

FOREWORD

In our first article, Professor James R. Rasband proposes a point of compromise in the long-running debate about whether a state's use of the public trust doctrine to revoke a prior grant of trust resources constitutes a taking of private property without just compensation. He suggests that regardless of whether a state's revocation of a grant of trust resources requires payment of just compensation under the Constitution, it at least merits compensation for improvements and expenditures made in reliance upon the grant. The article's starting point for this suggestion is the seminal case in public trust doctrine jurisprudence—*Illinois Central Railroad Co. v. Illinois*—and the Court's statement, in a neglected and largely forgotten passage, that Illinois should pay compensation for any improvements erected by the Railroad. By exploring the legal and theoretical justifications for the Court's compensation suggestion, the article attempts to shed new light on the nature and validity of the creation of the public trust doctrine in *Illinois Central* and to lay a foundation for the compensation requirement in modern public trust cases. The article concludes that a compensation requirement is appropriate either as an application of the equitable principle that good faith, mistaken improvers should be compensated for their mistaken improvements, or, alternatively, as a refinement of the public trust doctrine itself. Under the latter approach, compensation is conceived of as a constructive condition placed on the state's right to revoke a grant of trust resources, which right is itself a constructive term of the initial grant.

In our second article, Michael C. Blumm and Brett M. Swift address the right of Native American Indians to protect salmon habitats in the Pacific Northwest from habitat-damaging activities. Professor Blumm and Ms. Swift propose that courts recognize the right to habitat protection as a property right defined by the principles of *profit à prendre* law. The basis for this piscary *profit à prendre* can be found in the treaties entered into by the United States and Indian tribes which made possible the settlement of the Pacific Northwest. Under the treaties, the tribes voluntarily ceded millions of acres of their land in exchange for the "right of taking fish," largely motivated by their great dependence on salmon culturally, for sustenance, and, later, for

export. The article traces the development of this treaty right in court decisions and in administrative interpretations, revealing a liberal approach to construing the treaty right to ensure the tribes a continued livelihood from fishing as promised by the treaties. However, rapidly declining salmon populations have made it more difficult for tribes to make a moderate living from fishing. The authors note that without the right to protect the habitat of treaty fish, the treaty promise of a livelihood for the tribes from fishing would be an empty one, a result proscribed by the Supreme Court. The authors recognize that a return to treaty time fishing conditions is not warranted, and therefore urge courts to interpret this right to protect salmon habitat as a *profit à prendre*. Based on principles of basic property law, owners of *profits à prendre* do not have an absolute right to bar all potentially damaging activity but only that which unreasonably interferes with the profit. The authors conclude that *profit à prendre* law is uniquely suited to fulfill the promise of the treaties to ensure tribes a moderate livelihood from fishing without resulting in a complete cessation of all development affecting treaty fish.

In our third article, James N. Corbridge, Jr., assesses the capacity of Colorado's system of water laws to accommodate the increasing challenges imposed by expanding urban populations and associated shifts from agricultural to municipal water use. Growing demands on the state's limited water resources require that the system under which water rights and changes of use are adjudicated effectively promotes the most efficient allocation practicable. Professor Corbridge reveals the importance in this context of the water rights transfer process and identifies aspects of the current system which contribute to inefficient management and disincentives for optimal utilization of water. He explains that Colorado's practice of constraining changes or transfers of water rights to protect the vested rights of other water users is appropriate, but is not effectively linked to the actual injury which will be inflicted on the other users. By defining these limitations in terms of the harm caused to junior appropriators, he proposes that the process of water transfers will be made more efficient and resources will more effectively be distributed to the most valued uses. His analysis suggests that increasing the efficiency of the transfer process will assist resource planners in more accurately quantifying the projected returns on investments

in senior water rights, and will enable Colorado to come closer to its goal of optimal utilization of water resources.

Our first comment examines the current and future water resource needs of the national forests in light of the principal methods available to the United States Forest Service to meet these needs. The author argues that restrictions on the means by which the Forest Service obtains water for the national forests including federal reserved water rights, the acquisition of water rights under state law, and administrative actions under the agency's land management authority make it difficult for the agency to meet the full range of national forest water needs, including those mandated by statute. In particular, this comment examines the Forest Service's controversial imposition of bypass flow requirements in special use permits issued for dams and reservoirs within the national forests, concluding that congressional affirmation of this authority would greatly assist the Forest Service in meeting forest water needs. The author argues that to meet current and future water needs the Forest Service must exercise its land management authority to the fullest extent possible, including the imposition of bypass flow conditions on land-use permit renewals, as well as seek an expansion of federal law to provide the agency with funding and the authority to condemn water rights for the forests.

In our second comment, the author analyzes the law and debate surrounding the reclamation of inactive and abandoned hardrock mine sites ("IAMS"). The author discusses the liability scheme of both the Comprehensive Environmental Response Compensation Liability Act ("CERCLA") and the Clean Water Act ("CWA") and concludes that neither Act has been effective in compelling the cleanup of IAMS. In particular, one alternative approach to reclaiming IAMS, remining, has been effectively discouraged because of the potential liability under both CERCLA and the CWA. To encourage remining as a method for reclaiming IAMS, the author discusses various proposals to limit liability under both CERCLA and the CWA. The author concludes by giving examples of how discrete aspects of these proposals have already been implemented to encourage remining and the cleanup of IAMS.

Our third comment explores the inner workings of the Colorado Rangeland Reform Working Group and its contributions to rangeland reform under current Secretary of the Interior, Bruce Babbitt. The author begins by establishing the issues faced

by Secretary Babbitt at the start of his tenure. After reviewing historical rangeland reform and outlining the utilization, economics, and condition of the range, the author turns to an analysis of modern rangeland reform, focusing on the unique collaborative efforts of the Colorado Group. This group, which the author concludes provides a successful model for local collaborative approaches to range reform, was instrumental in shaping new rangeland regulation during Secretary Babbitt's tenure. The Resource Advisory Council model suggested by the Colorado Group promises to be the cornerstone of community-based involvement in future range management efforts.

THE EDITORS