

# ENVIRONMENTAL LAW

Lewis & Clark Law School

---

VOLUME 37

SUMMER 2007

NUMBER 3

---

## POEM

- The Lawyer Speaks of Rivers ..... xxi  
*Jean Stefancic*

## ARTICLES

- Emerging Commons and Tragic Institutions ..... 515  
*Brigham Daniels*

If there is a central fable to environmental law, it most surely is Garrett Hardin's Tragedy of the Commons. And if one starts to look, we find commons in all sorts of places—fisheries, grazing lands, aquifers, etc. As Hardin pointed out, and Carol Rose and Elinor Ostrom have famously explained, commons need not be tragic. We can create rules and institutions that govern the commons. Specifically designed to be stubborn and long-lasting, these very rules and institutions can result in their own tragedy, particularly in light of society's changing values. Whereas The Tragedy of the Commons is the tragedy of competing users, this Article explores the tragedy of competing uses.

- Missing the Link: The Importance of Keeping Ecosystems Intact and  
What the Endangered Species Act Suggests We Do About It ..... 573  
*Kalyani Robbins*

The Endangered Species Act allows for the protection of a struggling population of a species that is healthy elsewhere. In determining which of these “distinct population segments” to protect, we naturally take into account their significance. This Article discusses what makes a population significant, reviews the relevant understandings of conservation biology, and reaches the conclusion that we must consider a population’s significance to the ecosystem in which it lives.

## ESSAY

- Energy Independence and Global Warming ..... 595  
*Richard J. Pierce, Jr.*

This Essay explores why we should stop talking about the unattainable and nonsensical idea of energy independence and instead seriously discuss how to mitigate anthropogenic global warming. Proposing that only a globally coordinated cap and trade system or a globally

coordinated carbon tax have any realistic chance of mitigating global warming's effects, this Essay concludes that there is little reason to be optimistic that either approach will be adopted.

## COMMENTS

Israeli-Palestinian Water Literature's Misplaced Dependence upon Customary International Law .....	603
<i>Ian J. Silverbrand</i>	

The Judeo-Islamic conflict has lasted for centuries and recently has extended to environmental laws and policies. However, there has been no conflict within the literature of how these laws and policies should be shaped in the future. Perhaps though, some conflict in the literature is necessary. This Comment suggests that the literature's nearly unanimous recommendation of the application of customary international water law has actually impeded peaceful resolution of the water conflict between the Israelis and Palestinians. By diverging from the literature, the author recommends practical, alternative constructs that can result in an agreed-upon allocation of shared water resources.

Defenders of Appalachia: The Campaign to Eliminate Mountaintop Removal Coal Mining and the Role of Public Justice .....	629
<i>Mark Baller &amp; Leor Joseph Pantilat</i>	

The Appalachian Mountains are the location of one of the most diverse and vibrant ecosystems on earth. Tragically, this national treasure is in peril of being completely destroyed by the vicious practice of mountaintop removal coal mining. This is the story of the legal efforts of two litigators to terminate this form of mining and save the Appalachia.

## 2006 NINTH CIRCUIT ENVIRONMENTAL REVIEW

INTRODUCTION .....	665
CASE SUMMARIES .....	671

## CHAPTERS

The Quick and the Dead: <i>Earth Island v. Forest Service</i> and the Risk of Forest Service Financial Bias in Post-Fire Logging Adjudications.....	847
<i>Austin D. Saylor</i>	

In this Chapter, Mr. Saylor considers whether the procedural safeguards of the Fifth Amendment Due Process Clause apply to the Forest Service's handling of post-fire logging disputes. The Ninth Circuit's Judge Noonan posed this question in separate concurring opinions in two recent cases titled *Earth Island Institute v. U.S. Forest Service*, but set out only a cursory analysis because Earth Island had not raised the issue in briefing. The Chapter expands on Judge Noonan's insightful

observation, taking a deeper look at the Forest Service's financial stake in post-fire timber sales and probing the extent to which financial interests compromise the agency's ability to make neutral decisions.

Questionable Authority: A Recent CEQ Guidance Memorandum.....	885
<i>John C. Grothaus</i>	

A 2005 Council on Environmental Quality (CEQ) Guidance Memorandum asserts that aggregating the effects of past actions into the environmental baseline satisfies the National Environmental Policy Act's cumulative impacts analysis requirement. This Comment analyzes the degree to which courts should defer to the CEQ's regulatory materials and argues that courts should not accord the Guidance Memorandum authoritative weight.

<b>NINTH CIRCUIT INDEX .....</b>	<b>909</b>
----------------------------------	------------