

PLENARY SESSION

Thinking Outside the Boxes: Four Legal Traditions Operating on One Landscape – A Developing Perspective on Western Land Issues

2:00–3:15 p.m.
Thursday, April 21, 2005
Sturm Hall, Davis Auditorium

Moderator: **Federico Cheever**
Professor of Law
University of Denver College of Law
Denver, Colorado

Panelists: **Douglas M. Robotham**
Director
Colorado Office of the Trust for Public Lands

James S. Bedwell
Forest Supervisor
Arapaho & Roosevelt National Forests and
Pawnee National Grassland
Fort Collins, Colorado

Gary Severson
Executive Director
Northwest Colorado Council of Governments
Silverthorne, Colorado

THINKING OUTSIDE “THE BOXES” – FOUR LEGAL TRADITIONS OPERATING ON ONE LANDSCAPE

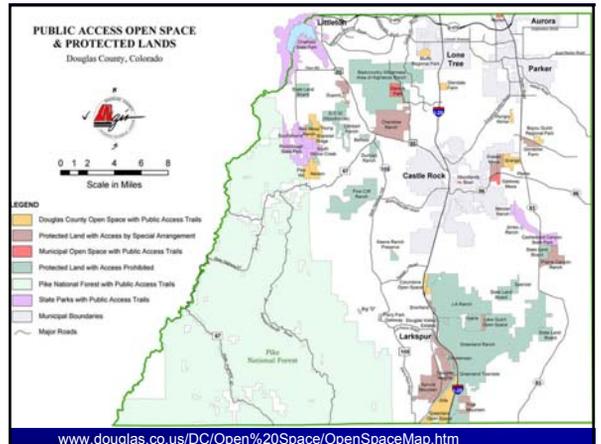
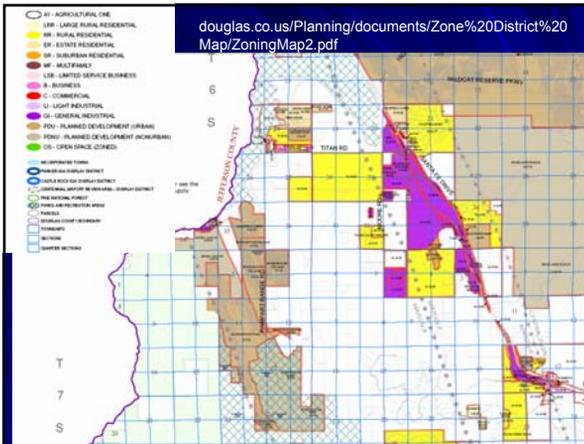
ROCKY MOUNTAIN LAND USE INSTITUTE, APRIL 21, 2005

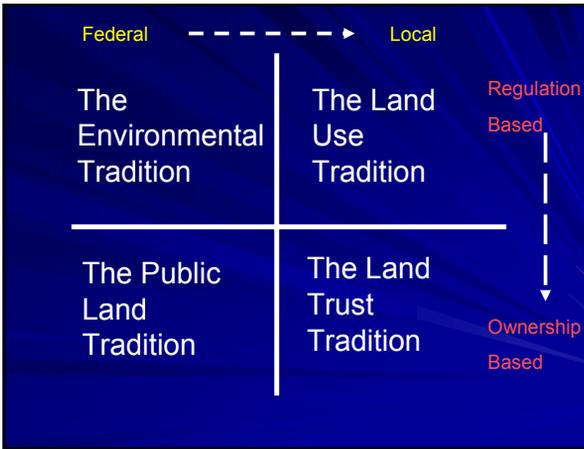
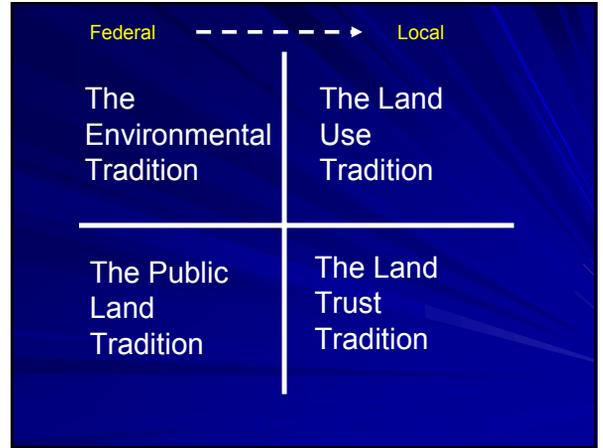
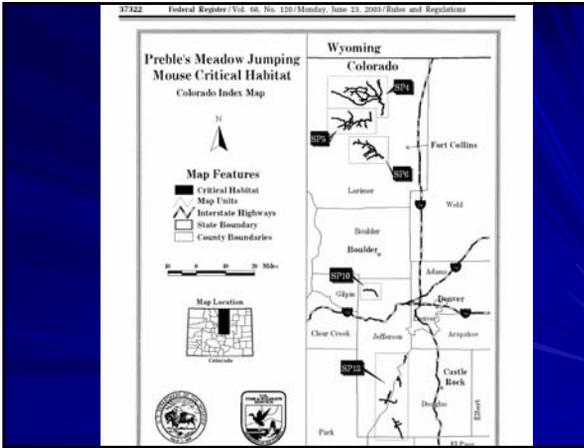
The Environmental Tradition

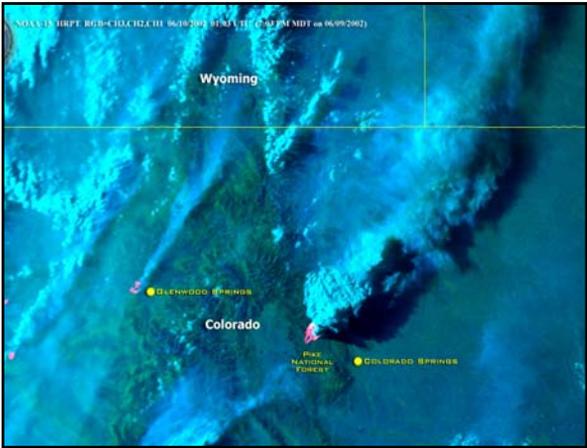
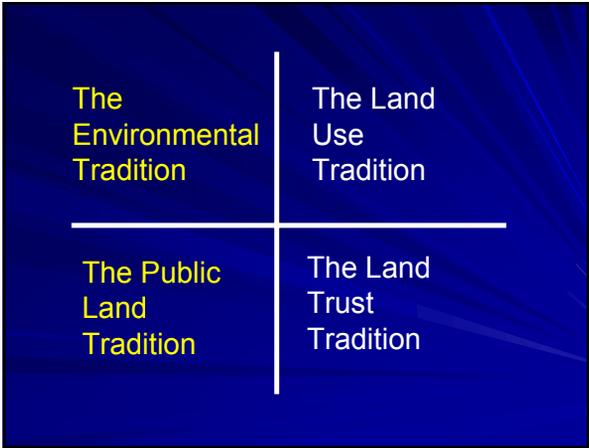
The Land Use Tradition

The Public Land Tradition

The Land Trust Tradition







Introduction

“Thinking Outside the Boxes” –Different Legal Traditions Operating on One Landscape -- A Developing Perspective on Wildland Urban Interface Issues

Thursday, April 21, 2005

**Federico Cheever
Professor of Law
Sturm College of Law
University of Denver**

Today, western landscapes are subject to management under four once distinct legal traditions. Each tradition has its own vocabulary and history. Each draws its authority from a specific set of legal principles. Each originally evolved to address a distinct perceived constellation of human problems, but now – everywhere in the American west -- all four are drawn more and more into collision, applied for on the same landscapes the same purposes.

The emergence of regional issues from wildfire management to low-cost housing for ski areas, to exurban sprawl have created an urgent need for a common planning and permitting vocabulary recognizing these four traditions. We have already begun building a management framework that recognizes federal and local authority and addresses federal and local concerns for land use planning and environmental quality. What does it look like now and what will it look like in the future? Much will depend on our ability to deal effectively with all four traditions.

What four traditions are we talking about?

First, there is the “Public Land Tradition.” This tradition governs primarily federal “public land,” carved out of the federal public domain between 1891 and 1934, to be managed for “its most productive use for the permanent good of the whole people . . . [u]nder such restrictions only as will insure the permanence of these resources.” Letter from James Wilson to Gifford Pinchot, first Chief of the United States Forest Service (1905).

The National Forests, like National Parks, National Wildlife Refuges and Bureau of Land Management lands are the fruit of a century-old realization that what remained of the Federal public domain needed “management” and the decision that much of the federal public land, a little less than one third of all the land in the United States, roughly 650 million acres, should remain under federal control. Since the mid-1990s, the traditionally statutory mandates of “multiple use” and “sustained yield” have largely been supplanted on the public lands. The new guiding concept in federal land management has become something called “ecosystem management.” Most people would agree that “ecosystem management” places emphasis on maintaining the integrity of the ecosystems

that exist, in part, on the public lands. Most ecosystems that exist on public land also exist on adjacent land outside the generally recognized realm of the Public Land Tradition. As a result, the Public Land Tradition has escaped its geographical borders and has become relevant for all land in a “wildland urban interface” of undefined scope.

Second, there is the “Land Use Planning Tradition.” This tradition thrives in most American local government jurisdictions with significant populations and budgets. Most have a “comprehensive master plan” intended to “influence” development “to preserve the county’s rich rural heritage and its natural beauty” and “to guide future growth and development decisions,” Douglas County Colorado Comprehensive Plan 1-1 (May 2001), and a zoning code intended to regulate development; “to govern the use of land for residential and non-residential purposes, regulate and limit the height and bulk of buildings and other structures, limit lot occupancy, determine the setbacks and provide for open spaces . . .” Douglas County Zoning Resolution, Sec 101 (March 1999). Like the Public Land Tradition, Land Use Planning has its own history and vocabulary. It arose in the second and third decade of the twentieth century to combat the perceived evils of American cities. While theoretically a function of state “police power,” delegated to counties and municipalities by statute, the Land Use Planning Tradition draws much of its authority from the right of local communities to shape their own futures.

Recently, land use planning has been convulsed by political battles over “sprawl.” The notion of “smart growth” speaks volumes about the Land Use Planning Tradition, its acceptance of development and its commitment to conscious planning to order that development. “Smart growth” is not a concept likely to guide any federal public land use plan. As Americans flock to live in those areas blessed with reasonable proximity to federal public lands, the “Land Use Planning Tradition” has collided with the “Public Land Tradition” with their different histories and goals being applied to the same acres.

Third, there is the Environmental Tradition. Environmental Law burst on the scene in the 1970s driven by fears for the human health effects of pollution but also driven by a growing concern for what we had begun to call “the environment.” Like the Public Land Tradition, Federal law dominates the Environmental Tradition (with the states in a strong supporting role). Unlike the Public Land Tradition, Environmental Law’s authority is founded on regulation, not ownership. Unlike Land Use Planning, Environmental Law flows from national decisions to shape the future, not local ones. Unlike the Public Land or Land Use Planning Traditions, Environmental Law places little or no emphasis on landscape planning.

The Environmental Tradition, however, governs filling of wetlands, pollution into streams and rivers, endangered species habitat, and air emissions from prescribed fires, the automobiles of those who commute into “the hills,” and the “regional haze” that obscures the views from their newly purchased homes. In this way it has the potential to regulate many of the activities that take place in the wildland urban interface.

Finally, there is The Land Trust Tradition. In the past two decades, many public entities and private land trusts have taken to buying property rights in land for the preservation of open space, historical sites and biological communities through “land conservation transactions.” Often these “land trusts” do not buy all the property rights associated with the land, but instead buy or are given “conservation easements,” popular, flexible, but conceptually challenging negative servitudes which grant one party the power to prevent the owner of the land from developing it beyond certain specific limits. Transactions often result from donations and private philanthropy, but are also funded through local sales taxes, the Colorado’s State lottery and, occasionally, the Federal Land and Water Conservation Fund. Like the traditional public lands, the power of Conservation Land Transactions is founded in ownership, but often private ownership as well as public. The hallmark of the Land Trust Tradition is a voluntary transfer for preservation.

While the vast majority of the public lands are governed by federal law and local land use planning is a local exercise of authority delegated by the states, conservation land transactions are creatures of both state property law and federal tax law. More than 1,500 private land trusts – incorporated under state law and tax exempt under the federal tax code -- operate in the United States, roughly 40 in Colorado. By the reckoning of their national umbrella organization, the Land Trust Alliance, by 2003, Land Trusts nation-wide have preserved more than nine million acres of land, an area larger than Massachusetts.

Land Conservation Transactions are now being used in the west to solve some of the problems created by the intersection of the other three traditions. Protecting land in the wildland urban interface with land conservation transactions adds the distinct qualities of this fourth legal tradition into the already complicated mix.

That we are using four distinct legal traditions on contiguous landscapes governed by natural processes that do not respect our jurisdictional boundaries is important. Equally important is the distinct but related proposition that we are using those four legal traditions to do, more or less, the same thing -- protect living landscapes. “Ecosystem management,” “smart growth,” ‘environmental protection’ through regulation and land preservation through acquisition – are all driven by the same desire to maintain unspoiled places and livable communities side by side across the West.

BUILDING BRIDGES PROJECT



Multi-Jurisdictional Cooperative Approaches to Land Management

bridge \ˈbrij\ *n* **1a:** a structure carrying a passageway over a depression or obstacle **b:** a time, place, or means of connection or transition.

The intent of the Building Bridges Project is to build bridges that will span the obstacles that inhibit cooperative interaction between municipal, county, state, and federal governmental jurisdictions. It is also the intent to build bridges that will connect governmental jurisdictions that are in transition due to changing land use.

The Building Bridges Project is intended to provide a communications platform for locally elected officials, community leaders, and decision level personnel of federal land and resource management agencies to communicate their jurisdictions' visions and goals. The project also intends to develop a collaborative process to discuss and formulate multi-jurisdictional policies and management strategies with respect to USDA Forest Service national forest plans, USDI Bureau of Land Management area plans, and local governments' master plans, their implementation and monitoring.

The development and coordination of a process where elected officials, community leaders, and federal land and resource decision level personnel can share information and collaborate with each other regarding multi-jurisdictional policy and direction will enable all jurisdictions to participate in "boundaryless" planning.

The process will also facilitate consensus building towards a shared vision and direction for the region and identify how all jurisdictions can develop policy to works towards local and regional objectives. The project will foster intergovernmental and community cooperation by addressing multi-jurisdictional approaches to the management of resources and impacts that transcend jurisdictional boundaries.

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February 23, 2000

The Honorable Larry E. Craig
United States Senate
Subcommittee on Forests and Public Land Management

Dear Senator Craig and Distinguished Committee Members:

Northwest Colorado Council of Governments (NWCCOG) appreciates this opportunity to present testimony to the Senate Subcommittee on Forests and Public Land Management regarding the Proposed Revised Land and Resource Management Plan for the White River National Forest and Draft Environmental Impact Statement.

Northwest Colorado Council of Governments was established as Colorado planning and management Region XII in 1972 by Executive Order of the Governor in response to the Federal Intergovernmental Cooperation Act of 1968. Regional planning was encouraged as a means to avoid overlap, duplication and competition between local planning activities. Today, NWCCOG serves a five county region comprised of the following twenty-six member jurisdictions:

- | | |
|---------------------------------|--------------------------|
| 1. Eagle County | 14. Town of Kremmling |
| 2. Town of Avon | 15. Town of Winter Park |
| 3. Town of Basalt | 16. Jackson County |
| 4. Town of Eagle | 17. Town of Walden |
| 5. Town of Gypsum | 18. Pitkin County |
| 6. Town of Minturn | 19. City of Aspen |
| 7. Town of Red Cliff | 20. Summit county |
| 8. Town of Vail | 21. Town of Blue River |
| 9. Grand County | 22. Town of Breckenridge |
| 10. Town of Town of Fraser | 23. Town of Dillon |
| 11. Town of Granby | 24. Town of Frisco |
| 12. Town of Grand Lake | 25. Town of Montezuma |
| 13. Town of Hot Sulphur Springs | 26. Town of Silverthorne |

The attached testimony is comprised of paraphrased and actual excerpts from the Northwest Colorado Council of Governments response to the Proposed Revised Land and Resource Management Plan for the White River National Forest. The response was approved by the NWCCOG Board of Directors on January 27, 2000 and submitted to the Responsible Official on January 28, 2000.

Sincerely,

Gary J. Severson
Executive Director

Northwest Colorado Council of Governments
Testimony Regarding the Proposed Revision of the White River National Forest Land and Resource Management Plan

Presented to the United States Senate Subcommittee on Forests and Public Land Management

Presented by Gary J. Severson, Executive Director
February 23, 2000
Washington, D.C.

On behalf of the twenty-six member jurisdictions of Northwest Colorado Council of Governments, I thank you for the opportunity to submit this testimony regarding the proposed revision of the White River National Forest Land and Resource Management Plan.

Northwest Colorado Council of Governments is comprised of twenty-six municipal and county governments in one of the fastest growing areas of Colorado. The overwhelming majority of land within three of those counties, Summit, Eagle, and Pitkin is managed by the USDA Forest Service contained within the administrative jurisdiction of the White River National Forest. In Summit County the Forest Service is responsible for managing nearly eighty percent of the land base, in Pitkin County seventy-nine percent, and fifty-five percent in Eagle County. This land ownership pattern presents unique challenges to county and municipal governments as they cope to deal with issues related to urbanization as a result of rapidly increasing populations on limited acreage. Adequate housing, transportation, police and fire protection, drinking water source protection, and waste water treatment are but a few of the challenges local governments face in light of population growth well above state and national averages.

Currently, there is no mechanism for on-going communications and collaboration for locally elected officials and Forest Service decision level personnel to discuss issues and form coordinated multi-jurisdictional policy related to land and resource management. As a result, planning, plan implementation, and the monitoring of actions is incomplete as resources such as water, wildlife, scenery, and air, and impacts such as wildfire, insects, disease, access, and environmental degradation transcend political boundaries. Decisions unilaterally made by one governmental jurisdiction can have direct impacts on the lands and resources of another. The impacts of policy decisions flow both ways across national forest and contiguous local governmental boundaries.

In light of the region's rapid population growth and the increasing need for multi-jurisdictional, intergovernmental cooperation and collaboration, Northwest Colorado Council of Governments was surprised to find that the White River National Forest proposed Forest Plan Revision had eliminated urbanization as a planning issue. We were further disappointed to learn that the preferred alternative identified zero acres for management prescriptions dealing with urbanization in the interface zones between private lands and the White River National Forest. Further, we were amazed that there is no process to ensure multi-jurisdictional collaboration. It is the belief of NWCCOG that much of the deficiency rests in the fact that there is no direction, mechanism, or established process for effectively collaborating with local governments. NWCCOG is concerned that, although there are goals for collaboration, there are no standards or guidelines under current regulations that insure measurable objectives will be established for its effective implementation.

Northwest Colorado Council of Governments believes that collaboration with local governments is a deficiency in all alternatives as presented in the Draft Environmental Impact Statement. Therefore, NWCCOG did not establish a preference of one alternative over another. However, NWCCOG unequivocally believes and recommends that whatever revision of the management

plan be approved for the White River National Forest, three components must be included:

- 1. The effects of urbanization (growth) on multi-jurisdictional planning and management must be assessed in collaboration with appropriate local general-purpose governmental jurisdictions and local, state, and federal land and resource management agencies.**
- 2. A multi-jurisdictional collaborative process must be established for the identification, planning, management, and monitoring of intermixed and or adjacent lands of other jurisdictions that are of concern to those jurisdictions.**
- 3. A collaborative process must be established to identify goals and objectives for multi-jurisdictional management actions that will strive to sustain community vitality and healthy ecosystems on a regional basis.**

As the population of our region of Colorado rapidly grows and the demand for resources and governmental services increases, the need for multi-jurisdictional collaborative processes becomes increasingly evident. Vanishing are the days when governmental jurisdictions could establish policies and govern with little regard to neighboring jurisdictions. Northwestern rural Colorado is becoming decreasingly separated by distance and geographic features and is increasingly being united by common issues and needs resulting from rapid urbanization.

The development and coordination of a process where elected officials and federal land and resource decision level personnel can share information and collaborate with each other regarding multi-jurisdictional policy and direction will enable all jurisdictions to participate in coordinated planning. Such a process will also facilitate consensus building towards a shared vision and direction for the region and identify how all jurisdictions, federal, state, county, and municipal, can develop policy to work towards local and regional objectives. A collaborative process will demonstrate intergovernmental cooperation by addressing multi-jurisdictional approaches to the management of resources and impacts that transcend jurisdictional boundaries.

The twenty-six county and municipal governments, through Northwest Colorado Council of Governments, are prepared to work with the USDA Forest Service to develop such a multi-jurisdictional collaborative process to work towards a more cooperative, unified regional approach to land and resource management in northwestern Colorado.*

* At the time of the preparation of this testimony, Northwest Colorado Council of Governments is awaiting approval of a USDA Forest Service Rural Communities Assistance grant application for the purpose of cooperating with the White River National Forest to develop a workable multi-jurisdictional communications and planning process.