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FALL ESSAY SERIES

Introduction 991
Adrienne L. Thompson

Sackett: The Road Forward 993
Craig N. Johnston

This Essay surveys the Supreme Court's opinion in *Sackett v. EPA* and, in so doing, summarizes both the issues the Court resolved and the most important questions the Court left unaddressed. It also suggests how EPA is likely to respond and how the Author believes it should respond. Most significantly, this Essay suggests that EPA can take relatively minor steps that will likely ensure that *Sackett* has only minimal effects on EPA's ability to efficiently generate positive compliance outcomes.

Practical Impacts of the *Sackett* Decision 1009
Albert Ferlo & Tom Lindley

This Essay discusses the practical impacts of the *Sackett* decision for a party deciding whether to challenge an agency action under the Administrative Procedure Act. Although *Sackett's* impact on the finality requirement for such a challenge is clear, it will have little effect on how courts look at the ripeness and exhaustion requirements for such challenges. *Sackett* therefore provides clients with a new but limited decision pivot point—whether to incur the delays, costs, and risks involved in filing an early challenge to an agency decision, or to proceed in light of an agency order that, while onerous or even without clear merit, nevertheless promises a quick and relatively inexpensive path to the completion of a project. Further, the agency decision may now include both: 1) the presence of a more complete record, and 2) more listening by and input from seasoned staff that can result in real rather than dictated agreements.

Sackett v. EPA and Judicial Interpretations of Environmental Statutes: What Role for NEPA? 1027
Joel A. Mintz

This Essay analyzes both the nature and practical importance of EPA administrative compliance orders and the (potential) precedential scope and significance of the U.S. Supreme Court's decision in *Sackett*. Additionally, it critiques the *Sackett* opinion for its failure to take account of section 102(1) of the National Environmental Policy Act (NEPA)—an unambiguous directive that all public laws, policies, and regulations be interpreted "to the fullest extent possible" in accordance with NEPA's environmentally protective policies.

ARTICLES

Dam Removal in the Pacific Northwest: Lessons for the Nation 1043
Michael C. Blumm & Andrew B. Erickson

Over the past dozen years, a number of large dams in the Pacific Northwest have been removed in an effort to restore riverine ecosystems and dependent species like salmon. These dam removals provide perhaps the best example of large-scale environmental remediation in the twenty-first century. This restoration, however, has occurred on a case-by-case basis, without a comprehensive plan. The result has been to put into motion ongoing rehabilitation efforts in four distinct river basins: the Elwha and White Salmon in Washington and the Sandy and Rogue in Oregon. In all, nine significant dams have been removed, and four more—in the contentious Klamath Basin of Oregon and California—are slated for removal within the next decade. This Article surveys both the successful and proposed removals in order to draw lessons both within and beyond the Pacific Northwest. We identify a number of factors that determine both the speed and success of dam removal efforts, including the availability of the federal licensing process under the Federal Power Act, the existence and organization of local opposition, the amount and sources of funding, and the support of federal and state resource agencies and well-positioned members of Congress. These factors suggest that the promised removal of the Klamath dams—as well as calls for removing four federal dams on the Lower Snake—face significant odds.

Fiddling as the World Floods and Burns: How Climate Change Urgently Requires a Paradigm Shift in the Permitting of Renewable Energy Projects 1101
Jeffrey Thaler

This Article is among the first to integrate current climate change science, particularly ongoing impacts and predicted impacts, with a detailed roadmap for substantial reform of our environmental processes for reviewing proposed renewable energy projects. Most existing articles either focus only on climate science or on minor modifications to the regulatory system. Using offshore wind power as a case study, this Article demonstrates how, in an increasingly carbon-

constrained world, our existing environmental laws and regulatory process no longer achieve their underlying goals of long-term ecosystem conservation. To the contrary, these laws and regulations are supporting a system with increasing greenhouse gas emissions that is annually costing trillions of dollars. We have little time left to create a practical path to achieving an 80% reduction in greenhouse gases by 2050—with failure resulting in average global temperatures rising more than the internationally-agreed targeted ceiling of 2°C. After examining the obstacles confronting a potential developer of offshore wind, this Article clearly lays out why and how the existing regulatory process should be quickly reformed so that offshore wind and other clean renewable energy sources can help us escape the escalating consequences of our carbon-intensive economic system.

Equity and the Colorado River Compact..... 1157
Jason A. Robison & Douglas S. Kenney

The Colorado River and the elaborate body of laws governing its flows (Law of the River) are at a critical juncture, with a formidable imbalance between water supplies and demands prompting diverse efforts to evaluate and to think anew about Colorado River governance. One such effort is the Colorado River Governance Initiative (CRGI) at the University of Colorado Law School. Incorporating CRGI research undertaken over the past two-and-a-half years, this Article focuses on the interstate Compact constituting the foundation of the Law of the River—the Colorado River Compact (Compact)—and approaches the water apportionment scheme established by this compact as a subject of central importance in current efforts to navigate the future of the river. Lying at the base of the Compact is a commitment to equity—"equitable division and apportionment of the use of the waters of the Colorado River System"—which poses the fundamental question explored in this Article: To what extent does the Compact's apportionment scheme fulfill this commitment to equity in its existing form? After providing an initial overview of the Compact, this Article considers the meaning of "equity" as a norm, setting the stage for a subsequent examination of water supplies and demands in the basin and of longstanding interpretive disputes involving the Compact's key terms. This examination reveals several equity-related concerns associated with the composition of the Compact's apportionment scheme and the governance structure devised for it. A discussion of these concerns occupies the final Part of this Article. Framing this discussion is our perspective that the Compact's commitment to equity is a venerable one and that the concerns raised in this final Part need to be addressed in ongoing dialogue about Colorado River governance in order to fulfill this commitment in contemporary times.

CERCLA, Institutional Controls, and the Legacy of Urban Industrial Use 1211
Sarah Fox

Population growth over the last few decades in cities around the country has created high demand for vacant urban land. But much of this now desirable property remains contaminated from prior uses. An increasingly popular option for managing the contamination left at urban sites is reliance on institutional controls to limit use of the property in line with the degree of cleanup accomplished through the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or other remediation programs. Through such limitations, institutional controls allow for both less than complete remediation and faster return of land to productive use. At the same time, however, recent amendments to CERCLA have limited the potential for review of liability with regard to institutional controls. And there appears to be widespread agreement that at least some institutional controls will fail to provide their intended protections. Based on the apparent lack of remedy available if these controls fail to operate as anticipated, this Article concludes that there is a need for judicial interpretation and/or congressional amendment of CERCLA's liability and timing of review provisions to better address institutional controls. In the meantime, planners would be wise to use caution in integrating institutional controls into designs for urban renewal; otherwise, new and beneficial patterns of urban growth may be derailed by future failures of those controls.

REMARKS

Legal Disputes Related to Climate Change Will Continue for a Century 1257
Richard J. Pierce, Jr.

These Remarks summarize the expected effects of anthropogenic climate change, discuss the expensive and ineffective mitigation efforts that have been attempted to date, describe a more promising strategy for the future, and explain why the U.S. must prepare to make major changes in the law in order to adapt to some significant, and inevitable, changes in climate. These Remarks were originally presented to the Washington D.C. Bar as the 2012 Harold Leventhal Lecture.

COMMENTS

Wading out of the Tilla-Muck: Reducing Timber Harvests in the Tillamook and Clatsop State Forests, and Protecting Rural Timber Economies Through Ecosystem Service Programs..... 1275
Tim G. Wigington

This Comment examines the contentious history of the ORS 530 state lands in the Tillamook and Clatsop State Forests of Oregon's Pacific Coast Range, including an analysis of the lands' unique "greatest permanent value" (GPV) management mandate, the local counties'

revenue incentives to harvest aggressively, and the subsequent and ongoing controversy over how to manage them. This Comment proceeds to interpret GPV and posits that the legislature intended environmental values to be co-equal to revenue maximization in the GPV equation. Based on this conclusion, this Comment suggests that environmentalists and the timber industry agree to permanently remove (i.e., decouple) some ecologically important ORS 530 lands from harvesting as a way to effectuate a more balanced GPV. This Comment then models the approximately $6 million/year revenue gap created by such an agreement, including county budget shortfalls in three key counties, timber job impacts, and the impact on statewide public school funding. To combat this gap, a state cash infusion to the counties is proposed—paid back over time by revenue from ecosystem service programs related to watershed protection, CO_2 sequestration, and recreation/aesthetic value monetization. This Comment concludes that such programs could more than make up the gap, while moving the counties toward more diversified economies, creating a more resilient forest ecosystem, and possibly curtailing much of the political wrangling that has hampered the ORS 530 forests for decades.

A Critical Discussion of Critical Habitat Designations: Is Compliance With The National Environmental Policy Act Required? 1339
Mele Coleman

Since 1996, the Ninth and Tenth Circuit Courts of Appeals have been split over whether critical habitat designations require National Environmental Policy Act (NEPA) compliance. Providing a fresh and objective perspective, this Comment argues that critical habitat designations should not require NEPA compliance because: 1) application of the functional equivalence exemption is appropriate, and 2) federal actions that do not alter the physical environment do not fall under the purview of NEPA. Although this Comment recommends that the U.S. Supreme Court resolve the split to enable the agencies that designate critical habitat to maximize their conservation of endangered and threatened species, it also recognizes that the Court may not accept certiorari on the issue in the near future, if ever, and thus encourages the agencies to jointly develop consistent national policies on NEPA compliance.

Environmental Contamination as Continuing Trespass..... 1381
Christopher M. Rhymes

Courts in the United States generally agree that environmental contamination can form the basis of a trespass action. However, there is disagreement amongst these courts as to how statutes of limitations should operate in such cases. Some courts, following the injury-based approach, hold that the mere presence of contaminants can constitute a "continuing trespass" that will not be barred by a general statute of limitations for tort actions. Other courts, following the conduct-based approach, hold that a continuing trespass cannot exist without continued tortious conduct of the kind that caused the contamination. This Comment begins with an exposition of the continuing trespass as

contemplated by the Restatement and doctrinal writers. The Comment then analyzes the competing jurisprudential approaches to the problem of the continuing contamination trespass illustrated by opinions from the supreme courts of Colorado, Louisiana, and Massachusetts. At the conclusion of this comparative analysis, this Comment closes with the suggestion that the conduct-based approach, in general, provides the better rule.