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ARTICLES

The New Electric Powerhouses: Will They Transform Your Life?

Suedeen G. Kelly

Over the last thirty years the price of electricity has soared. This spurred experimentation with competition in the generation of electricity. In 1992, Congress promoted wholesale competition in the generation of electricity with the passage of the Energy Policy Act. The year 1999 finds seventeen states embarking on retail competition in generation. They are looking for choice, lower costs, and innovation--typical attributes of a competitive market--but they do not want to lose the reliability, universal service, and environmental protection that the regulated generation monopoly brought us. Trying to achieve all of these goals poses an enormous challenge for state policy makers. The issues they must resolve are difficult ones, and some of them are novel to regulatory policy. They include recovery of stranded costs, criteria for approval of mergers and acquisitions, and cost-shifting from large to small electricity consumers. So far the states have worked to solve these uncommon problems with uncommon sense. They are proceeding slowly, on a state-by-state basis, using consensus-building processes, and showing willingness to devise creative solutions that will also be politically acceptable. While this is the very process that foretells a successful transition to a restructured industry, it is threatened by objections that it is too slow, lacks uniformity, and results in solutions at odds with our economic models. These objections have merit. However, they should not be heeded because their merits are outweighed by their costs.

The Wrong War, with the Wrong Enemy, at the Wrong Time: The Coming Battle over the Military Land Withdrawal Act and an Experiment in Privatizing the Regulation of Public Lands

Darrin Hostetler

Environmental groups and the Department of Defense will soon square off in a legal and political battle over control of seven million acres of federal lands, much of it pristine wilderness. The lands, which were withdrawn from general public use and entrusted to the Pentagon for military training and testing purposes during the Cold War, are governed by the Military Land Withdrawal Act (MLWA)--a law that must be renewed or amended by Congress in the year 2001. In this Article, Darrin Hostetler reviews the history of withdrawn military lands and argues that conflict between environmentalist and military forces in a legislative forum during the MLWA renewal debate will result in bad law and incoherent land use policy. Instead, this Article suggests that the MLWA be amended to allow for direct "opt-out" negotiations between environmentalists and local land "stakeholders" on one side, and the military on the other. Mr. Hostetler concludes that this new legal regime, in addition to providing a valuable and unique opportunity to experiment with regulatory privatization of public lands, will result in an equitable and efficient use of military properties that best facilitates both environmental and national-security interests.

Aquatic Invasive Species in the Coastal West: An Analysis of State Regulation Within a Federal Framework

Viki Nadol

Invasive species are a growing problem in the United States. They are virtually impossible to eradicate once established, and each year they cause enormous nationwide economic losses measuring in the billions of dollars. They are also responsible for environmental losses, including habitat destruction and increased stress on already endangered and threatened native species. Invasive species include plants, animals, and insects and can be either terrestrial or aquatic in nature. This Article examines aquatic invasive species (AIS) in the American coastal West; specifically, this Article addresses the impacts of AIS in California, Oregon, Washington, and Alaska. It then examines the legal responses that each of these states has crafted to reduce AIS introduction and to eradicate already established AIS populations. Ultimately, this Article

concludes that state efforts alone insufficiently address AIS. To be effective, any state AIS regulation must fall within a comprehensive federal framework.

COMMENTS

The United States Forest Service's Response to Biodiversity Science

Greg D. Corbin

The National Forest Management Act and its implementing regulations require the United States Forest Service to manage the national forests' biodiversity based on a set of science-based management prescriptions. Over the past two decades the scientific principles underpinning those prescriptions have evolved, adding new understanding to biodiversity management. In this Comment, the author argues that while the Forest Service adopted a regulatory program designed to incorporate that new understanding into the forest planning process, the agency has not done so in order to maintain regulatory flexibility. In addition to providing a history of biodiversity management on the national forests and detailing the evolution of biodiversity science, the author demonstrates how the agency's litigation posture and proposed regulatory changes in favor of ecosystem management ignore the science of biodiversity to preserve broad regulatory discretion and maximum on-the-ground management flexibility.

The Mythical Giant: Clean Water Act Section 401 and Nonpoint Source Pollution

Kristi Johnson

Does Section 401 of the Clean Water Act apply to both point source and nonpoint source pollution? The Ninth Circuit recently held that Section 401 does not apply to nonpoint source pollution but then withdrew its opinion pending reconsideration. An examination of the statute and its legislative history indicates that the original Ninth Circuit decision was correct: Section 401 only applies to point source pollution. However, even if courts eventually interpret Section 401 to apply to nonpoint source pollution, applying Section 401 will accomplish little in the fight to reduce agricultural nonpoint source pollution, which is the main contributor to the nonpoint source pollution problem. Existing laws and programs can provide adequate means to deal with nonpoint source pollution. Applying Section 401 to nonpoint sources would merely add a needless layer of regulation.

Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act

Shannon Petersen

The author explores the Endangered Species Act's past to provide a thorough analysis of the expectations of the bill upon its passage in 1973. The Act was sold on the passionate images of large and breathtaking wildlife. Further, legislative history indicates that many of the problems that the ESA has encountered were not foreseen. Since 1973 the scientific understanding of the scale of threatened extinction and the needs of endangered species has grown, indicating that a much greater effort and cost than originally thought will be needed to preserve species. Meanwhile, judicial interpretation of the Act has broadly expanded its power. Though both the strengths and weaknesses of the ESA trouble many, the experience of the ESA offers great wisdom for the future of environmental protection.

CLEAR THE AIR

Appellate Study Panel Issues Final Report

Carl Tobias

As an update to his previous Article featured in Environmental Law, Professor Tobias discusses the recent final report issued by the Commission on Structural Alternatives for the Federal Courts of Appeals regarding the potential split in the Ninth Circuit.