J-lobbs, Trout & Raley, P.C.

Attorneys At Law 1775 Sherman Street • Suite 1300 Denver, Colorado 80203 (303) 861-1963 • Fax: (303) 832-4465

Ext. 123

February 6, 1993

Honorable Bruce Babbitt Secretary of Interior Washington, D.C.

RE: Western Water Law and "Long's Peak Report"

Dear Secretary Babbitt:

I am a Colorado Democrat who has served as an EPA enforcement attorney, First Assistant Attorney for Natural Resources in Colorado, and Principal Counsel to the Northern Colorado Water Conservancy District, operator of the Colorado-Big Thompson Reclamation Project.

In November of 1992, I attended a breakfast with you hosted by Ray Moses in Boulder at the C.U. Law School. Those in attendance included a cross-section of practicing Colorado water lawyers, environmental representatives and faculty. You engaged us in a lively debate regarding water matters in the West. Divergent viewpoints were presented.

In marked contrast to the composition of the group assembled by Ray Moses, another group calling itself the "Long's Peak Working Group" was assembled in Colorado in early December of 1992 to discuss water policy recommendations for the new Administration--not one practicing Colorado water attorney or representative from municipalities or water districts, whose job it is to supply water to Colorado citizens, was invited to participate.

As a result, the recommendation of the Long's Peak Working Group is skewed toward federal preemptive regulatory approaches which, if implemented, would destroy the long history of federalism in water matters and lead to water rights takings, as well as a new round of warfare over water matters in the West.

An objective study and assessment of water policy and its legal and political context would have produced a far different product, in tone and substance, than the Long's Peak Report.

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state and federal law. This was an attempt partisan fashion to administration in overturn existing to influence this A herd of "water buffalo" yes-terday attacked a University of The report by the Long's Peak Working Group outlines 47 recom-Colorado-based report to Prestdent Clinton that they say recommends heavy federal influence on western water policy and could be misconstrued as state-sanctioned

Denyer Post Capitol Bureau By Steve Lipsher

Greg Hobbs, Denver water lawyer

> tion that critics believe could, in many respects, etrip states of their

power to control water within "It's obvious to me this was an

their borders.

mendations to the new administra-

philosophy.

cy, and recommends such actions as returning many water rights to Native Americans,

"A major movement toward waler policy reform already is afoot at the local, state, tribal, regional and federal levels," the report

tration in a partisan fashion to

overturn existing state and federal law," said Greg Hobbs, a Denver

attempt to influence this adminis-

needs of Indian tribes, other ethniccluding sound fiscal policy and the "Too often, other concerns - incommunities and ecosystems were ignored."

sity of Colorado Law School, de-

Gene Nichol, dean of the Univer-

water lawver.

academic effort meant solely to

fended the study as a nonpartisan,

Foundation and published by the

The study, funded by the Ford

put issues on the table,

school's Natural Resources Law

Center, calls for greater federal nfluence in water issues, including establishing a national water poli-

culture and Natural Resources But lawmakers at a joint meeting of the Senate and House Agricommittees lambasted the report as a partisan effort to overturn 180 years of state water law.

invited to participate in this forum," Hobbs said, "Not one was given a volce,"

pressed concern that because the study emanated from a two-day committee members exmeeding last December at the University of Colorado — a state instltutton - It would appear to represent the state's position. AlBO,

proval. And I think that credibility Jerke, R-LaSalle, chalrman of the "It looks to have a stamp of apdon't want in any way for us to impede scholarly research," he said, is the problem," said Rep. Bill House Agriculture Committee, "I

"But this appears to me to be very one-sided . . . I just ask for sensitivity about advancing what is clearly a political piece that may be construed as what state of Colorado's policy is."

The report was intended merely

of the Natural Resources Law Center, "Undoubtedly this is a docmendations regarding policy," Mcto put issues on the table for consideration, said Larry MacDonnell ument intended to make recom-Donnell said. "If that's political

Critics noted the conference included representatives from environmental groups such as the Na-

Spylronmental Defense Fund, but opment interests characterized as "Not one of those persons was none of the thirsty Colorado develtional Audubon Society and "water buffalo,"

then so be it.

Water experts offer policy ideas to Clinton ALLENSPARK (AP)—Thirty term needs of humans as part of proving river ecosystems to profront runner in a national wate experts from across the country the ecological community." said tecting Indian water rights

both the economic and environsay the federal government needs to design a water policy that encompasses a variety of needs on mental level.

the ecological community," said David Getches, University of Col-orado law professor and a mem-

The experts have proposed their President-elect ideas

longmust "Sound water policy address contemporary and

The Long's Peak Working Group outlined its objectives Frirecommendations, some in the first 100 days of the presidency. day and called on the Clinton administration to implement its ber of the group.

its objectives ranged from im-

tecting Indian water rights.

The group, assembled by the University of Colorado-Boulder's velop objectives for "sustainable water use" and recommendations Natural Resources Law Center, met Dec. 6-8 at Allenspark to de-

for specific action.

It developed four main water use objectives and 47 recommendations for specific action.

at strengthening the Clean Water The group said its agenda Many of its objectives were aimed government took into account Act and ensuring that the federal both economic and environmental principal of ecological health. costs of water policy. stemmed

The group urged the Clinton management rights and regulatory affected by them; to be the decisions to the people most closeadministration

organizations.

an water rights and fair water access to low-income and ethnic conservation program; to launch a program aimed at protecting Indicommunities, and to declare watersheds as the fundamental unit front runner in a national water

mental Protection Agency a cabnet-level position, and to create task forces aimed at reviewing wa-Further, the group urged Clin-n to seek congressional congressional ton to seek congressional approval for making the Environof water management. ter management policy.

National Wildlife Federation, Native American Rights Fund, Naas individuals Audubon Society and various and as representatives of their The members of the group, which included representatives of he Environmental Defense Fund, National other private and university rep-Conservancy, resentatives, . met ure

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Bruce Babbitt, Secretary of Interior February 6, 1993 Page Two

As you well know, water rights are among the most valuable and essential property rights held by westerners. These rights were created by the states in reliance on the rejection of riparian water law by Congress and the courts in favor of water allocation and use under state law. The "Ecological Integrity" section of the Long's Peak Report, which calls for the use of federal regulatory power to maintain and restore the aquatic eco-system, appears to be aimed directly at prior appropriation law and the water rights which have been vested in water users of the West.

Riparian water law favors natural values to the exclusion of uses away from the stream, a doctrine which could not be applied to the water-short states west of the Hundredth Meridian. The exercise of water rights necessarily involves withdrawing water from the natural streams and lakes for beneficial uses. The Progressive Conservation Movement, pursued as public policy on a bi-partisan basis, has resulted in state and local initiatives fostered by the national government to build the water infrastructure of the west in reliance on the stability, certainty and flexibility of water allocations made under state law.

The call for "Ecological Integrity" as national water law is a surrogate for riparian water law imposed on the western states through federal regulatory preemption unless tempered by the recognition of the role of state water law and the recognition of water rights as valuable property rights which must be protected. The Long's Peak Report, however, does not address the sustainability of agricultural, municipal, industrial and recreational water rights within a federal system of government.

I am enclosing a paper I will deliver to the American Bar Association on February 11 regarding Water Rights Takings and federal/state water interrelationships. I am also enclosing an issue of the Colorado Water Congress Water Legal News discussing important recreational water and instream flow cases which demonstrate the capability of prior appropriation law to adapt the constituency, economy and ethics of citizens of the West.

As you proceed with your most important work, I urge you to work in a consensusbuilding, broad-based manner, hearing from those whose duty it is to supply water for beneficial uses, as well as those who seek to foster environmental values. When I heard you in open discussion at the Ray Moses breakfast, I gained confidence that you would not surround yourself with those who speak only for a singular point of view.

Sincerely,

Gregory J. Hobbs, Jr.

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HOBBS, TROUT & RALEY, P.C.

J-lobbs, Trout & Raley, P.C.

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January 28, 1993

Senator Don Ament, Chairman Senate Agriculture Committee Colorado Senate State Capitol Denver, Colorado 80203

Representative Bill Jerke, Chairman House Agriculture Committee Colorado House of Representatives State Capitol Denver, Colorado 80203

Dear Chairmen Ament and Jerke:

In early December, 1992, the University of Colorado School of Law Natural Resources Law Center co-hosted a meeting calling upon the Clinton Administration to issue orders to federal agencies which, if promulgated as requested, would pre-empt Colorado water law and impair the exercise of water rights in this state and throughout the west.

The group's manifesto is entitled "America's Waters: A New Era of Sustainability, Report of the Long's Peak Group on National Water Policy Objectives and Initiatives, December, 1992." However, "sustainability", as used in the report, does not include sustaining state water law systems and the economy built on them.

Not one Colorado legislator or representative of any Colorado water organization or municipality which owns or seeks to protect its water rights was invited to attend.

The group called upon President Clinton to issue an executive order within 100 days to utilize all available federal laws and regulations to "restore ecological integrity" to the west on a watershed basis. For those who study and practice Colorado water law, these are code words for the impairment of interstate water compact development and the imposition of riparian and public trust principles anti-ethical to Colorado's prior appropriation doctrine. Riparian water principles, which

Mr. Gene Nichol Mr. Larry MacDonnell February 2, 1993 Page 2

considered to be objective, nor can it be considered to be legal scholarship. The Working Group was simply a highly partisan advocacy group for this position, and the limited "disclaimer" of any such intent in the beginning of the Report is not sufficient, particularly when the Report is apparently published and distributed by the Center. Let me be clear on this point - it would have been equally improper for the Center to have sponsored a forum limited to members of People for the West or another extreme group on the opposite side of these issues. If the Center wants to become an environmental advocacy group, it should do so openly and not pretend to be objective.

The second problem is with the substance of the Report. I am appalled at the lack of recognition of the need to protect existing vested water rights, or to preserve the ability of states like Colorado to develop and use its interstate water allocations. Instead, the Report recommends that the Clinton Administration erect yet more barriers to the future development and use of water in Colorado, and also supports policies which will be asserted to require the reallocation of water from existing water rights to new uses. These positions are further proof of the bias of the Center, and its advocacy of positions which are contrary to the interests of the State of Colorado and its citizens.

It would be incorrect for you to assume that my opposition to the activities of the Center is based on my opposition to the recognition and satisfaction of environmental and other non-traditional water uses. The difference is that I believe that these demands should be satisfied without either sacrificing future development and use of water in Colorado or abrogating private property rights through the expedient, but intellectually suspect, methodology of retrospectively redefining previously established rights.

I believe that the credibility of the Center as an objective forum for the development of natural resources law and policy has been severely compromised, and suggest that the Center should sever its relationship with the Law School so that it can continue its activities as an independent advocacy group. You should also understand that I am not interested in belated offers of token involvement in this issue by others with different points of view or cosmetic changes in the form of Center publications, but instead expect a defined and substantial commitment to balance in the activities of the Center if it is to continue its association with the Law School.

Mr. Gene Nichol Mr. Larry MacDonnell February 2, 1993 Page 3

I also understand that the House and Senate Agriculture Committees may hold a joint hearing on the Report later this month. I will not be able to attend the hearing because it is in the middle of a long-scheduled and awaited vacation. However, I would be happy to discuss this matter further at another time.

Yours very truly,

Bennett W. Raley

for

HOBBS, TROUT & RALEY, P.C.

obbs, Trout & Raley, P.C.

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February 2, 1993

m Gene Nichol, Dean University of Colorado School of Law Boulder, Colorado 80302

Mr. Larry MacDonnell, Director Natural Resources Law Center University of Colorado School of Law Campus Box 401 Boulder, Colorado 80309-0401

Gentlemen:

Enclosed is a copy of a letter which was sent last week to Senator Ament and Representative Jerke regarding the Report of the "Longs Peak Working Group". The letter was prompted by our discovery that the report is being widely circulated throughout the nation, and is being misrepresented as an objective recommendation on behalf of Colorado and the West to the Clinton Administration for the development of public policy.

There are two problems with the Report. The first problem is the evolution of the Center from a forum for legal scholarship and the objective development of natural resources policy into an advocate for those who espouse federal control over land and water development and use. The participation in the Working Group was clearly limited to those who share the common goals of redefining existing property rights in water in order to reallocate the water to other uses without payment of compensation, and abrogating state primacy over water allocation and administration. People with other views were pointedly excluded. There were no participants who are responsible for the development of water supplies, no practicing water attorneys from the West, and no representatives of local and state governments.

While there is nothing wrong with partisan activities and I support the right of the participating individuals to hold and express these views, I do object to the misuse of the Center for this purpose. The work product of the Working Group cannot be

Senator Don Ament Representative Bill Jerke January 28, 1993 Page Two

severely restrict the withdrawal of water from streams and lakes, were rejected long ago as a matter of federal law in order to provide security, stability and flexibility through state prior appropriation law.

The biased effort of the C.U. Natural Resources Law Center to influence federal water policy is particularly damaging to Colorado at this time because 1) the Forest Service is attempting to take up to 40% of the perfected water yield of northern Colorado cities and ditch companies as the price of special use permit renewals, and 2) the Ute Indian water rights settlement, involving construction of the Animas-La Plata Project, is the subject of severe attack based on endangered species and ecological integrity principles exactly like those endorsed by the Long's Peak Group, and 3) fish and wildlife service suggestions that yield from already developed water storage projects in Colorado become the subject of § 7 consultation and by-pass or release requirements under the Endangered Species Act.

In the absence of the Colorado Legislature considering and adopting principles protective of Colorado's water compacts, water rights, and water allocation law, we are greatly concerned that the University of Colorado's role in hosting and producing the 100-day agenda for the Clinton Administration will be construed as reflective of Colorado policy and thinking. Perhaps your committees could hear from those who were excluded from presenting their views.

Best regards.

Sincerely,

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Gragory A. Hobbs, Jr.

D D D 1/ T -

Robert V. Trout

Bennett W. Raley

HOBBS, TROUT & RALEY, P.C.



March 3, 1993

The Honorable Ben Nighthorse Campbell United States Senate Washington, DC 20510

Dear Senator Campbell:

In early December 1992, the University of Colorado School of Law, Natural Resources Law Center co-hosted a meeting calling upon the Clinton Administration to chart a new approach toward managing America's waters. The resulting "America's Waters: A New Era of Sustainability. Report of the Long's Peak Working Group on National Water Policy" has serious implications for western water policy.

While the National Water Resources Association was not asked to participate in the meeting, as the largest organization representing western water users, we feel that it is very important to let you know that this report is not representative of the majority of water users in the West. In many cases, the ideals advocated in this report are diametrically opposed to long-held historical water principles that are largely responsible for settling the West and for its economic success today. This report is of such concern that the Colorado state legislature recently held hearings on the Long's Peak Report to discuss its the long-term impacts that this report -- if implemented -- would have on Colorado's water supply.

Generally speaking, there are two significant problems with this report. They are:

- The limited scope of those who participated in the working group and the resulting lack of objectivity; and,
- 2. The failure to recognize existing western water law based on the principle of State Primacy that is largely responsible for the settlement of the arid West.

PRESIDENT
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EXECUTIVE VICE PRESIDENT
Thomas F. Donnelly

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Leroy Goodson

The first problem of the working group's report appears to be that participation was limited to those who share the common goals of redefining existing property rights in water in order to reallocate the water to other uses without payment of compensation, and abrogation of state primacy over water allocation and administration. The hand-picked participants appear to have been discriminatingly chosen to exclude those who are responsible for the development and sustainability of water supplies in the West.

Secondly, regarding the substance of this report, there appears to be a flagrant disregard for the need to protect existing vested water rights. Congress is largely responsible for defining the historical parameters which allowed the West to be pioneered and permanently settled due in a large part to the establishment of stable and long-term supplies of water. These parameters -- under the jurisdiction of each state -- are the very foundation of the economic success of the West, both for farmers and cities.

Should Congress seek to review the <u>Long's Peak Report</u> in any meaningful way, we would like for you to keep in mind that we do not believe this report represents mainstream western views. We would request the opportunity to appear in any forum where this report may be considered in order to present a balanced view of water policy issues that affect our members -- western municipalities and western farmers and ranchers.

In the meantime, if you are interested in further information about this subject, please do not hesitate to call on me personally. This issue is vitally important to the future of the West.

Sincerely,

Thomas F. Donnelly

Executive Vice President



DON AMENT State Senator Route 1, Box 142 Iliff, Colorado 80736 Capitol: 866-4866 Home: 522-8205

Senate Chamber State of Colorado Denver

COMMITTEES:
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Resources and Energy
Member of:
Capital Development
Local Government
State, Veterans and
Military Affairs

March 3, 1993

The Honorable Bruce Babbitt United States Secretary of Interior 1849 C Street NW Washington, D.C. 20240

Re: "Long's Peak Report" and Colorado and National Water Policy

Dear Secretary Babbitt:

The Senate and House Agriculture and Natural Resources Committees of the Colorado General Assembly met in joint session on February 17, 1993 to hear a presentation of the "Long's Peak Report" by representatives of the Natural Resources Law Center of the University of Colorado School of Law, and a response to that report by representatives of Colorado farmers, cities, and businesses who own and exercise water rights.

As a result of our hearing, we would like to inform you that the "Long's Peak Report" dated, December, 1992, does not accurately reflect Colorado law or policy, and the invitation list excluded those in Colorado who would have articulated a different view.

We are especially concerned about the recommendations which call upon the President and executive agencies, such as yours, to issue directives and regulations through federal laws, permits or licenses in order to "restore the aquatic eco-system." In Colorado and the other western states, water rights are vested property rights which entitle their owners to withdraw water from the streams and lakes for beneficial use. A water right decree specifies a place of diversion or storage, the amount of water involved, and the beneficial uses involved. The most important element of a water right is its priority to use, to the exclusion of others, that amount of water which is decreed to the right.

If the United States, or your agency, need water for beneficial uses, including for recreation and fish and wildlife uses, it should proceed according to established state and federal law pertaining to the creation of water rights, rather than using permits and licenses and other regulatory mechanisms to deprive Colorado water right holders of the water yield to which they are entitled under their rights.

An example of what we are most concerned about is the attempt by the administrators of the Arapaho and Roosevelt National Forests in Colorado to require Colorado cities and farmers to surrender water yield from their existing water rights in order to pursue water facility maintenance, repair or replacement projects or obtain renewal of their special use permits. Four Colorado cities (Boulder, Loveland, Greeley and Fort Collins) and farmers under the Water Supply and Storage Company system are experiencing great difficulties with the Forest Service over keeping water for their citizens which has been developed and utilized for decades.

The Long's Peak Report demonstrates little, if any, regard for property rights in water, and for the state's role in water allocation and administration.

When the report talks about equity for Native Americans, it fails to call for the construction of the Animas-La Plata, which is an essential feature of the Ute Indian Water Rights Settlement, and was promised to Colorado simultaneously with construction of the Central Arizona Project under the 1968 Colorado River Basin Project Act.

The report seeks national permits on dams and irrigation return flow which are exempt from such permits under the Clean Water Act as non-point sources subject to best management practices tailored by the states under the guidance of EPA.

We urge you and the President not to embark upon federal pre-exemption of state water law, water rights, and interstate water compact entitlements through regulatory means. We are willing and prepared to work with your agencies to address water user and environmental concerns.

Sincerely,

Don Ament

Chairman, Senate Agriculture,

Mill felie

Natural Resources and Energy Committee

Bill Jerke

Chairman, House Agriculture, Livestock

and Natural Resources Committee

cc: Colorado Congressional Delegation



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Senate Chamber State of Colorado Denver

COMMITTES:
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Agriculture, Natural
Resources and Energy
Member of:
Capital Development
Local Government
State, Veterans and
Military Affairs

March 3, 1993

The Honorable Mike Espy United States Secretary of Agriculture Fourteenth Street and Independence Avenue SW Washington, D.C. 20250

Re: "Long's Peak Report" and Colorado and National Water Policy

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Agriculture, Natural
Resources and Energy
Member of:
Capital Development
Local Government
State, Veterans and
Military Affairs

March 3, 1993

Carol Browner
Administrator
United States Environmental
Protection Agency
401 M Street SW
Washington, D.C. 20460

Re: "Long's Peak Report" and Colorado and National Water Policy

Dear Administrator Browner:

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Bill Jerke

Chairman, House Agriculture, Livestock

and Natural Resources Committee

cc: Colorado Congressional Delegation



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Fax: 492-1297

Senator Ben Nighthorse Campbell 380 Russell Senate Office Building Washington, DC 20510

Dear Senator Campbell:

Recently you have received a copy of a letter from Don Ament and Bill Jerke, chairs respectively of the Senate and House Agriculture Committees of the Colorado General Assembly. This letter mentions the "Long's Peak Report" produced by a group of water policy experts convened in December 1992. I would like to take this opportunity to provide you with some background to this report.

Shortly after the election in November we were contacted by a foundation and asked whether anyone had pulled together the many strands of water-related policy reform ideas and proposals that have been so widely discussed in recent years for consideration by the new Clinton Administration. Upon determining that no such comprehensive effort was underway, we agreed to organize and convene a group for this purpose.

Two-and-one-half weeks later, 30 individuals from around the country who have been active in studying and proposing forms in natural water policy came together near Estes Park, Colorado for an intensive two-day meeting. We began Sunday evening, December 6, 1992, and completed our work by noon on Tuesday, December 8. In this very short time we moved from a group of people who, in some cases, did not even know one another, to a group able to reach consensus on major water policy objectives and specific recommendations to achieve those objectives.

I enclose a copy of the report for your review. As you will see, it identifies four key objectives related to water: water use efficiency, ecological integrity, clean water, and equity and participation in decisionmaking. Each of these objectives is described, and general principles are outlined. The report then

Senator Ben Nighthorse Campbell March 16, 1992 Page 2 of 2

provides 47 specific recommendations for accomplishing these objectives.

The report is directed at the new Administration and thus emphasizes the federal role in achieving the identified policy objectives. Federal leadership is important and even essential in some cases. But the report emphasizes an integrated approach to water resources, one in which the many diverse interests in water seek common approaches and solutions "closest to the levels at which problems are posed and impacts felt"--perhaps at the watershed level.

There has been widespread interest in the report, most of it positive. The members of the Long's Peak Working Group represented diverse interests both geographically and in other ways. They shared common experience in their long-standing involvement in national water policy issues, including a number of recent studies and initiatives. The success of this effort took advantage of the unique expertise of this particular group. As the disclaimer on the first page of the report notes, the positions represented in the report are those of the group's members only and not their employees.

Please let me know if you have any questions regarding the report or the process by which it was produced.

Sincerely,

Lawrence J. MacDonnell

- Lawy Fac Donnell

Director

LJM/ad

Enclosure:

"America's Waters: A New Era of Sustainability"

cc:

Senator Don Ament Representative Bill Jerke



February 16, 1993

Chairman, Senate Agriculture Natural Resources and Energy Committee Chairman, House Agriculture Livestock and Natural Resources Committee State Capitol Denver, CO 80203

Long's Peak Report

Gentlemen:

The City of Colorado Springs Utilities has reviewed the report of the Long's Peak Working Group as issued in December, 1992. report makes a number of legislative and policy recommendations for consideration by the Clinton administration which appear to be contrary to the best interests of Colorado in the wise administration of its water resources.

Following is a brief description of the concerns of the City as regards both the manner in which the report was prepared and disseminated, and its content. This memorandum should not be viewed as opposition either to all of the concepts contained in the report, some of which certainly merit additional consideration, or to the exploration of water management approaches which seek to accommodate both environmental protection and necessary water resource development. Unfortunately, the report does not reflect a balance of Western water interests.

The City's objections to the manner in which the report was prepared can be outlined as follows:

Though the report indicates that it was prepared by "a working group of 30 national experts in water policy," there is a noted absence of those individuals and entities, such as municipalities, conservancy and conservation districts and ditch companies, together with farmers and ranchers, who actively engage in the acquisition and use of water rights. Given that their interests are so directly at stake, one would have hoped that their interests would have been represented in the working group and its report

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recommendations. However, the absence of these interests in this process has resulted in a set of recommendations which have very limited, one-sided perspectives.

- 2. The Natural Resources Law Center is part of the University of Colorado Law School, and therefore benefits from tax funding. However, despite this fact, the Law Center participated in the preparation of a report which did not take into account the views of many interests in the water community who would actively oppose certain of the proposed policies and recommendations. While individuals in the academic community certainly have the right to voice their opinion, and should do so, any assistance from a tax-supported institution is inappropriate. State money is, in effect, being utilized to develop and promote principles which are contrary to the best interests of the citizens who pay the taxes.
- 3. To the best knowledge of the City, the report was not circulated for comment beyond those invited to participate in the working group. Had it been circulated for review, certain policy recommendations may have been withdrawn or modified in order to achieve a balance of interests.

With reference to the content of the report, the City would simply wish to bring to the attention of the committees the following concepts as set forth in the report, together with an explanation of the basis for the City's concern.

- 1. The report promotes the concept of "ecological integrity" or biocriteria. This is a fairly new concept currently being advocated by EPA on a national basis. It is a clear departure from the traditional regulation of the "discharge of pollutants," to a regulatory focus upon the protection and restoration of ecosystems. While the goal is laudable, such a program could have significant adverse effects upon water diversion activities, as the removal of water could change the ecology within downstream river reaches. It advances a riparian concept of water administration at the expense of the prior appropriation doctrine. In addition, the state Water Quality Control Commission and Water Quality Control Division have each independently determined that it is not appropriate to adopt a state biocriteria program at this time.
- The report advocates increased federal involvement in water conservation efforts. While federal funding could be helpful, federal mandates would usurp local control over water use decisions. In addition, water conservation

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principles could be utilized to argue that no additional diversion facilities are necessary.

- 3. The report advocates a "regulatory" non-point source program. To date, section 319 of the Clean Water Act is "voluntary" in nature. Any regulatory program could have a dramatic impact upon those who divert water resources and place them to beneficial use, thereby impacting dilution flows and ecological integrity, and those who engage in land use activities, such as urban development, mining and farming.
- 4. The report calls for the development of a clear statutory antidegradation policy. EPA and the State of Colorado have traditionally been at odds over the proper interpretation of antidegradation principles. House Bill 1200, passed in the last legislative session, was an attempt to resolve some of the issues facing the state. It cannot be forgotten that the strict application of antidegradation principles can prevent any measurable change in water quality below a water diversion activity. Even the intermediate level of protection provided by such a policy could result in permit denial or the imposition of expensive permit conditions. To date, there is no clear mandate in the federal Act for the antidegradation rule.
- 5. The report calls for a strengthening of the section 404 program to provide greater protection for wetlands. The current section 404 program already is proving quite onerous to those who engage in water development activities. Any strengthening thereof could be the death knell for any existing or future undertakings requiring permits.
- 6. The report advocates a quick reauthorization of the Endangered Species Act with provisions to promote ecosystem protection. Once again, the state already is facing significant difficulties in meeting Endangered Species Act requirements, such as on the Colorado River in the 15-mile reach. For economic reasons, Colorado should advocate a more "balanced" approach to the protection of threatened and endangered species.
- 7. The report advocates the imposition of NPDES point source permit requirements upon large dams. Thus, water diversion and storage facilities would be treated the same as industrial discharges. This does not bode well for either future storage facilities or the operation of existing facilities.

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- 8. The report calls for the establishment of a national "discharge fee program" to pay all costs of monitoring and enforcement. The financial burden upon regulated entities is communities.
- 9. The report calls for a substantial expansion of the national wild and scenic river system. Wild and scenic rivers carry with them federal reserved water rights. This will severely impact both wise management of existing water resources and the future development of water supplies.

In conclusion, we believe that the Long's Peak Report invites unwarranted and unnecessary intrusion by the federal government into the management, development and conservation of the state's comments into consideration in developing an appropriate response to the Long's Peak Report. We urge you to adopt a joint working Group and the validity of their recommendations. Further, the State Legislature should take a leadership role in balanced recommendations which truly reflect all of the interests of Colorado.

Sincerely,

Harold E. Miskel Manager, Resources Planning and Development

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