ESSAYS

ENVIRONMENTAL LAW AT 50: A CUTTING-EDGE JOURNAL EXAMINING THE CENTRAL ISSUES OF OUR TIME

BY

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This Paper, a celebratory essay marking the 50th anniversary of the first issue of Environmental Law, the nation’s oldest and most comprehensive law student-edited environmental law review, discusses the background of the founding of the journal in 1970 and surveys the many symposia and leading articles it has published over the years. The output has been fairly astonishing in terms of the breadth of coverage and the innovative environmental ideas advanced. The Essay notes the numerous authors who have published in Environmental Law more than once, and an appendix catalogs some thirty years of publishing the articles of distinguished environmental visitors to Lewis & Clark Law.

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I. INTRODUCTION

A half-century ago, in 1970, eight years after the publication of *Silent Spring*¹ and just a year after pictures from the moon landing showed the interconnectedness and vulnerability of planet Earth,² Lewis & Clark Law School became the first law school to publish a journal dedicated to the then-nascent field of environmental law.³ It was a providential decision, one that proved to be a harbinger of the school’s great success over the last half-century in assembling its top-rated environmental program,⁴ its rich and unrivaled curriculum,⁵ its unmatched environmental clinics,⁶ its consistent success in

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¹ *Rachel Carson, Silent Spring* (1962). It is not too much to claim that *Silent Spring* inspired the modern environmental movement, as the book aimed “at igniting a democratic activist movement that would not only question the direction of science and technology but would also demand answers and accountability.” *Silent Spring, The Life and Legacy of Rachel Carson,* https://perma.cc/8SU4-MGE6 (last visited Oct. 20, 2019). Carson’s book was serialized in three parts in *The New Yorker*, where it was read by President Kennedy before it was published in the summer of 1962. The book, based on six years of Carson’s research on the effects of commonly used pesticides like DDT on human health and the environment, advocated allowing citizens to challenge government policies that were often the product of polluters’ lobbying, foreshadowing environmental legislation’s reliance on citizen suits for enforcement. *Id.*

² See Christopher Riley, *Apollo 40 Years On: How the Moon Missions Changed the World For Ever,* THE GUARDIAN (Dec. 15, 2012), https://perma.cc/5FGY-EYKH (discussing “Earthrise,” an Apollo 8 portrait of a vibrant-blue planet, contrasted with the barren, brown-grey horizon of the moon, which drew attention to Earth’s apparent fragility, prompting one commentator to remark that “on the way to the moon, we discovered Earth”).


⁴ Lewis & Clark Law School’s environmental law program is currently ranked #1 in the country in U.S. News & World Report, *Best Environmental Law Programs,* U.S. NEWS & WORLD REPORT, https://perma.cc/8CSK-BMRB (last visited Jan. 25, 2020), and has been ranked #1 or #2 for each of the last twenty years.


⁶ The Northwest Environmental Defense Center, the law school’s first environmental practical skills offering, which offers first-year students exposure to case work, is also celebrating its 50th year. *Northwest Environmental Defense Center,* LEWIS & CLARK LAW SCH., https://perma.cc/FH56-HWQ (last visited Jan. 25, 2020). Earthrise Law Center, formed in 1996 by Professors Craig Johnston and Dan Rohlf, and now under the leadership of Professors Tom Buchele and Allison LaPlante, offers select students an
environmental moot courts, and its graduates who have gone on to fill important positions throughout the country in environmental and natural resources law. None of this was foreordained when Environmental Law was founded the year of the first Earth Day.

As we celebrate the first fifty years of the journal, it is worth a look back to its origins, its evolution, and continuing importance to a legal field that has only grown in importance since 1970, and today is central to efforts to manage the ongoing effects of climate change due to atmospheric pollution. This is a brief effort to do so.


7 The Lewis & Clark Moot Court teams, under the direction of Professor Johnston, have been perennial contenders for national honors, reaching the semi-finals twenty-two times in twenty-eight years, making the finals fifteen times, and winning seven national championships (no other school has won more than five times). Environmental, Natural Resources, & Energy Law: LC’s Environmental Moot Court Team Continues Record of Success, LEWIS & CLARK LAW SCH. (Mar. 11, 2019), https://perma.cc/4TAZ-UZSA.


II. ORIGINS

Legendary faculty member Billy Williamson was the instigator behind the founding of Environmental Law.10 Billy had been the motivating force the year before in establishing the on-campus non-profit organization, the Northwest Environmental Defense Center (NEDC), staffed by volunteer law students and attorneys.11 NEDC has since grown to retain an executive director, its own staff attorney, and student law clerks. Williamson’s far-sightedness in founding both NEDC and Environmental Law is now remembered every year when the school’s environmental alumni select a Williamson Public Interest Environmental Law award winner from the graduating class, given to the person whose commitment, vision, leadership, and creativity in the public interest environmental law field demonstrates a commitment to continue the work after law school.12

1970 was a tumultuous year in American history and a formative one for modern environmental law.13 The year began with President Nixon signing the National Environmental Policy Act (NEPA) into law on the first day of the new decade.14 NEPA, the so-called Magna Carta of the environment,15 declared a national goal to maintain conditions in which man and nature can co-exist in productive harmony in order to promote efforts to prevent or eliminate damage to the environment and biosphere and protect the health and welfare of man, and increase understanding of ecological systems and natural resources.16 NEPA called for early public involvement in government decision making and required public disclosure of the environmental consequences of all proposed federal actions.17 The heart of the statute was to make federal agencies evaluate practicable alternative courses of action to foster its

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11 See Northwest Environmental Defense Center (NEDC), LEWIS & CLARK LAW SCH., https://perma.cc/27J9-GZ4E (last visited Jan. 25, 2020) (NEDC, a volunteer organization non-profit organization now headed by Executive Director Mark Riskedahl, has been an on-campus presence for 50 years, empowering law students to work with lawyers on cases, fill leadership roles within the organization, and launch public interest law careers).
17 Id. § 4332(2)(C) (2012) (public involvement and disclosure).
goals, including making federal agencies fulfill their responsibilities “as trustee[s] of the environment for succeeding generations” and promote uses that ensure “the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.”

The first issue of Environmental Law was published in the spring of 1970, with Professor Williamson as the sole faculty advisor, featuring a message from President Nixon to the editors praising them for undertaking an effort to search for positive answers to what he called the “great question of the Seventies, which is whether we shall surrender to our surroundings or whether we shall make our peace with nature and begin to make reparations for the damage we have done to our air, our land and our water.” Nixon’s apparent chief competitor at the time in the upcoming 1972 election, Sen. Edmund Muskie (D-Me.), contributed an article for the inaugural issue, outlining an environmental agenda for the nation. Famed environmental litigator, Victor Yannacone, authored an article on NEPA. Supreme Court Justice William O. Douglas offered an article on ocean pollution. The journal made an early significant mark on the field.

That same spring of 1970, and just six days after the first Earth Day celebrations, President Nixon ordered U.S. combat troops to invade Cambodia on April 28, in an effort to prevent North Vietnamese troops from attacking South Vietnam from their Cambodian sanctuaries. The invasion poured fuel on the fires of a largescale anti-war movement on college campuses nationwide, no doubt exacerbated by the reinstitution of the military draft six months before. The widespread protests resulted in the shooting and killing of four students by national

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18 Id. § 4332(2)(iii). The regulations promulgated by the Council on Environmental Quality, an agency created by Title II of NEPA, id. § 4342, declare that the duty to consider alternatives is “the heart” of the NEPA process. 40 C.F.R. § 1502.14 (2017).
19 42 U.S.C. § 4331(b)(1), (3). Congress’ recognition of the trustee responsibilities of federal agencies and the promise no environmental degradation have been largely ignored by the courts.
24 See Andrew Glass, Nixon Authorizes Invasion of Cambodia, April 28, 1970, POLITICO (Apr. 28, 2015), https://perma.cc/6MDP-JL2R (noting that neither Secretary of State William Rodgers nor Secretary of Defense Melvin Laird were consulted in advance concerning the Cambodian invasion, and top staffers on the National Security Council, including Henry Kissinger, resigned in protest).
guardsmen at Kent State University and two more at Jackson State University. The protests disrupted college campuses nationwide, with many schools going out on strike for the remainder of the academic year. Although the demonstrations failed to stop the war, they did encourage the Senate to repeal the 1964 Gulf of Tonkin resolution, thought to authorize the buildup of troops in Vietnam, in June, on an 81–10 vote.

In some respects, the Vietnam protests—on the heels of the Civil Rights movement of the early 1960s—created an era of activism that fueled the environmental movement. Thus, it was unsurprising that

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28 See Zoe Altaras, The May 1970 Student Strike at UW, ANTIWAR & RADICAL HISTORY PROJECT – PAC. NW. (2014), https://perma.cc/N349-55YQ (recalling the student strike at the University of Washington) (“One of the greatest successes of the strike was that it educated people about current issues and moved thousands of students from apathy to action. The level of awareness about political and civil rights issues significantly increased. The strike also resulted in a ‘New University’ where professors taught free classes to students on strike issues. Finally, the strike had an effect on each individual who participated. The students felt empowered to know they were making a real change. Years later in an interview with the Seattle Civil Rights and Labor History Project, US District Court Judge Ricardo Martinez spoke about his involvement in the May 5, 1970, freeway march with pride and mentioned he enjoyed telling his daughters about the experience. Although the strike didn’t result in the drastic change that was being demanded, the UW and hundreds of other universities won small victories and that affected the lives of thousands of student strikers. Many of these students continued to fight for civil rights and efforts to end the Vietnam War throughout their college and professional careers.”) (citations omitted).
29 See Senate Repeals Tonkin Gulf Resolution, HISTORY.COM, https://perma.cc/4SXX-8B4Y (noting that the repeal was sponsored by Sen. Bob Dole (R-Kan.), later a presidential nominee). The Tonkin Gulf Resolution of 1964, which passed the Senate 88–2 and the House unanimously, was a response to an alleged attack by North Vietnamese patrol torpedo boats on USS Maddox when the destroyer was in international waters in the Gulf of Tonkin. The resolution authorized the president “to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.” H.R.J. Res. 1145, 88th Cong. (1964); see EDWIN E. MOÏSE, TONKIN GULF AND THE ESCALATION OF THE VIETNAM WAR (1996). The Senate voted to repeal the resolution on June 24, 1970, and the repeal was later included in the Foreign Military Sales Act that Nixon signed into law in January 1971. See Gulf of Tonkin Resolution Is Repealed Without Furor, N.Y. TIMES (Jan. 14, 1971), https://perma.cc/DPQ9-N2LV. Two years later, in 1973, Congress passed the War Powers Resolution, over Nixon’s veto, in an effort to restore limits on presidential authority to send U.S. forces into hostilities without congressional consultation and a formal declaration of war. War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2012). The resolution remains in effect today.
31 See Adam Rome, “Give Earth a Chance”: The Environmental Movement and the Sixties, 90 J. AM. HIST. 525, 547 (2003) (“For many intellectuals, therefore, the movement to end the war and the movement to protect the environment became aspects of one all-encompassing struggle. Many critics pointed to the complicity of the corporate world in
the chief political supporter of the first Earth Day, Sen. Gaylord Nelson (D-Wis.), was also a staunch antiwar opponent.

The enactment of NEPA, the Earth Day celebrations, and the founding of Environmental Law were hardly all the environmental achievements in that tumultuous year of 1970. For example, before the year was out, President Nixon created the Environmental Protection Agency, and he then signed into law the Clean Air Act Amendments of 1970 on the last day of the year, December 31st, 1970. From NEPA on the first day of the year to the Clean Air Act on the last, the founding of Environmental Law came at a propitious time.

### III. EVOLUTION

The 1970s were a decade of overwhelming environmental legislation. Students of environmental law, as I was then, were simply inundated with new legislative initiatives, from what is now called the Clean Water Act Amendments of 1972, the Endangered Species Act of 1973, the Resource Conservation and Recovery Act of 1976, the environmental devastation abroad and at home. The same companies that profited from the defoliation campaign in Vietnam also profited from the wanton use of toxic chemicals in the United States. According to some critics, the war and the environmental crisis both followed from the deadly logic of technocracy. In Vietnam, Americans destroyed towns to ‘save’ them; at home, Americans degraded the environment to make ‘progress.’ According to other critics, the heart of the problem lay instead in the Western drive to conquer the world, to remake societies and landscapes at will. The war in Vietnam was akin to the war Americans had waged against Indians and wilderness.

Also in 1970: 18 year-olds obtained the right to vote; the Beatles broke up; Jimi Hendrix died at 27; the comic, Doonesbury, began; the North Tower of the World Trade Center became the tallest building in the world; and Lieutenant William Calley went on trial for killing twenty-two Vietnamese civilians in the My Lai Massacre, in which twenty-six American servicemen were charged with killing 300–500 Vietnamese civilians. Only Calley was convicted, serving 3-1/2 years of house arrest. See 1970 in the United States, WIKIPEDIA, https://perma.cc/5CAH-VGUC.

The agency was proposed by President Nixon in Reorganization Plan No. 3 on July 9, 1970 following transmission of his 37-point environmental agenda to Congress. See The Origins of EPA, U.S. ENVTL. PROT. AGENCY, https://perma.cc/JRA8-KMWN (last updated Nov. 19, 2018). The reorganization plan was transmitted to Congress, which approved it after hearings, and the plan went into effect, officially creating the EPA in December. William Ruckelshaus was appointed the agency’s first administrator. Id.


Comprehensive Environmental Responsibility, Liability and Compensation Act of 1980,\textsuperscript{38} and so forth. It seemed as if there were no end to the legislative fixes that Congress was willing to enact.

And then, after enactment of the Alaska National Interest Conservation and Lands Act in in the lame-duck session of 1980,\textsuperscript{39} the environmental legislative revolution suddenly stopped. The incoming Reagan Administration and a new Republican Senate would be much more skeptical of new environmental initiatives, and divided government would characterize the rest of the decade and continue well into the 1990s.\textsuperscript{40} The 1970s environmental decade of legislation would never be repeated.\textsuperscript{41} That hardly meant a slowdown in environmental law, however, as administrative and judicial interpretations proliferated. But it did mean that environmental statutes became difficult to enact and often impossible to update to keep pace with scientific and technological advances.

\textit{Environmental Law} kept pace with these developments, growing from three issues a year to four in 1981–1982, once producing a volume embracing a full 2,321 pages.\textsuperscript{42} As Professor John Leshy, then Interior Solicitor, explained on the journal’s twenty-fifth birthday in 1995, \textit{Environmental Law} became “a bible in this field;” in his tribute, Leshy mentioned articles by several well-known figures as well as unusual articles during the early 1990s that illustrated the great variety of subjects the journal has continued to publish over the years.\textsuperscript{43}


\textsuperscript{40} See, e.g., Michael C. Blumm, Twenty Years of Environmental Law: Role Reversals Between Congress and the Executive, Judicial Activism Undermining the Environment, and the Proliferation of Environmental (and Anti-Environmental) Groups, 20 VA. ENVTL. L.J. 5, 6–10 (2001) (describing the “congressional retreat” in environmental law and some creative regulatory interpretations of statutes by administrative agencies).


In the same anniversary issue in which Leshy wrote, Denis Hayes, national coordinator of the first Earth Day, explored environmental law’s challenges in the mid-1990s.44 Well-known law professors Robert Adler, J.B. Ruhl, and L&C’s own Susan Mandiberg also contributed.45 In the volume containing that anniversary issue were symposia (sometimes called colloquia) on the then recent Supreme Court decision in Dolan v. City of Tigard,46 on “Who Runs the (Columbia) River?,” and on President Clinton’s New Land Policies.47 The following year the journal produced an epic cumulative index of its first quarter-century that was over 300 pages and is still well worth consulting today.48

Over the ensuing twenty-five years, Environmental Law continued to feature a dizzying variety of issues. A sampling of symposia includes those on Northwest Water Law,49 another on management of the Columbia River,50 on habitat conservation plans under the Endangered Species Act,51 on population law,52 on international environmental law,53

Saint Thomas Aquinas, A Superfund Trivia Test, NEPAWOCKY: A Panegyric Verse (by L&C Law prof., Brian Blum), Everything You Need to Know About Environmental Law You Learned in Kindergarten, and What Outrages Me About the Endangered Species Act, Id. at 969 (citations omitted). Leshy also contributed an important article on the contributions of the Bruce Babbitt-led Interior Department, of which he had a first-hand view. John D. Leshy, The Babbitt Legacy at the Department of the Interior: A Preliminary View, 31 ENVTL. L. 199 (2001).

47 25 ENVTL. L. (1995). The latter symposium included articles by law profs John Leshy, Oliver Houck, the late Joe Feller, Allan Miller, and Mary Wood.
48 Twenty-Five Year Index, 26 ENVTL. L. (1996).
on takings law, on energy law, on the Clean Water Act on its thirtieth anniversary, on the Endangered Species Act on its thirtieth anniversary, on public lands management, on the rule of capture and its consequences, on the effects of Oregon Ballot Measure 37 that attempted to revolutionize takings law in the state, on Western instream flows, on law, science, and the environment, on environmental justice, on greening the electric grid, on the Clean Air


64 Symposium, Greening the Grid: Building a Legal Framework for Carbon Neutrality, 39 ENVTL. L. 927 (2009) (articles by Melissa Powers, Duncan Delano, Joseph P. Tomain,
Act at Forty,65 on animal migration and conservation,66 on the Migratory Bird Treaty Act,67 on the Supreme Court’s decision in Sackett v. EPA, concerning Clean Water Act enforcement,68 on point versus nonpoint regulation under the Clean Water Act in the wake of Supreme Court’s decision in Decker v. NEDC,69 on the Wilderness Act at Fifty,70 on the public trust doctrine,71 on the Clean Water Act’s jurisdictional rule,72 on food law,73 and on the Trump Administration and environmental law.74

Environmental Law had thirtieth and fortieth anniversary issues75 and festschrifts for retiring faculty members, Jim Huffman, Janet Steven Ferrey, Jim Rossi, Irma S. Russell, Rachel E. Salcido, Joshua P. Fershee, and Alice Kaswan).


Continuing features of the journal included an annual review of significant Ninth Circuit opinions, begun in 1990,77 annual contributions of Distinguished Environmental Visitors, begun in 1988,78 and a regular feature of short commentary, Clear the Air, initiated in 1991.79

This brief review hardly does justice to the vibrant scholarship that has appeared in the journal, however.80 It is safe to say that no other


78 Environmental, Natural Resources, and Energy Law Distinguished Visitors, LEWIS & CLARK LAW SCH., https://perma.cc/VLX9-C5J2 (last visited Jan. 25, 2020). The articles by distinguished visitors are collected in the Appendix to this article. Worth noting is the fact that no fewer than fourteen of these professors have contributed multiple articles to Environmental Law over the years. John Leshy and J.B. Ruhl currently hold the record among the group at five articles a piece.


80 At the risk of overlooking people, worth noting are the multiple contributions of these non-L&C Law professors, reading like a “who’s who” in Environmental Law teaching: Robert ‘Bo’ Abrams, Jonathan H. Adler, Reed D. Benson, Eric Biber, George Cameron Coggins, Barbara A. Cosens, Daniel H. Cole, the late Federico Cheever, Robin Kundis Craig, Jason J. Czarnezki, David M. Driesen, Myrl L. Duncan, Harrison ‘Hap’ Dunning, Daniel C. Esty, David S. Favre, the late Joseph M. Feller, Steven Ferrey, Robert L. Fischman, Victor B. Flatt, Eric T. Freyfogle, Robert L. Glicksman, Dale D. Goble, Keith
law journal has consistently produced articles on the breadth of environmental issues as those examined in *Environmental Law* over the last half-century.81

### IV. CONTINUING SIGNIFICANCE

During the past decade, *Environmental Law* has continued presenting cutting-edge legal scholarship. For example, long before there was controversy over the president’s authority to diminish the size of national monuments, the journal featured articles on judicial review of monument directives.82 Combatting climate change was front and center in the 2010 Clean Air Act symposium.83 And nearly every ensuing volume of the journal has featured several provocative climate change-related articles. A cursory review counts at least twenty in just the years 2010 to 2018 alone.84

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81 Most environmental law journals produce fewer than four issues a year. Of the longstanding ones, only *Ecology Law Quarterly* and *BC Environmental Affairs* have regularly published four times a year, although usually producing far fewer pages than *Environmental Law*.


Other recent cutting-edge articles included those on biodiversity conservation,85 on controlling “takes” under the Endangered Species Act,86 creating a sustainable, renewable energy economy,87 examining “orphan shares” and CERCLA liability,88 exploring solar energy development on Southwestern public lands,89 improving evidence fact-finding by international courts,90 explaining the historical rationale for environmental regulation,91 pricing whaling harvests,92 portraying the dilemma of human wildlife restoration efforts in wilderness areas,93 examining Chinese natural resources and biodiversity law,94 comparing


85 Andrew Long, Global Climate Governance to Enhance Biodiversity and Well-Being: Integrating Non-State Networks and Public International Law in Tropical Forests, 41 ENVTL. L. 95 (2011).
93 Sean Kammer, Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration, 43 ENVTL. L. 83 (2013).
the Supreme Court’s treatment of health care and environmental law, providing a history of environmental policy innovation, examining the federalism of hydraulic fracking regulation, suggesting a new interpretation of the origins of the Clean Air Act, exploring environmental cleanups by the military, critically looking at the Supreme Court’s invention of constitutional standing, providing an archive of audio recordings of environmental law Supreme Court arguments, explaining administrative agency bias in environmental decision making, examining the marketing of conserved water, exploring catch shares and ocean groundfish management, claiming that criminal law can help save the environment, calling for consistent statutory approach to federal environmental enforcement, comparing environmental management in the United States and Europe, advocating a modernizing of the Columbia River Treaty, critiquing alleged state supremacy concerning fish and wildlife management on federal lands, renewing a call for pollution taxes,

102 Brian S. Tomasovic, Soundscape History and Environmental Law in the Supreme Court, 45 ENVTL. L. 895 (2015).
reviewing state endangered species legislation,\textsuperscript{110} criticizing the abandonment of compensatory mitigation as permit conditions,\textsuperscript{111} examining ecosystem services in the Trump Administration,\textsuperscript{112} and exploring the role of eco-labeling in encouraging sustainable consumer choices.\textsuperscript{113} A particularly provocative article critiqued law school education for its "ecologically dismissive subtexts;"\textsuperscript{114} another applied a "Cubism" property rights analysis to transboundary pollution problems.\textsuperscript{115} These are just samples; they don’t actually capture the full diversity of scholarship \textit{Environmental Law} has published during the past decade.

\textbf{V. CONCLUSION}

One innovation of \textit{Environmental Law}’s that has been evident from its beginning in 1970 has been the way in which it gave full author status to student notes and comments, refusing to relegate student authors to the back of a note or comment, or worse. Although treating students as full authors has become more commonplace over the years, in 1970 it was unheard of.

But \textit{Environmental Law}’s chief contribution has been to the scholarship of the field itself, as from President Nixon’s letter\textsuperscript{116} forward, the journal has published the most diverse and in-depth scholarship of any environmental law review. It has also proved to be a model for other journals.\textsuperscript{117} And it has done so for a half-century, through fifty editorial boards, consistently vindicating Billy Williamson’s prescient vision, perhaps beyond his wildest dreams.

One envisions the next half-century of \textit{Environmental Law} as being even more consequential than its first half-century. The beneficiaries will be widespread.

To the next half-century of \textit{Environmental Law}, the nation’s oldest and most comprehensive student-edited law review.

\textsuperscript{111} Dave Owen, \textit{The Conservative Turn Against Compensatory Mitigation}, 48 ENVTL. L. 265 (2018).
\textsuperscript{116} Nixon, supra note 20.
APPENDIX: ARTICLES BY DISTINGUISHED ENVIRONMENTAL LAW VISITORS
In chronological order, with additional articles by frequent contributors:


Barton H. Thompson, Jr., Tragically Difficult: The Obstacles to Governing the Commons, 30 ENVTL. L. 241 (2000); see also A Federal Act to Promote Integrated Water Management: Is the CZMA a Useful Model?, 42 ENVTL. L. 201 (2012).


A. Dan Tarlock, *Western Water Law and the Challenge of Climate Disruption*, 48 ENVTL. L. 1 (2018); see also *The Legacy of Schodde v. Twin Falls & Water Co.: The Evolving Reasonable Appropriation
