

ENVIRONMENTAL LAW

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ARTICLES

- The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a
Property Theorist..... 851

Marc R. Poirier

This Article sorts through the NAFTA expropriation debate, relying on a theory of regulatory takings as a process of renegotiation of property rights. As they have been applied in some recent arbitral awards, the investment protection provisions of NAFTA sometimes seem to short-circuit the signatory nations' ability to protect their citizens against environmental externalities. Article 1110, the provision on expropriation, and a concomitant investor state dispute resolution process, appear to embody a concept of property rights and processes favorable to the community of transnational investment interests and unfavorable to territorially based sovereigns, which traditionally have balanced property rights against the need to address externalities through regulation. While the substance and process of NAFTA are adequate to address direct expropriations, they cannot be justified when applied to "indirect expropriation" and "measures tantamount to expropriation." They cannot bridge the gap between the disparate objectives for property norms of the sovereign territorial community and the investor community. They fail to recognize the importance of anchoring the dispute resolution process territorially, in geographic proximity to the site of the environmental externalities, where local concerns about adverse effects can be most effectively identified and expressed. The Article contends that the substance of international law on indirect expropriations will necessarily remain vague, despite demands for a doctrinal clarity that would cabin the discretion of NAFTA arbitrators. As for procedures, the Article recommends returning indirect expropriation disputes to national fora wherever those fora are able to apply a bona fide balancing test, so as to favor public dialogue and recognize the importance of territorial situs to legitimacy. But it recognizes that such a change in direction is unacceptable to the investor community. The shift in property processes the Article discerns is probably an inevitable consequence of globalization.

- Proposal for a Model State Watershed Management Act..... 929

*J.B. Ruhl, Christopher Lant, Tim Loftus, Steven Kraft,
Jane Adams, and Leslie Duram*

This Article proposes a framework for a model state watershed management law. Recognizing that the federal government is ill-equipped to take on the role of comprehensive watershed management czar as it has for pollution control and other environmental programs and that local governments, even if organized around watershed boundaries, are unlikely to provide the platform for effective policy implementation, this Article proposes a multi-tiered governance system linking state, regional, and local units of government through careful distribution of planning responsibilities and policy implementation authorities. Although for many states this framework would introduce a new “layer” of governance, its superior correspondence to the inescapable realities of ecosystem dynamics makes it worthy of serious consideration.

Water Dispute Resolution in the West: Process Elements for the
Modern Era in Basin-Wide Problem Solving 949
Barbara Cosens

This Article recommends a new approach to water dispute resolution. Alternative dispute resolution processes are underway on most major water basins in the West, with potential for improvement in river governance, development of water to fulfill tribal water rights, and reversal of environmental harm to riparian systems. The Article applies the recommended approach, intended to ensure that the broader interest in the fair and efficient use of our water resources and the durability of the solutions are not overlooked in local forums, to the settlements on the Milk River of Montana and on the Truckee River of California and Nevada.

COMMENTS

The Worst of Times: A Tale of Two Fishes in the Klamath Basin 1019
Matthew G. McHenry

In this Comment, Mr. McHenry examines the various facets of the ongoing water crisis in the Klamath Basin in Northern California and Southern Oregon. After providing a historical account of the events leading up to the controversy, this Comment discusses the rights and relative priorities of each of the principle entities involved. The Comment argues that, of all the players, the endangered suckers residing in the Upper Klamath Lake and the threatened coho salmon that use the Klamath River as spawning habitat hold the highest-ranking water rights from a legal standpoint. The Comment ultimately concludes that, if such a distinction became necessary as the result of an extremely dry year, the hydrological needs of the endangered suckers should take precedence over those of the coho salmon.

Chronic Wasting Disease of Deer and Elk: A Call for National
Management 1059

Ronald W. Opsahl

In this Comment, Mr. Opsahl discusses the issues faced by wildlife managers and policy makers related to chronic wasting disease (CWD), a fatal neurologic disease of deer and elk. After brief overviews of the science surrounding CWD and the history and regulation of alternative livestock operations, the Comment examines the primarily reactive state and federal legislation and agency polices designed to curb the spread of CWD. The Comment concludes that, without a forceful regulatory response, CWD will likely lead to significant declines in deer and elk populations, increases in state and federal management expenditures, and significant negative economic impacts to rural communities that depend on wildlife-related recreation.

BOOK REVIEW

The Uncertain Future Path of Environmental Enforcement and Compliance: A Book Review Essay Regarding Clifford Rechtschaffen and David L. Markell, *Reinventing Environmental Enforcement and the State-Federal Relationship*..... 1093
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