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HEADLINE: **Issues Groups Fund Seminars for Judges;** Classes at Resorts Cover Property Rights

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BODY:

Federal judges are attending expenses-paid, five-day seminars on property rights and the environment at resorts in Montana, sessions underwritten by conservative foundations that are also funding a wave of litigation on those issues in the federal courts.

Funding for the seminars, run by a group called the Foundation for Research on Economics and the Environment (FREE), also comes from foundations run by companies with a significant interest in property rights and environmental law issues, Internal Revenue Service records show.

A 1996 letter to judges said the seminars "explore the role of property rights, incentives, and voluntary cooperation in achieving environmental goals," and noted, "Conference and travel expenses are paid and time is provided for cycling, fishing, golfing, hiking and horseback riding."

The seminars are held at the Gallatin Gateway Inn, a restored 1927 railroad hotel near Bozeman complete with its own casting pond, and Elkhorn Ranch near Big Sky, described in its promotional material as a "traditional dude ranch" one mile from Yellowstone National Park, where "the comfortably rustic guest cabins . . . are built from hand-hewn native logs." Some judges bring spouses at their own expense and must pay for some of the activities, like golfing.

FREE chairman John A. Baden said he would not release a list of judges who have attended the meetings. "Some judges just don't want that known," he said. A 1996 FREE list obtained by The Washington Post named 109 judges who have attended, and a listing of the four 1997 programs said one-third of the 900-member federal judiciary has attended or asked to enroll. Four more sessions, with 17 judges each, are scheduled for 1998.

Baden, who had previously organized seminars for academics, said he started the judicial seminars in 1992 because most federal judges lack a grounding in economic and environmental issues. "Federal judges are some of America's most important environmental decision-makers," he said.

In its literature, FREE says its seminars "are explicitly pro-environment," but also "explain why ecological values are not the only important values" and emphasize the "importance of secure property rights and the market process in the efficient and

sensitive use of natural resources."

Two major sources of FREE attendees are the U.S. Court of Claims and the U.S. Court of Appeals for the Federal Circuit. Financial disclosure forms on file with the Administrative Office of the U.S. Courts and FREE's list show that 10 of the 24 judges on those two courts have attended the seminars since they began in 1992.

These courts are specialized bodies that hear most property rights cases against the federal government. In recent years, they have been the focus of intense efforts by conservative legal groups and businesses to secure a broader interpretation of the constitution's "takings" clause, which provides that government cannot take private property without "just compensation."

Property rights advocates and business groups have been pushing the idea that the takings clause should apply to any regulation that diminishes the value of private property, such as rent control ordinances, zoning regulations and environmental rules.

In the 1996 case, *Preseault v. United States*, the Federal Circuit expanded takings law when it ruled that a Vermont couple was entitled to compensation when an old railroad right-of-way on their property was converted into a recreational trail under the 1983 Rails-to-Trails Act -- even though the property was already at risk of being used as a trail when they purchased it.

Four of the six judges who ruled against the government in *Preseault* reported on their financial disclosure forms that they have attended FREE seminars, along with one of the three judges who came down on the government's side. The John M. Olin Foundation, which gives money to FREE to support the judicial seminars, is also a financial backer of the New England Legal Foundation, which litigated the *Preseault* case.

"I don't really see any conflict of interest there," said Olin Foundation executive director James Piereson. "There might be a connection if we ourselves were orchestrating something in the courts."

Douglas Kendall of Community Rights Counsel, which helps local governments defend their activities against efforts by property rights advocates and provided information about the FREE seminars to *The Post*, called them "junkets for judges, sponsored by the same foundations that are bankrolling takings cases before the same judges. . . . At the very least, they create an appearance problem."

Baden called that a "totally uninformed" analysis by someone who knew nothing about the seminars, which he said involve at least 4 1/2 hours of classes per day. "We have to make provisions for [recreational activities] every day because otherwise you just burn out," he said. "This is heavy-duty stuff."

One environmental lawyer who attended a FREE seminar last year on the Endangered Species Act said the program raised questions, particularly since he said liberal environmental groups lack the funding to put on similar programs for judges.

"The number of judges who have attended and its potential impact on a number of pending environmental cases are really significant issues," said Doug Honnold, of the Earthjustice Legal Defense Fund, formerly the Sierra Club Legal Defense Fund. "From

my standpoint, one of the most important groups of decision-makers is being fairly systematically exposed to a particular philosophical standpoint and with the express purpose of modifying results."

On the D.C. Circuit, which hears a significant number of environmental cases, among those listed by FREE as having attended are Judges James L. Buckley, Stephen F. Williams, A. Raymond Randolph and Douglas H. Ginsburg, who also serves on FREE's board.

Buckley said he found the seminars useful and had not been aware of FREE's funding. Randolph said he has attended two FREE seminars, describing them as "all business and very grueling." Randolph, who also chairs the U.S. Judicial Conference Committee on Codes of Conduct, said of the foundations funding both the FREE seminars and federal court litigation on takings, "It's not a problem I thought about until you called."

Judges commonly accept free travel and lodging from bar associations, law schools and similar organizations. A 1980 ethical ruling by a judicial advisory committee permitted judges to accept free lodging and transportation to educational seminars, even if they "may emphasize a particular viewpoint or school of thought."

However, the opinion added, "it would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation or likely to be so involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of some litigation."

FREE is not the only group that sponsors judicial seminars. The Institute for Law and Economics at George Mason University Law School has for 24 years sponsored one- to two-week seminars for judges on law and economics, held at resorts in Arizona, California and Florida and funded by many of the same foundations that contribute to FREE. Nearly 40 percent of the federal judiciary have attended the seminars.

New York University legal ethics expert Stephen Gillers said he did not know about the FREE seminars in particular, but that in general, "the luxury of these trips is often apparent and the sponsors have a particular viewpoint that they want to see the judiciary advance and the content of the seminars promotes that viewpoint. I have always felt uncomfortable with the phenomenon but it doesn't violate a clear rule."

Asked about FREE's funding, chairman Baden said, "We take money only from dead people. This money has to come from foundations, and the reason is obvious. I'm sure there are a large number of companies who would love to fund this program but I'm sure a company large enough to fund it would have many cases before the federal courts so there's a potential conflict."

FREE's 1997 annual report shows that it received \$ 157,500 directly from corporations, in addition to \$ 389,350 from foundations. Baden said the corporate money, whose precise sources he declined to identify, was used for general operating expenses such as salaries and rent, and other FREE activities, such as writing books.

A number of the foundations that fund FREE are also major givers to legal groups pressing property rights cases, including Defenders of Property Rights, Pacific Legal

Foundation, New England Legal Foundation, Washington Legal Foundation and Institute for Justice.

One of the biggest contributors to FREE is the Carthage Foundation, headed by conservative publisher Richard Mellon Scaife, which has given \$ 100,000 annually since 1993, according to IRS records, and has also been a major funder of such legal groups. Baden said the Carthage money was not used for the judicial seminars themselves.

The M.J. Murdock Charitable Trust, identified by Baden as the biggest supporter of the judicial seminars, gave \$ 200,000 in 1994 to the Pacific Legal Foundation. That same year, PLF submitted friend-of-the-court briefs in two critical cases in the federal circuit that involved wetlands. The author of one the opinions, S. Jay Plager, has since attended two FREE seminars, according to financial disclosure forms. Plager also wrote for the court majority in the Preseault case.

"When I get invited to attend a conference . . . I assure myself that the sponsor is not a litigant or potential litigant before this court and I assure myself that the sponsor is a charitable institution," he said. "Beyond that I do not ask and, indeed, I do not want to know the details because I'm aware that on both sides of the political spectrum one can find organizations and foundations that seek to pursue some of their objectives by encouraging education. As long as they do it in a nonpartisan and nonpolitical way, I see no problem with being educated."

Two foundations controlled by Charles and David Koch, conservative brothers who also run Koch Industries, an oil and gas company, have also contributed to FREE, including providing funding earmarked for the seminars. Koch Industries is currently being sued by the United States for violating the Clean Water Act.

FREE has also received funding from industry-run foundations, including Amoco, Burlington Resources and Shell Oil, all of which have an interest in environmental regulation. Baden said this money does not go to the judicial seminars.

U.S. District Judge Richard Stearns of Boston, a Clinton appointee who has attended two FREE seminars and is scheduled to lecture at a third in September, said, "I've never detected any attempt to indoctrinate" judges at the seminars. "I certainly wouldn't feel friendlier to someone because they contributed to an educational seminar. If that were their motive, it certainly isn't working."

Baden said the seminars present "a very wide range" of viewpoints on property rights and environmental regulation, saying, "The last thing that would make sense for judges who are used to hearing two sides is to only present one. That would be grossly counterproductive, I think."