ENVIRONMENTAL LAW
Lewis & Clark Law School

VOLUME 47 | WINTER 2017 | NUMBER 1

ARTICLES

Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability.. 1
Daniel C. Esty

Twentieth century environmental protection delivered significant improvements in America's air and water quality and led companies to manage their waste, use of toxic substances, and other environmental impacts with much greater care. But the pace of environmental progress has slowed as the limits of the command-and-control regulatory model have been reached. This Article calls for a new 21st century sustainability strategy that overcomes the ideological, structural, and operational issues that have led to political gridlock and blocked environmental policy reform. It makes the case for a transformed legal framework that prioritizes innovation, requires payment of "harm charges" and an "end to externalities," and shifts toward market-based regulatory strategies that expand business and individual choices rather than government mandates. It further proposes a systems approach to policy that acknowledges tradeoffs across competing aims, integrates economic and energy goals with environmental aspirations, and emphasizes on-the-ground pollution control and natural resource management results. This new approach would go beyond the "red lights" and stop signs of the existing framework of environmental law that centers on telling people what they cannot do, to a broader structure of incentives and "green lights" that would engage the public and the business world in environmental problem solving. Building on the changed circumstances of the 21st century, including the extensive breakthroughs in information and communications technologies, the transformation envisioned would permit a shift in the "environmental possibility frontier" and a lighter and stronger structure of pollution control and resource management that could appeal to Americans from all parts of the political spectrum, making real reform possible after decades of deadlock.

A Modern Treaty for the Columbia River... 81
Thomas G. Bode

The Columbia River supports tens of millions of people in seven states and British Columbia through power generation, water supply, fishing, flood control, transportation, and other ecosystem services. Yet the river faces a number of environmental problems that negatively impact those same people. Salmon populations have collapsed, taking with them the commercial fisheries and depressing coastal communities. Salmon conservation efforts cost hundreds of millions of dollars each year. In Canada, reservoirs flood hundreds of square miles of land, causing mudflats and dust storms and transforming beautiful valleys into muddy wastelands. And everywhere on the river and its tributaries, human development has polluted water, destroyed habitat, and degraded ecosystems. Both the United States and Canada have domestic programs to slow or reverse these environmental problems, but the Columbia River Treaty is a large obstacle to these efforts. By the terms of the treaty, 15.5 million acre feet of storage—the majority of storage on the river—must be allocated only to maximize power generation and prevent floods, and cannot be allocated for environmental reasons.

A new treaty for the Columbia River should be negotiated, one that includes an ecosystem function as a primary purpose of river governance. This ecosystem function should chiefly be a provision requiring environmental flows, which are a practical means for addressing environmental issues within the scope of existing international governance. The international law principle of equitable and reasonable use is the framework that should be used to resolve water allocation conflicts among the purposes identified in the treaty and the sharing of benefits with Canada. This new treaty will address the river's serious environmental issues and ensure it continues to benefit the people dependent on it.

Alienation and Reconciliation in Social-Ecological Systems.............. 127
Ann M. Eisenberg

After rancher Ammon Bundy's forceful occupation of the Malheur National Wildlife Refuge to protest federal "tyranny" in 2016, mainstream commentary dismissed Bundy and his supporters as crackpots. But the dismissal of the occupation as errant overlooked this event's significance. This conflict: 1) involved a clash over scarce natural resources, of the type that will likely gain more frequency and intensity in the face of climate change; and 2) highlighted the popular idea that the federal government and federal environmental regulations are the enemy of the (white, rural, male) worker. This thread of anti-environmental, anti-federal alienation among many working people has been given light consideration in climate scholarship and policy. Yet, this alienation goes beyond Bundy. Altogether, these are social issues within social-ecological systems (SESs) of various scales, which the law must evolve to address.

Using the Malheur occupation as a focal point, I suggest that adaptive

governance, also known as adaptive comanagement, is not only appropriate for operationalizing resilience theory in SES regulation, but is also likely a pathway to steer climate governance more toward reconciliation over alienation, reducing the risks conflicts pose to effective outcomes. Scholars have recognized that a shift from environmental advocacy's traditional focus on adversarial approaches is necessary in the face of climate change, but few have focused specifically on how to achieve this shift. Two anti-federal, anti-environmental social movements—the Land Transfer Movement and the War on Coal Campaign—illustrate the impediment this particular form of alienation within SESs has posed to effective climate governance, while also highlighting the longstanding and inhibiting rift between labor and environmental interests.

I examine one case study, the Malheur Comprehensive Conservation Plan planning process, as an illustration of adaptive governance successfully reconciling ranchers, environmentalists, tribes, and several agencies—mitigating anti-federal and anti-environmental alienation and the work–environment rift, to the benefit of federal SES climate adaptation mechanisms (and showing that Malheur was an ironic choice for Bundy's protest). By contrast, a second case study, the administrative rulemaking process that created the federal Clean Power Plan, illustrates how process can fuel alienation and undermine the substance of federal climate policy. Adaptive governance receives more consideration for public lands and adaptation issues than for climate mitigation, but there is potential in the climate mitigation context for the United States Environmental Protection Agency to apply some of the adaptive governance and reconciliation principles illustrated at Malheur.

The research for this Article began prior to the 2016 presidential election and will be published in the weeks following the 2017 inauguration. Although the relevance of much of environmental law scholarship may have been called into question in the new political landscape, this discussion now seems more important than ever in light of the country's ongoing political and cultural divides that continue to stymie efforts to address climate change.

Reeling in Uncertainty: Adapting Marine Fisheries Management to Cope with Climate Effects on Ocean Ecosystems.......................... 179
Don Gourlie

Physical, chemical, and biological parameters of ocean ecosystems are constantly changing. A variety of scientific research methods demonstrate this unequivocally. To ensure adequate management of resources, fisheries management in the United States is designed to adapt to these ecosystem changes. However, increased uncertainty and unprecedented unidirectional change as a result of climate change are testing our capacity to manage. In light of this challenge, all interested and involved parties must cooperate and play a proactive role in an adaptation effort. Scientists and fishing communities must work together to identify changing conditions and predict future scenarios. Managers must implement flexible regulations that

incorporate emerging information. As a society, we must shift our habits to adapt, as humankind has done throughout existence.

Climate change presents a challenge, but also a unique opportunity to revolutionize the U.S. fisheries with dynamic and flexible approaches to management. By exploring the predicted effects of climate change on marine fisheries and the current statutory and regulatory framework, this Article establishes that U.S. fisheries management is well designed to adapt to changing circumstances if involved parties are proactive. The Article proceeds to suggest several emerging methods for managing both fishery resources and the humans that use them that fit well within the current legal framework. The methods analyzed in this Article are no doubt a small sampling of innovations that fishing communities, scientists, and managers are developing. Ultimately, this Article aims to provide a framework for adapting current fisheries management to the environmental changes our planet is currently experiencing.

Farmers' Cooperatives to Regionalize Food Systems: A Critique of Local Food Law Scholarship and Suggestion for Critical Reconsideration of Existing Legal Tools for Changing the U.S. Food System 225
Michaela Oldfield

Changes in oil and gas production technology in recent years led to a substantial increase in domestic oil and gas production. This production reduced the nation's dependence on imported fuel, but it has resulted in serious air pollution problems developing in rural areas of the western United States, including Indian lands. The lack of effective air pollution controls on new and existing oil and gas well operations has made it difficult to control emissions from this industry. This Article looks at the efforts being made to deal with air quality issues arising in Indian country that involve federal and tribal law. It includes an examination of air pollution controls in Utah's Indian country.

COMMENT

"One Ought Not Have So Delicate a Nose": CAFOs, Agricultural Nuisance, and the Rise of the Right to Farm 261
Jonathan Morris

The origins of agricultural nuisance can be traced back more than four hundred years to William Aldred's Case in 1610. There, William Aldred brought an action against Thomas Benton for housing livestock in a manner that resulted in unpleasant odors reaching his property. In deciding in favor of Aldred, the Court of Common Pleas ultimately set in motion more than four hundred years of agricultural nuisance suits. This Article, which begins by exploring the roots of agricultural nuisance in early English and American law, ultimately focuses on the trend toward the statutory and constitutional protection of agriculture. The Article's discussion of those protections begins with the passage of right-to-farm laws. These laws, which now exist in some form in

every state, have had inconsistent effects upon the success of agricultural nuisance suits. Finally, this Article discusses the potential trend toward the amendment of state constitutions to include a right to farm. Currently, only North Dakota and Missouri have amended their constitutions to include this right. A similar measure was proposed in Oklahoma in 2016 but was easily defeated.