ENVIRONMENTAL LAW

Lewis & Clark Law School

VOLUME 41 FALL 2011 NUMBER 4

ARTICLES

Neither Joint Nor Several: Orphan Shares and Private CERCLA Actions 1045

Kenneth K. Kilbert

The broad liability scheme of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) often results in multiple "responsible parties" being liable for the costs of cleaning up a contaminated site. Typically, CERCLA cleanup costs are allocated among the various responsible parties pursuant to equitable factors, but frequently some of the responsible parties are now insolvent, dead, or defunct. Who must pay the cleanup costs attributable to the insolvent, dead, or defunct parties—i.e., the "orphan shares"—has long been one of most unsettled and critical issues in private CERCLA litigation. Via a pair of recent decisions, the Supreme Court ushered in a new era in private CERCLA litigation, expanding the availability of private claims under CERCLA section 107 while limiting them under CERCLA section 113. Although this change has raised the specter of jointly and severally liable defendants in private CERCLA actions being forced to bear the entire orphan share burden as a matter of law even where the plaintiff is more culpable, this Article posits that this new era affords a fresh opportunity to solve the long-standing orphan share problem. It is time to discard the labels "joint and several" and "several" when describing the scope of liability in private actions under CERCLA sections 107 and 113. Instead, all private CERCLA claims should be governed by a uniform scope of liability in which orphan shares are allocated among all viable responsible parties, both plaintiffs and defendants, pursuant to equitable factors.

Water, Work, Wildlife, and Wilderness: The Collaborative Federal Public Lands Planning Framework for Utility-Scale Solar Energy Development in the Desert Southwest 1093

Siobhan McIntyre & Timothy P. Duane

Federal public lands agencies have recently been confronted with a rush of large utility-scale solar energy project development proposals

seeking federal Rights-of-Way (ROW) from the United States Bureau of Land Management (BLM) in the desert southwest. State permits and licenses, together with compliance with other federal regulatory requirements (especially under the National Environmental Policy Act and the Endangered Species Act) must be coordinated with the BLM ROW grant process. This Article describes the BLM ROW process; describes and evaluates the BLM review for three utility-scale solar energy projects undergoing fast-track permitting under the American Recovery and Reinvestment Act of 2009 in Nevada, Arizona, and California; and evaluates how the BLM's Draft Programmatic Environmental Impact Statement (PEIS) for solar development in the six-state region of Utah, Colorado, New Mexico, Arizona, Nevada, and California could improve the BLM ROW process in order to reduce conflicts between renewable energy development goals and policy concerns about water, work, wildlife, and wilderness in the desert southwest. The Article demonstrates that state law and policy and the degree of coordination and collaboration between the BLM and state agencies has a direct impact on the outcomes of the BLM ROW process. It also recommends policy changes for the PEIS and all BLM ROW grant reviews that will incorporate the best practices of the analyzed projects.

Mastering the Evidence: Improving Fact Finding by International Courts 1191
Cymie Payne

Although international courts increasingly must resolve transboundary conflicts over natural resources and environmental pollution, international judges have limited assistance to adequately review voluminous and complex scientific evidence that is often submitted with these disputes. This potentially constrains their assessment of the factual record, and consequently undermines confidence in their judgments and the development of their jurisprudence. Special masters have been used successfully by the United States Supreme Court to manage the portion of its docket where it, like the international courts, acts as a trial court whose judgments are final and without appeal. This Article explains the master's role and how masters might provide a solution for international courts, particularly but not exclusively the International Court of Justice. It also draws on international experience to suggest a variation on the standard scope of a master. It concludes that special masters will be particularly useful and flexible aids when international courts and tribunals face extensive or highly specialized evidence and resolution of the dispute rests on resolving the parties' factual differences.

Setting the Foundation: Climate Change Adaptation at the Local Level 1221
Thomas M. Gremillion

This Article examines the role of local governments in responding to climate change impacts. At the local level, climate change adaptation initiatives can synchronize with broader environmental management goals and set the foundation for a system of robust, polycentric carbon regulation. Most American cities have yet to begin planning for

climate change impacts, but a few early leaders offer instructive examples of how to integrate climate considerations into urban planning and local management functions. Federal policy reforms could remove obstacles to these types of initiatives, and stimulate more local governments to undertake them.

COMMENTS

The Answer Lies in Admiralty: Justifying Oil Spill Punitive Damages Recovery Through Admiralty Law 1255
Brittan J. Bush

Oil spills, unlike other environmental disasters, often cue a certain immediacy among society for not only increased regulation but punishment exerted against the parties responsible for a spill. Within our American tort system, society's call for punishment is most clearly embodied within the realm of punitive damages recovery. However, the current federal oil spill liability regime, the Oil Pollution Act of 1990 (OPA), and its accompanying jurisprudence stifle the possibility of oil spill punitive damages recovery. This Comment posits legal and normative justifications in favor of punitive damages recovery for OPA as well as general maritime law causes of action arising out of an oil spill. It first refutes the reliability of the prior jurisprudence regarding the OPA's effect on punitive damages recovery. It then argues that the Clean Water Act preemption analysis from *Exxon Shipping Co. v. Baker* as well as the Court's criticism of *Miles v. Apex* in *Atlantic Sounding Co. v. Townsend* form a complementary argument supporting oil spill punitive damages recovery. Applying these arguments to causes of action under general maritime law as well as the OPA, this Comment concludes that punitive damages' goals of punishment and deterrence require an extension of punitive damages recovery to post OPA oil spills.

Preventing Coal Companies from Using Compliance Schedule to Loophole Around the Mountains 1295
Jessica Morgan

This Comment examines West Virginia coal mining industry's abuse of compliance schedules for selenium in their NPDES permits to avoid implementing expensive treatment technologies. The Comment explains how concerned citizen groups and the Environmental Protection Agency can use the Clean Water Act and current regulations to enforce violations of the Clean Water Act for the selenium discharges despite the extended compliance schedules.

State Trust Lands: Static Management and Shifting Value Perspectives..... 1333
Erin Pounds

This Comment examines the evolution of management restrictions imposed on federally granted state lands as a result of recent state trust land litigation. The Comment determines

that devoting state trust land to activities at below market value violates the trust, but suggests that managing trust lands for recreation and wildlife purposes does not necessarily violate the trust, so long as these purposes generate the greatest revenue over the long run.

BOOK REVIEW

The Real Story Behind the Columbia Basin Salmon Debacle: Dam Preservation Under the Endangered Species Act 1363
Michael Blumm

This review of Steven Hawley's provocative book, *Recovering a Lost River: Removing Dams, Rewilding Salmon, Revitalizing Communities*, examines Hawley's claim that the best way to recover endangered Snake River salmon is by removing the four Lower Snake River dams. These dams, managed by the United States Army Corps of Engineers, impede access to more than 5300 miles of prime salmon habitat and operate with enormous public subsidies, largely to maintain a seaport 465 miles inland at Lewiston, Idaho. Hawley's book shows not only that additional public subsidies in the form of river dredging and new levees will be necessary to maintain the port, but also that local residents are beginning to question the sustainability of relying on the port for their economic future. The book explains how Endangered Species Act procedures have only resulted in minor changes to dam operations and discusses the benefits of a restored Snake River by examining salmon runs in undammed Alaska and in California and Maine where dams have been removed. Although the removal of the Lower Snake Dams faces long political odds, Hawley's book is a reminder that both economically and ecologically it is the best means of restoring Snake River salmon.

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