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Water law scholars have long supported water markets for addressing critical water needs, especially in arid regions like the western United States, and that support seems to be growing among policymakers as well. But translating academic theories about water markets to the field has proved challenging. To be sure, water can be transferred from one use to another use in all western states, but water markets in those states are not presently capable of providing prospective buyers with a reliable source of water when and where they need it. The reasons are myriad, but are primarily related to the high transaction costs and significant lead times needed to consummate transfers. Under the current system, no municipal water supplier in the western United States can guarantee its customers the water they demand if they are forced to rely on the availability of water on the open market.

Remarkably, Australia has managed to adapt its water rights system in such a way that water markets have flourished. The water rights regime in the western United States is different in some significant ways from the Australian system, and thus it is unrealistic to think that the western states can duplicate Australia's experience and success. But there are important lessons to learn from an Australian transfer system that has cut approval times for temporary transfers to less than five days and for permanent transfers less than twenty days.

One way for western states to make progress towards developing functioning water markets is to cabin the scope of a marketing program so that it has a better chance of garnering the support of affected parties, and in particular the farmers who will be selling their

water to cities for domestic and industrial uses. By focusing on “conserved water”—defined here as water that was previously but is no longer consumed by the water user—states will find it easier to adopt reforms that can provide farmers with incentives to make some portion of their water available for other uses. Farmers can keep farming even as they find ways to use less water to grow profitable crops.

Agricultural scientists have made great progress towards identifying and refining techniques for maintaining stable crop production even while using less water. These techniques, which include deficit irrigation, crop switching, and rotational fallowing, have the potential to free up enough water to serve western communities for many years to come, even in the face of severe, sustained drought. But the law has yet to catch up with the science, and in most western states, transferring conserved water is not legally possible. Even where it is allowed, the process remains too cumbersome. This Article begins a discussion about overcoming the legal obstacles to marketing conserved water and suggests modest and practical reforms to current law that could finally open the western United States to robust water markets.

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Domestically and internationally, there is a trend toward greater reliance on the burning of wood as a partial response to the problems of global warming and climate change. But in labeling wood burning as a source of “renewable energy,” consumers and corporations have overlooked a more compelling and immediate health problem. Worldwide, air pollution causes the deaths of approximately seven million people every year, far more than the number of deaths from climate change. Mortality is largely due to air emissions of fine particulate matter. Given the popularity of burning wood and regulatory loopholes, the public health effects of air pollution go underregulated, and often unregulated. As a source of energy that is generated by combustion and results in the direct emission of fine particulates, biomass is like coal, oil, and natural gas (non-renewable energy), and unlike solar and wind (renewable energy). Whether biomass may play a role in an effective climate change strategy is unclear and is the subject of ongoing debate. Recent attempts to address the problem of residential wood burning through the Environmental Protection Agency’s New Source Performance Standards and New York City’s Local Law 38 of 2015 demonstrate the political and legal challenges to regulating emissions from the burning of wood.

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Over the last decade, cities across the nation have pursued local initiatives to mitigate climate change. These efforts, however, have been significantly hampered by cities’ dependence on an electric

power industry that has fought climate policies at the state and federal levels to defend its reliance on fossil fuels. Yet changes now underway in the electricity sector—including President Obama’s Clean Power Plan and related initiatives—are unsettling the traditional utility model and fueling a low-carbon shift that will affect federal, regional, state, and local levels of energy governance. This Article maps the evolving landscape for cities and the low-carbon grid at this critical juncture, and is the first to take up the implications of the U.S. grid transition for cities working to align their electricity profile with community climate aspirations. In charting existing and emerging approaches to community-scale utility ownership and energy localization, the Article explores the legal landscape shaping cities’ potential to advance the low-carbon grid.

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Government regulators and regulated businesses issue periodic alarms about the cost of environmental litigation in delayed decisions and burdensome response requirements. Litigation over commercial fishing in U.S. waters is no exception. The effects of litigation on the operations of the National Marine Fisheries Service have been the subject of internal investigations, National Academy studies, congressional hearings, and opinion columns. While lawsuits over endangered species, compliance with harvest limits, and consideration of environmental consequences have been part of the fishery management scene for decades, a more recent phenomenon involves challenges to federal catch share policy—the practice of limiting the pool of users who have access to take public resources.

This controversial fishery management tool has been around since the early 1990s. Much has been written in economic and political journals about the policy, variously termed “catch shares,” “individual transferable quotas,” “limited access privileges,” and “rationalization.” Whatever one labels this grant of public resources to individuals the process has been legislated, regulated, litigated, and implemented. An examination of the record of wins and losses, sources of claims, changes in regulation, and legislative reform reveals a twenty-year history of fine-tuning the rules of catch share programs. Early litigation over fundamental questions, such as whether a catch share permit created a property right, was addressed by Congress in legislative reforms enacted in 1996 and 2006. Challenges arose equally from environmental advocates, the fishing industry, and other entities. Federal fishery managers have prevailed in more lawsuits and in the substance of their decisions more frequently as the law included greater specificity. Like catch share programs, litigation is a tool. Agency hand wringing to the contrary, it is part of the system—not an indication that the system is broken.

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The nation is experiencing a white collar crime boomlet, if not a wave, of offenses that harm public health, jeopardize worker and consumer safety, and threaten the environment. Some big cases have settled and others are being tried. Still others are under investigation, including the notorious Volkswagen (VW) “defeat device” case that continues to make news almost every day. Stung by criticism that too-big-to-fail banks escaped criminal prosecution for the 2008 market crash that continues to cause misery in the country, the Department of Justice has pledged to indict individual corporate executives whenever possible. It has yet to deliver on that promise, but unless Republicans retake the White House and carry through on pledges to further dismantle the regulatory state, every account of high-profile corporate malfeasance will speculate about criminal implications.

These developments do not represent an idiosyncratic emergence of a handful of rogue corporations and executives even as their competitors studiously avoid running afoul of the law. Instead, a relentless campaign against big government has produced weak to nonexistent enforcement as well as widespread corporate disdain for regulatory requirements. Without any question, criminal law is the last resort. It closes the barn door after the horses have run free, leaving the aftermath of an incident to be ameliorated at great cost, often over periods of several years. Environmental laws were enacted because of similar flaws in the tort system with the goal of preventing injury rather than merely compensating it. Good regulation enforced aggressively to prevent harm is always a better choice. But congressional conservatives and their industry allies have embarked on a highly successful strategy of starving and badgering the agencies—even the Environmental Protection Agency, the strongest and most rebellious among them—into quiescence. In the vacuum that remains, criminal prosecutions, especially of individual senior executives, have a better potential to deter violations than the broken regulatory system.

This Essay explores, contrasts, and compares the two most prominent criminal cases that have emerged in the last several years: the \$4 billion criminal settlement with British Petroleum that resulted from the Deepwater Horizon blowout and oil spill and the VW cheat device scandal. The similarities between the two cases are chilling. They suggest that until and unless the regulatory state is not just revived but greatly strengthened, a result that does not seem foreseeable in the near-term, criminal prosecution is the best hope for people who believe that the government must redouble its efforts to preserve natural resources and protect the public health.

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This Essay suggests that the disparate and outdated enforcement provisions of several major federal pollution control statutes be revised and made consistent. Focusing on the enforcement sections of the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act, I examine the extent to which each of those provisions promotes the efficient and effective enforcement of pollution control requirements. The Essay closely compares the relevant enforcement provisions, identifying key similarities and differences among them, and noting several significant, currently unresolved legal issues common to all three pieces of legislation. It assesses the relative merits of the statutory sections in question, and offers some practical recommendations for statutory reform.

COMMENT

Are the West's Water Resources Fracked? A Study on the Effects of Fracking and How States and Localities are Responding 257
Rebecca Fischer

In the early 2000s, the advent of hydraulic fracturing coupled with directional drilling opened up many previously uneconomical oil and natural gas fields to drilling. Many of these fields, however, were in areas directly next to small, quiet communities unaccustomed to the intensity of oil and gas development. Some towns were overwhelmed by the speed and money behind the boom. A few communities fought back with local measures banning the controversial well stimulation technique of hydraulic fracturing in order to protect their water resources. This Comment seeks to examine how these measures fared in the legal challenges filed against them and to help other communities looking to use these measures learn from these fights.