

ENVIRONMENTAL LAW

Lewis & Clark Law School

VOLUME 46

SUMMER 2016

NUMBER 3

ESSAYS

- A Blast From the Past: The Public Trust Doctrine and Its Growing Threat to Water Rights 461
Hon. Milan D. Smith, Jr.

Unprecedented water shortages in the Western United States have led to similarly unprecedented attempts to restrict water usage, some of questionable legality. In this article, Ninth Circuit Court of Appeals Judge Milan D. Smith, Jr. surveys the state of water shortages, government responses thereto, and the history of water rights in the United States. He then considers whether the public trust doctrine, which the United States inherited from the English common law, might be employed to change the way water is used and distributed. Judge Smith examines how such a use of the doctrine compares to earlier applications, and how other procedural and substantive laws may affect attempts to litigate water cases employing the public trust doctrine. The article closes with questions about the role of the judiciary, federalism, and the Constitution in the application of the public trust doctrine.

- Two Wrongs? Correcting Professor Lazarus's Misunderstanding of the Public Trust Doctrine..... 481
Michael C. Blumm

This paper responds to Professor Richard Lazarus's recent and longstanding criticisms of the public trust doctrine, claiming that Richard misunderstands the nonabsolutist nature of the doctrine, which seeks accommodation between public and private property. Although he acknowledges the value of the public trust doctrine as a defense to claims of private takings, he thinks that the "background principles" defense it affords government regulators is a static doctrine. And he fails to see that the public trust doctrine hardly equips courts with the authority to displace legislative and administrative decision makers. Instead, as epitomized in the well-known *Mono Lake* decision, the doctrine—an inherent limit on all sovereigns—requires those more representative branches to exercise

their discretion in protecting trust resources from monopolization or destruction.

ARTICLES

Living with Water in a Climate-Changed World: Will Federal Flood Policy Sink or Swim?.....

491

A. Dan Tarlock & Deborah M. Chizewer

Global climate change will increase inland and coastal flooding, and strain already stressed flood damage prevention and mitigation systems. In the face of Congressional unwillingness to deal with the increased flood risks, the Obama Administration has undertaken several initiatives to support local resilience in the face of climate change-induced floods and sea level rise. We place these initiatives in the context of existing flood control and insurance programs which encourage moral hazard behavior. We argue that the reforms are promising, but the Obama Administration's approach is severely limited because the existing patchwork of flood-related legislation remains unreformed. The current, competing missions could hinder the reforms' effectiveness. The federal government's lack of a comprehensive climate change response and its retreat from flood control spending pushes the problem to local governments that must cope with increased flood events. Local governments, however, face their own political, fiscal, and legal barriers to adapt to the increased risks of climate change-induced floods. In this constrained environment, the federal government should induce local governments to align their land-use policies with emerging federal policies.

Local governments should lead on flood management because they are on the front lines of flooding; they also can most readily control land-use to manage floodplain development, a key strategy for reducing flood damage. We can no longer rely almost exclusively on structural solutions to coastal sea level rise, storm surges and inland floods. Science does not support this position. The federal and state governments must encourage integrated flood management by providing guidelines and increasing incentives. The proposed federal flood risk management standard, new commitments to regional climate data collection, and existing federal grant programs—such as hazard mitigation planning grants and community block development grants—can provide important direction to local governments. Takings jurisprudence has the potential to chill these efforts. Courts also need to incorporate the moral hazard concept into takings analysis to support beneficial land-use policies that suit a climate-changed world.

Ultimately, the United States should move toward the European Union's risk-based flood management approach and adopt integrated floodplain and coastal management in a comprehensive federal statutory scheme. Federal involvement in flood management can prevent disparity between states and provide an integrated structure that works across states lines.

Nationwide Permit 13, Shoreline Armoring, and the Important Role of the U.S. Army Corps of Engineers in Coastal Climate Change Adaptation	537
<i>Travis O. Brandon</i>	

The ongoing armoring of the nation’s coastlines with seawalls and bulkheads causes the inevitable destruction of miles of coastal wetlands. Armoring increases the rate of shoreline erosion and blocks the long term migration of wetlands inland, a process that will be necessary for coastal wetlands to survive sea level rise. Coastal armoring also reduces the habitat available to coastal species, and blocks access to the upper reaches of the beach for sea turtles and other species that depend on the beach for nesting. And yet, despite these well established and significant environmental harms, the United States Army Corps of Engineers currently authorizes the construction of bulkheads and seawalls up to five-hundred feet in length through a general permit—Nationwide Permit 13—that does not even require property owners to notify the United States Army Corps of Engineers before beginning construction. Under the Clean Water Act, such general permits are only authorized for activities that have “minimal adverse environmental effects.” This Article explains why Nationwide Permit 13 is unlawful under the Clean Water Act, and how Nationwide Permit 13 acts to encourage coastal development and undermine the adoption of less environmentally damaging erosion control measures, such as living shorelines. In addition, this Article argues that the upcoming reissuance of Nationwide Permit 13 in 2017 presents a crucial opportunity for the United States Army Corps of Engineers to change its approach to coastal armoring permits and assume an important role in administering a federal program of coastal climate change adaptation.

**2015 NINTH CIRCUIT
ENVIRONMENTAL REVIEW**

INTRODUCTION	585
CASE SUMMARIES	587

CHAPTERS

Revitalizing Critical Habitat: The Ninth Circuit’s Pro-Efficiency Approach	653
<i>Dashiell Farewell</i>	

The Ninth Circuit Court of Appeals’ recent decisions in *Bear Valley Mutual Water Co. v. Jewell* and *Building Industry Ass’n of the Bay Area v. U.S. Department of Commerce* speak to the court’s interest in promoting discretionary and efficient critical habitat designations under the Endangered Species Act. This Chapter explores how the Ninth Circuit permitted the U.S. Fish & Wildlife Service and National Marine Fisheries Service to efficiently designate critical habitat by

refusing to impose a series of unnecessary and atextual procedural barriers on the designation process. This Chapter argues that, as a matter of both proper statutory interpretation and sound environmental policy, the Ninth Circuit should encourage the Services to designate critical habitat by ensuring that critical habitat designations are both efficient and affordable. Finally, this Chapter concludes that the courts should play a more meaningful role in promoting critical habitat designations, which are essential to the full recovery of threatened and endangered species.

State Activism in the Movement to Conserve Sharks: The Ninth Circuit’s Guidance on Preemption and the Magnuson-Stevens Act in <i>Chinatown Neighborhood Ass’n v. Harris</i>	679
<i>Ryan Ichinaga</i>	

In recent years, both the states and the federal government have enacted laws to prevent the rapid decline of shark populations. States can regulate fisheries within state waters, but beyond those waters, the Magnuson-Stevens Act puts fishery regulation in the hands of the federal government. In *Chinatown Neighborhood Ass’n v. Harris*, the Ninth Circuit was unwilling to hold that the Magnuson-Stevens Act preempted California’s state shark fin ban. This Chapter examines the history of state and federal fishery management, shedding light on the purposes of the Magnuson-Stevens Act. This Chapter also demonstrates the unique difficulties of shark regulation and tracks state and federal efforts to conserve sharks. Finally, this Chapter examines the Ninth Circuit’s preemption analysis, concluding that the Ninth Circuit’s decision is consistent with the purposes of the Magnuson-Stevens Act and is a progressive step forward in shark and fishery conservation.

NINTH CIRCUIT INDEX	707
----------------------------------	-----