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ARTICLES

For nearly four decades, national policy has been to restore Columbia Basin salmon devastated by the construction and operation of the Federal Columbia River Power System (FCRPS). In the 1980 Northwest Power Act, Congress declared that salmon restoration was a national priority and that it would be funded largely through federal hydropower sales. A basinwide plan approved by the Northwest states began the restoration effort in 1982, but since that plan did not focus on wild salmon restoration, it was soon eclipsed by federal biological opinions (BiOps) after the listing of several salmon species under the Endangered Species Act (ESA) in the early 1990s. There followed a seemingly endless series of court challenges to the adequacy of the BiOps, most of which succeeded.

Although we discuss all of the Columbia Basin ESA salmon court decisions over the last quarter-century, our focus is on the 2016 decision, a remarkable 149-page opinion that is a paragon of close judicial review. United States District Judge Michael H. Simon became the third consecutive federal judge to find the federal BiOp on FCRPS hydroelectric operations wanting, but he did so in much greater detail and scope than did his predecessors. The result was a judicial opinion that could produce substantial changes in the way the federal government approaches ESA compliance of the world's largest integrated hydroelectric system. Some of those changes were evident in an ensuing 2017 decision ordering increased spills of water at mainstem dams to facilitate downstream fish passage.

Like his predecessors, Judge Simon faulted the federal government for failing to ensure that the mitigation measures—which the FCRPS BiOp assumed would produce immediate, significant benefits—were actually "reasonably certain to occur." In addition, among other

shortcomings, he determined that the BiOp failed to 1) employ a proper methodology for evaluating species jeopardy in its BiOp; 2) account for the low abundance levels and declining recruits per spawning salmon without an adequate margin of safety; 3) rationally examine recovery of the listed species; 4) consider effects of climate change on the mitigation measures; and 5) prepare a programmatic environmental impact statement (EIS) on the cumulative effects of those measures and reasonable alternatives.

Implementation of Judge Simon's opinion, if carried out faithfully, could substantially improve prospects for the recovery of the thirteen ESA-listed salmon runs. The opinion also may establish important ESA precedent concerning the species jeopardy that BiOps are to avoid, the critical habitat that BiOps are supposed to protect, and the relationship between BiOp implementation and procedures necessary to satisfy the National Environmental Policy Act (NEPA). Concerning the latter, perhaps the most arresting aspect of the Simon opinion was the strong suggestion that the EIS the court ordered should include an evaluation of the alternative of breaching the four federal dams on the lower Snake River. However, perhaps more significant in terms of the forthcoming BiOp, the court was insistent that the burden of uncertainty no longer be shouldered by the listed species. Although a court may encourage the FCRPS agencies to consider dam breaching as a NEPA alternative, neither the agencies nor a court have authority to order dam breaching, a power that lies exclusively with Congress in the case of federal dams.

The 2017 injunction ordering increased spills beginning in 2018 promised the first substantive improvement in fish passage due to changed hydroelectric project operations since United States District Judge James A. Redden ordered spills over a dozen years earlier in 2005. This injunctive relief, which also included promised judicial scrutiny of large-scale expenditures at the lower Snake dams, is interim—pending completion of revised BiOp and the new EIS that Judge Simon ordered. But the injunction may reflect the fact that the longstanding federal effort to direct attention away from dam operations to offsite habitat creation and restoration and hatchery production has not entirely succeeded. If so, that is a good omen for the fate of imperiled Columbia Basin salmon.

Taking a multidisciplinary approach in the constructivist tradition, this Article combines discourse analysis, a survey, and legal analysis in an exploration of the fossil fuel divestment campaigns at Harvard and Stanford. The legal analysis identifies the fiduciary framework through which divestment decisions must be made, while the survey and discourse analysis give insight into whether campaigners exhibit a sophisticated approach to that framework. Specifically, this Article argues that because fiduciary law and the rules governing divestment set the bounds of the possible in the endowment management arena,

and because those rules contain specific prohibitions against politically motivated divestment, the way campaigners talk about divestment matters. By contextualizing divestment law and the campaign discourse within the broader cultural politics of climate change, the article reveals the relationship between discourse and policy formation in the divestment movement.

Ideally, the campaigners should align their discourse with the rules governing divestment if the endowment trustees are the target audience. Yet as the analysis reveals, the campaign is simultaneously targeting multiple audiences and advancing multiple goals. Distinct and at times disparate discursive narratives are employed, symptomatic of the broader ideological clashes within the cultural politics of climate change. While the neoliberal-managerial discourse variant aligns fairly well with the rules governing divestment, its rhetorical gains are undermined by a politicized eco-radical discourse that chafes against the divestment rules (viz., prohibitions against politically motivated and blanket industry-wide divestment). The dual discursive deployment and discursive misalignment incurs opportunity costs for the campaigners. Additionally, the survey and discourse analysis results reveal an agenda well beyond the scope of endowment management.

The final analysis revisits the goals of the campaign and argues that fiduciary law can accommodate environmental, social, and governance concerns. Those seeking to "green" the endowments are more likely to succeed if they frame their arguments and methods as consistent with fiduciary duty and endowment finance. Ultimately, however, such accommodation will fail to satisfy some campaigners. Those seeking radical political and socioeconomic reform through the divestment movement are unlikely to find it in the realm of endowment management.

Over the past fifty years, hundreds of municipalities across the country have enacted historic preservation laws—ordinances that regulate the alteration and demolition of buildings deemed historically or aesthetically significant. Recently, however, preservation has become pervasive, freezing the development of vast neighborhoods filled with undistinguished buildings. Local preservation commissions tend to focus on the benefits of saving old buildings rather than the costs. This Article encourages local governments to consider costs, and proposes adapting the federal model of agency cost-benefit analysis to historic preservation.

Milestone anniversaries provide a unique opportunity for reflection. Enacted in 1966, the National Historic Preservation Act fundamentally transformed the field of historic preservation—particularly at the federal level. This Article explores the evolution of National Historic Preservation Act compliance from an agency perspective and provides a comprehensive survey of all appellate litigation involving the United States Forest Service. To this end, this Article profiles litigation trends and how cultural resource management practices have been shaped by the courts over the past five decades. Ultimately, an understanding of how cultural resource management has evolved as historic preservation has become more inclusive is critical to thinking about how to address future challenges.

COMMENT

People in the western United States rely on groundwater for agricultural, domestic, and conservation uses. Achieving balance among these often-competing interests is largely left to state legislatures and agencies. Oregon regulates groundwater according to a permit system based on prior appropriation. In some groundwater-dependent areas of the state, wells are drying up, and stream-levels and water tables are dropping. Oregon's aquifers are at risk of overdraft. Still Oregon's Water Resources Department has been approving new-use permits, allowing additional groundwater withdrawals, when it does not have sufficient information to determine that water is available. This Comment analyzes Oregon's governing statutes and regulations, and concludes that Oregon law prohibits groundwater mining and that Department's policy runs afoul of that prohibition. Comparing Oregon's groundwater law to other western states' law, the Article suggests that Oregon's legislature or the Water Resources Department should incorporate groundwater management mechanisms from these states to better enforce Oregon's groundwater mining prohibition.