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ARTICLES

An Overview of Korean Environmental Law

Hong Sik Cho

Many developing nations pursuing rapid industrialization and economic prosperity look to Korea as a model. As this Article discusses, however, Korea's economic advancement came with a price. While Korea realized tremendous economic expansion in a relatively short period of time, the pressure placed on the environment as a result of this expansion revealed the importance of balancing industrialization with environmental protection. This Article describes how a number of severe environmental harms forced the Korean people to reevaluate their "faster and faster" motto, a slogan used by the Koreans in promoting industrialization and one of the main causes of environmental degradation. As a result, both the people of Korea and the Korean government, prompted by increasing social awareness of the importance of a healthy environment, have rallied to change Korea's approach in this area. As people reach a certain point in economic prosperity, the Article argues, they begin to evaluate their surroundings and quality of life as affected by the environment. Korea has reached this point, and its people are addressing these quality of life issues. The Article recommends that as other developing nations focus their energy on achieving industrial advancement like Korea, they should also take a serious look at Korea's current challenge of balancing economic prosperity with environmental protection.

REMARK

Beyond the APA: Rulemaking in the Real World

Robin Kundis Craig

In her Essay, Professor Craig reviews Cornelius M. Kerwin's updated exposition, *Rulemaking: How Government Agencies Write Law and Make Policy*. The 1999 edition provides practical insights into the real process of agency rulemaking and takes practitioners far beyond the basics of the federal Administrative Procedure Act (APA). However, the public's contribution to rulemaking remains a murky aspect of the rulemaking process, undermining some of Kerwin's conclusions.

1998 NINTH CIRCUIT ENVIRONMENTAL REVIEW

Water, Water, Everywhere, and at Last a Drop for Salmon? *NRDC v. Houston* Heralds New Prospects Under Section 7 of the Endangered Species Act

Nathan Baker

Section 7 of the Endangered Species Act requires federal agencies proposing an action that may affect an endangered or threatened species to consult with the appropriate federal fish or wildlife agency in order to ensure that the action will not jeopardize a protected species. The Ninth Circuit Court of Appeals recently held in *Natural Resources Defense Council v. Houston (NRDC v. Houston)* that routine renewals of federal water delivery contracts constitute "agency actions" under the ESA, thereby triggering the procedural and substantive obligations of section 7. This Chapter discusses *NRDC v. Houston's* potential to revolutionize federal water delivery programs in the Pacific Northwest. The Chapter concludes that *NRDC v. Houston* will lead to greater protection of imperiled salmon and other listed species in the Pacific Northwest, because the Bureau of Reclamation will be required to increase consultation with the fish and wildlife agencies on the effects of its various projects in the region.

Striking the Balance: The Tale of Eight Ninth Circuit Timber Sales Cases

Susan Jane M. Brown

March 4, 1998 was a day that went from bad to worse for the United States Forest Service. On that day, the Ninth Circuit Court of Appeals handed down two precedential decisions against the Forest Service and in favor of environmental groups. This Chapter asserts that *Neighbors of Cuddy Mountain v. United States Forest Service* and *Idaho Sporting Congress v. Thomas* are unique in Ninth Circuit environmental case law because they halted, albeit perhaps only temporarily, the backward slide that is taking place in the Ninth Circuit with regard to environmental protection. These two opinions are distinctive because the court rigorously held the Forest Service to the standards established by law, in contrast to previous decisions in timber sale litigation. This Chapter argues that this development has important consequences for future environmental plaintiffs who may try to discern just what is the law in the Ninth Circuit Court of Appeals.

United States v. Washington: The Boldt Decision Reincarnated

Maribel J. Combs

Native Americans have only recently begun asserting their treaty rights to Washington State's shellfishery. Shellfish growers, private property owners, and the State of Washington vehemently oppose tribal access to shellfish beds affecting their respective interests. This Chapter explores the Ninth Circuit's recent decision imposing time, place, and manner restrictions on tribal harvests, and rejecting the idea that Washington State is a 'citizen.' It concludes that the Ninth Circuit erred in its allocation of Washington's shellfish resources because it did not correctly adhere to case law, canons of treaty interpretation, and cannons of statutory construction.

To Clear the Muddy Waters: Tribal Regulatory Authority Under Section 518 of the Clean Water Act

Regina Cutler

Under section 518 of the Clean Water Act (CWA), qualified tribes may assume regulatory authority over various CWA programs. Despite the demonstrated benefits to tribal interests, many tribes have as yet to take on the full mantle of regulatory authority. This is due in part to the jurisdictional conflicts that arise when tribal regulation of reservation water resources affects nontribal members who own land or live within reservation boundaries. In an effort to mediate between these competing interests, the Environmental Protection Agency (EPA) has determined that prior to asserting regulatory authority over reservation waters, a tribe must demonstrate that such authority falls within the scope of its inherent sovereign power. This interpretation of the force and intended operation of section 518 was recently upheld by the Ninth Circuit in *Montana v. Environmental Protection Agency*. In so doing, the court resolved a decade long controversy over the Confederated Kootenai and Salish Tribes' authority to set water quality standards within the Flathead Reservation in western Montana. However, in summarily deferring to EPA's legal interpretation, the court did little to resolve the jurisdictional conflicts that have historically undermined tribal authority. This Chapter assesses both the Ninth Circuit's approach to the doctrine of inherent sovereignty as it relates to water quality regulation and the court's failure to recognize section 518 as a direct delegation of tribal regulatory authority. Ms. Cutler concludes that the Ninth Circuit avoided an invaluable opportunity to substantiate the legal basis of tribal authority over environmental programs on reservation lands. Continued tribal advancement in the area of environmental regulation will thus depend not on law, but rather on the extent to which EPA continues to advance an Indian policy favoring tribal regulatory authority and self-determination.

Inadequate Analysis Leading to an Accurate Conclusion: The Ninth Circuit's Cursory Treatment of the Constitutionality of the Lacey Act in United States v. Senchenko

Timothy M. Sullivan

Under the Lacey Act, violation of a state law or regulation governing the taking of wildlife can form the basis for a federal criminal conviction. By prohibiting the movement in interstate commerce of wildlife taken in violation of federal, state, foreign, or tribal laws or regulations, the Act incorporates state criminal law as a basis for federal wildlife protection. In 1998, the Ninth Circuit affirmed the conviction of Nikolay Senchenko under the Lacey Act for violating Washington State's prohibition on the use of snares to capture black bears. In *United States v. Senchenko*, the court upheld the constitutionality of the Lacey Act, dismissing without analysis Senchenko's claim that a federal prosecution based on a state criminal offense violated Article I of

the United States Constitution. This Chapter provides the analysis left out of the Ninth Circuit's opinion, assessing the constitutionality and wisdom of the Act. This analysis concludes that not only is the Lacey Act constitutional, but it also embodies good public policy by providing a powerful tool for the protection of wildlife.