ENVIRONMENTAL LAW
Lewis & Clark Law School

VOLUME 41 WINTER 2011 NUMBER 1

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What Climate Change Can Do About Tort Law 1
Douglas A. Kysar

To date, scholars exploring the connection between climate change and tort law have tended to ask what the latter can do about the former. With a few notable exceptions, they have answered, "Not much." This Article first reviews a series of doctrinal hurdles facing climate change plaintiffs and concludes that the pessimism of legal scholars is justified. The Article then poses an inverse and previously unexplored question: what can climate change do about tort law? As it turns out, the answer is, "Quite a bit." By forcing courts to confront questions of harm, causation, and responsibility that lie at the frontiers of science and ethics, climate change lawsuits hold potential to move the bar for what counts as exotic in the domain of tort. Radical though it may seem, such a recalibration should be welcomed: just as the administrative state is being forced to adapt to grapple with the global, complex, uncertain, and potentially catastrophic nature of twenty-first century threats to social welfare, the tort system also must shift in order to serve its role as the administrative state's traditional and necessary backdrop. Not only the climate is changing.

The Curious Case of Greening in Carbon Markets..... 73
William Boyd & James Salzman

Over the last several years, so-called "carbon markets" have emerged around the world. These markets trade greenhouse gas credits. This article takes a close look at an unexpected and unprecedented development—premium "green" currencies have emerged alongside and even displaced standard compliance currencies. Past experiences with other environmental compliance markets, such as the sulfur dioxide and wetlands mitigation markets, suggest the exact opposite should be occurring. Indeed, buyers in such markets should only be interested in buying compliance, not in the underlying environmental integrity of the compliance unit. In carbon markets, however, higher quality green credits have emerged in recent years as important currencies for a number of buyers, representing a dynamic that we

refer to as "Gresham's law in reverse"—more stringent currencies emerging alongside and even displacing inferior currencies.

This piece provides the first recognition and analysis of green differentiation in environmental markets. We explore a range of explanations for this curious development. We then identify potential lessons for the design and evolution of future carbon markets and, more generally, environmental compliance markets.

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This Article proposes a hybrid public-private governance approach to reducing carbon emissions from deforestation while promoting a broad array of benefits for biodiversity and human well-being that enhance climate change adaptation. In so doing, the Article also offers a concomitant model for combining private market finance and public funding to increase the coherence and effectiveness of global environmental regulation. The proposal, while developed in the tropical forest context, responds to broader concerns of fragmentation, accountability, and legitimacy in the design and administration of global environmental programs.

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In recent years, a number of courts have ruled that, under section 7 of the Endangered Species Act, the United States Fish and Wildlife Service (FWS) and National Marine Fisheries Service must quantify the level of incidental take permitted in their incidental take statements. Despite this requirement, a 2009 Government Accountability Office report found that FWS lacks a systematic method for tracking the cumulative take of most species. The report warned that the lack of a systematic means to track take results in a knowledge gap concerning the status of listed species and exposes the Services to unobserved declines in species, not to mention future litigation. This Article explores the recent court rulings concerning how the Services specify the amount of take in their incidental take statements and the importance of these court rulings in the context of monitoring take and evaluating cumulative take. This Article argues that by utilizing several different provisions of the Act, the Services can harness federal, state, and private entities to assist the Services in achieving a comprehensive approach to monitoring and tracking take. The adoption of an interagency approach that utilizes all relevant provisions of the Act will not only allow the Services to make better section 7 consultation decisions but also better inform the Services' administration of the Act as a whole.

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This Comment suggests that the North Pacific Fishery Management Council's recent preemptive closure of the Arctic Management Area provides an example of the sort of heightened precaution necessary for sustainable management of fisheries facing the taxing effects of climate change. The Council's unprecedented action demonstrates the need to revise federal fisheries regulations to provide for, and at times, require closure of fisheries where scientific uncertainty exceeds a threshold level.