

Volume 26, Issue 1

Spring 1996

ARTICLE

International Negotiations Paralyzed by Domestic Politics: Two-Level Game Theory and the Problem of the Pacific Salmon Commission

Robert J. Schmidt, Jr.

Mr. Schmidt takes an in-depth look at the failed negotiations between Canada and the United States over the harvesting of Pacific salmon. Relying upon models of two-level game theory in the arena of international negotiations, Mr. Schmidt provides insight into the "why" of the current impasse and the "how" of resolving it. Mr. Schmidt concludes that resolution of the salmon allocation dispute between the United States and Canada may depend on first resolving domestic disputes between the State of Alaska and the States of Oregon and Washington.

ESSAYS

Taking and Giving: Police Power, Public Value, and Private Right

Gerald Torres

Professor Torres engages in a discussion of the relationship between property as a social artifact and law, and why this relationship is misunderstood. Professor Torres describes the political and narrative techniques used by property rights advocates, examines the current state of takings jurisprudence, and voices strong concern regarding the political and social values at stake in the struggle to define "property rights."

Water Rights and the Common Wealth

Eric T. Freyfogle

Professor Freyfogle takes issue with the view that water marketing should be the primary tool to meet new needs for water in the West and to bring an end to the most environmentally damaging water uses. Recognizing that market reasoning only perpetuates the view that nature is merely a collection of resources, existing chiefly to serve human needs and easily shifted from place to place, Professor Freyfogle encourages lawmakers to react by making the beneficial-use requirement a more meaningful construct.

A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation

Jonathan Poisner

Civic republicans advocate a model of democratic participation that requires broad public participation in a deliberative decision-making process to arrive at a "common good." Mr. Poisner advances this model by reviewing the citizen participation provisions of the National Environmental Policy Act and developing criteria that would enable citizens to take a more active role in fulfilling the Act's requirements.

SYMPOSIUM: NORTHWEST WATER LAW

On May 19 and 20, 1995, the Northwest Water Law & Policy Project of Northwestern School of Law of Lewis & Clark College sponsored a Conference on Water Policy and Sustainability in the Columbia River Basin. By bringing together water users, elected officials, government agency personnel, members of Indian tribes, activists, and other interested individuals, the conference provided a unique forum for a broad discussion of water policy issues that affect the entire Columbia River Basin. These Articles are either adaptations of remarks delivered at the Symposium or expanded versions of manuscripts presented at the Symposium.

Seven Myths of Northwest Water Law and Associated Stories

Michael C. Blumm

In this introduction for the Symposium, Professor Blumm sets out to debunk seven common myths that have long hampered a full understanding of water rights allocation in the Northwest.

Changing the River's Course: Western Water Policy Reform

David H. Getches

With the Columbia River unable to support healthy salmon populations, Professor Getches suggests that traditional instruments of water policy in the West--the beneficial-use requirement of the prior appropriation doctrine and the idea of watershed management--can be reformed, with a community-based approach, to cure many of the Columbia's ills.

A Watershed Issue: The Role of Streamflow Protection in Northwest River Basin Management

Reed D. Benson

Mr. Benson examines how watershed protection efforts have become popular in the Northwest, as governments at all levels have found reasons to embrace them. He concludes that although these efforts promise a holistic approach to environmental problems, Western water law and politics may prevent them from addressing a key need of healthy watersheds: adequate instream flows.

Leasing Water Rights for Instream Flow Uses: A Survey of Water Transfer Policy, Practices, and Problems in the Pacific Northwest

James D. Crammond

Mr. Crammond engages in a comprehensive review of instream water right leasing in the Pacific Northwest. While Mr. Crammond observes that legal hurdles, combined with uncertainty over monitoring and enforcement of instream rights, limit lease opportunities in some watersheds, he concludes that lease markets are developing as parties gain experience and as information about opportunities, benefits, and results accumulate.

The Hanford Reach: Protecting the Columbia's Last Safe Haven for Salmon

Sauna Marie Whidden

The Hanford Reach of the Columbia River is home to the largest naturally spawning population of fall chinook salmon in the Columbia River Basin. Ms. Whidden discusses the factors that have contributed to the success of this species and compares the legal strategies and political opportunities for providing permanent protect to the Hanford Reach.

Drafting from an Overdrawn Account: Continuing Water Diversions from the Mainstem Columbia and Snake Rivers

Joy Ellis

Ms. Ellis analyzes restrictions on diversions of mainstem Columbia River flows in Washington, Oregon, and Idaho. She concludes that, while the moratoria recently imposed by the three states will contribute to the recovery of threatened and endangered salmon species, state agencies must do more to protect instream flow from further water appropriation activity.

COMMENTS

Tradable Emissions Programs: Implications Under the Takings Clause

Susan A. Austin

Tradable emissions programs are an innovative, market-based alternative to the traditional command-and-control method of air pollution regulation. Ms. Austin explores whether tradable emissions programs could render the government vulnerable to a Fifth Amendment takings claim should subsequent government actions decrease or destroy the value of tradable emissions permits.

Of Fish, Federal Dams, and State Protections: A State's Options Against the Federal Government for Dam-Related Fish Kills on the Columbia River

Robin Kundis Craig

Ms. Craig examines the possible means for states to bring claims against the federal government for dam-related fish kills. She explores the federal government's sovereign immunity and interaction between the states' and federal government's interests in the Columbia River Basin. Ms. Craig argues in favor of a strict liability remedy against the federal government so that states may obtain damages for the fish kills.

Alabama-Tombigbee Rivers Coalition v. Department of Interior: Giving Sabers to a "Toothless Tiger," the Federal Advisory Committee Act

Douglas D. Morris

Mr. Morris critiques the Eleventh Circuit's decision in *Alabama-Tombigbee Rivers Coalition v. Department of Interior*. With a review of the Federal Advisory Committee Act and the law of injunctions, Mr. Morris concludes that the court erred in enjoining agency consideration of information submitted by a committee that had acted in violation of FACA.

The Federal Advisory Committee Act: Barrier or Boon to Effective Natural Resource Management?

Dover Norris-York

Ms. Norris-York analyzes the role of the Federal Advisory Committee Act in the management of natural resources by reviewing pertinent case law and examining its application to the Department of the Interior's Rangeland Management Plan. Finding the status quo inadequate, Ms. Norris-York concludes with suggestions for achieving more meaningful public participation in natural resource management issues.

CLEAR THE AIR

Consensus in the Klamath

Senator Mark O. Hatfield

Senator Hatfield describes the success of a southern Oregon citizens' group in reaching solutions to natural resources issues in that region.

An Update on Pleadings and Sanctions in Environmental Cases

Carl Tobias

Professor Tobias provides an update on complications arising from Rules 8 and 11 of the Federal Rules of Civil Procedure in environmental cases.