbins, LLC; and The Nature Conservancy. Participation by industry and various levels of government is being actively sought.

Part 2 is an evaluation of the decision-making process that agencies follow during the four stages of oil and gas development—agency land-use planning, leasing, exploration, and production/reclamation. From this evaluation, the Center will develop recommendations for improving the process and allowing for more effective, meaningful, and timely consideration of wildlife impacts. For information, contact Kathryn Mutz at (Kathryn.mutz@colorado.edu).

Drought and the Colorado River

By Doug Kenney, Senior Research Associate

The NRLC continues to be involved in many facets of Colorado River issues as the interstate rules evolve rapidly in response to severe drought conditions on the river. Of particular interest to the NRLC is:

- the combined impact of climate variability and change, population growth, and law and policy reform in modifying and reshaping the risk of shortages in the basin;
- how this should influence discussions about new developments (in Colorado and elsewhere);
- the reliability of existing projects; and
- efforts to protect and restore environmental resources.

Environmental Law Society and NRLC Public Comment Project

▣ White Paper on Forest Planning ▣

By Ryan Knight, Research Assistant

In March 2007, a federal district court in California struck down the U.S. Forest Service's 2005 land use planning rules. The agency had failed to analyze the environmental impacts of the proposed rules as required by the National Environmental Policy Act (NEPA). These rules set land-use planning standards for nearly 200 million acres of public lands under Service control. The Service claims that the planning process has become too cumbersome and is far too prescriptive to allow the Service to do its job efficiently. The Service has prepared a draft Environmental Impact Statement (EIS) in an effort to bring the 2005 Rule into compliance with NEPA.

The NRLC is studying the planning process and will be coordinating law student involvement in the EIS commenting process in collaboration with the law school's Environmental Law Society. The NRLC and the Environmental Law Society hope to offer an alternative planning framework to the U.S. Forest Service. This alternative framework will attempt to minimize the burdens of planning on the Service but would allow for critical land use choices to be made during the planning process and would assure meaningful public participation in the development plans.

For information: Ryan Knight (rdknight@hotmail.com) or Mark Squillace (mark.squillace@colorado.edu).

Recent NRLC Staff Presentations

Mark Squillace:

Reforming Western Water Law, Rocky Mountain Institute, Boulder, Colorado, August 27, 2007.

Public Participation in NEPA and Land Use Planning Processes, at the Bureau of Land Management, Glenwood Springs, Colorado, August 9, 2007.

Mining and Public Land Law Update, Rocky Mountain Mineral Law Foundation Annual Meeting, Vancouver, BC, July 22, 2007.

Meaningful Engagement: The Future of Public Participation, NRLC 25th Anniversary Conference, Boulder, Colorado, June 6, 2007.

Wetlands Regulation after Rapanos, NRLC Hot Topics presentation, Denver, CO, May 10, 2007.

The Rule of Law: A View from the American West, 2007 Fulbright Visiting Scholar Conference, Denver, Colorado, April 2007.

Doug Kenney:

Residential Water Demand Management in Aurora: Lessons Learned and Remaining Questions, at the 2007 Regional Water Symposium: Sustainable Water, Unlimited Growth, Quality of Life: Can We Have it All? Tucson, Arizona., August 31, 2007.

Jonathan Hanna:

Climate Change and Native Communities, at the National Congress of American Indians (NCAI) Mid-Year Conference, Anchorage, Alaska, June 10-13, 2007.

Immediately following the event, Jon was featured in a short television interview for "Native Report" which covers current events and topics of particular relevance for a Native American audience.

Environmental Law Society Update

By Carrie Covington, ELS Liaison to the NRLC

This year's officers are looking forward to a great and busy year working to foster an environmental law society within Colorado Law School. In addition, our goal is to expand the group's connections to the larger natural resources and environmental law society throughout Colorado and the West. The Front Range is the heart of the Rocky Mountain West's natural resource community, and the ELS officers are committed to helping Colorado Law students participate in and contribute to that community.

Central to these efforts is a closer partnership with the Natural Resources Law Center. ELS will take a larger role in planning and carrying out the annual summer conference in return for the Center's contributions to the ELS scholarship fund for low and unpaid summer jobs at environmental non-profits. ELS also seeks to develop connections between law students and practitioners through Hot Topic discussions of contemporary resource law issues.

ELS sponsors a Flatirons hike and barbeque during orientation week and hosts one of the first big Law School social events of the fall: Trivia Night. Other activities include group participation in various local restoration and preservation activities such as the Flagstaff Trash Bash. ELS also informs members and the larger Colorado Law community of important elections, rallies, and conferences.

If you are interested in participating in a Hot Topic panel discussion, would like to make a presentation, or have volunteer opportunities open to ELS students, please contact me at Carrell.Covington@colorado.edu.

SUPPORT THE NATURAL RESOURCES LAW CENTER

The NRLC is a self-sustaining program within the Colorado Law School. Our work is possible only because of generous grants and support from people like you. **Help us reach our goal of \$1 million for the Clyde Martz Endowment Fund. We are almost half-way there!**

To contribute ...

By check: Make your check payable to the
University of Colorado Foundation

Mail to: Natural Resources Law Center
University of Colorado Law School
401 UCB – Wolf Law Building
Boulder, CO 80301-0401

By credit card on-line:

<http://www.cufund.org/giveonline/index.php?ID=28>
and scroll to "Other."

Be sure to indicate that your donation is for the
Martz Endowment Fund (Acct #01-54293)

-or-

NRLC General Fund (Acct #01-24031)

For information about contributing to the Center,
contact Mark Squillace at:

Mark.Squillace@colorado.edu
Phone: 303-492-1287

"I have found that among its other benefits,
giving liberates the soul of the giver."

Maya Angelou

