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- Race, Ethnicity, and Air Pollution: New Directions in Environmental Justice 713
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Environmental justice recognizes that low-income, minority communities are disproportionately affected by air pollution, and that this problem should be addressed through environmental law and policy. While it is easy to identify general relationships between poverty, demographic patterns, and air pollution, it is far more difficult to demonstrate that companies build industrial facilities at particular sites based on the racial or ethnic composition of the neighboring community, or even that a minority community would be subject to disproportionate health and welfare impacts from a particular facility. It is even more difficult to prohibit the construction of industrial facilities based on a disproportionate impact on low income, minority communities. This Article reviews the reported cases considering the discrimination-based claims of the environmental justice movement, in the context of permitting and environmental reviews for industrial facilities. It concludes that this approach has not been successful in limiting their construction and operation. Finally, the Article suggests that land use planning restrictions on industrial development based on air pollution loading would provide a more direct and viable means of protecting low income, minority communities.

- Tall Firs, Zip-Lines, and Reserved Interest Deeds: An Assessment of the Effectiveness of Federal Conservation Easements in the Columbia River Gorge National Scenic Area..... 759
Nathan J. Baker & James A. Fraser

The federal government owns many thousands of conservation easements on private lands. Thus far, private landowners have challenged few of these federal easements in litigation. In the Columbia River Gorge National Scenic Area, the United States Forest Service has acquired more than two dozen conservation easements to

protect scenic and other resources, and in recent years, landowners have tested several of these easements through litigation at the county, state, interstate, and federal levels. Scholars write extensively on conservation easement law, but few address whether federal conservation easements are effective in protecting resources in the face of landowner challenges. In this Article, we discuss three litigation case studies involving disputes over federal conservation easements in the Columbia River Gorge National Scenic Area. We argue that these conservation easements have been effective in protecting resources, primarily because government and citizen enforcement of zoning requirements have filled gaps left by ambiguous or silent easement terms. We also make several recommendations for improving the effectiveness of conservation easements in the National Scenic Area, some of which may be applicable in other jurisdictions.

- A Tale of Two Continents: Environmental Management-Based Regulation in the European Union and the United States
Rachel E. Deming

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Many environmental issues, such as addressing climate change and encouraging sustainability, have transcended existing statutory schemes, causing regulators and scholars to evaluate alternative regulatory mechanisms. One area of focus has been the potential for using environmental management systems (EMSs) as a way to leverage governmental regulation of operations that impact the environment. An EMS is a systematic planning, implementation and review process that organizations use to continuously improve environmental performance. While there is some literature on the impact that regulations incorporating EMSs have had, almost nothing has been written from a comparative viewpoint. This Article analyzes what role EMSs have played in governmental regulation by comparing two of the most prominent governmental programs based on EMSs: The European Commission's Eco-Management and Audit Scheme (EMAS) and the United States Environmental Protection Agency's Performance Track program. This comparison is especially useful because governmental regulators in the European Union and the United States took opposite approaches with respect to those programs. The European Union continues to develop and promote EMAS while the United States withdrew its Performance Track program in 2009. The Article concludes that there is strong potential for EMS-based regulations to produce significant environmental performance and compliance benefits, and that more should be done in the United States to evaluate lessons learned from Performance Track as well as EMAS developments. Some of the major benefits, such as risk management, avoidance of negative incidents and external engagement, are hard to quantify but could provide the basis for transforming current adversarial relationships among regulated facilities, regulators and other stakeholders into more productive collaborative governance relationships.

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The year 1976 marked a sea change in federal policy regarding the treatment of American Indian tribes and their water rights. In that year, the Supreme Court of the United States was called upon to determine the scope of the McCarran Amendment, a rider on a federal appropriations bill that waived the sovereign immunity of the United States in state court general stream adjudications “where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise.” The Supreme Court, in what has been called a “clear example of judicial legislation,” interpreted that language to grant state court jurisdiction for the determination of Indian reserved water rights. In so doing, the Court abandoned the “deeply rooted” federal policy of “leaving Indians free from state jurisdiction and control,” and has subjected the tribes to “hostile [state court] forums in which [the tribes] must be prepared to compromise their [water right] claims.”

The purpose of this Article is to examine the legislative history of the McCarran Amendment, the available Congressional Record, the Senate Report, as well as the Hearing Minutes, in an effort to ascertain whether it was Congress’s intent to include Indian reserved water rights within the scope of the McCarran Amendment.

The legislative history indicates that “the McCarran Amendment was meant to be interpreted narrowly, not broadly.” It demonstrates that the Senators’ actual concern had not to do with federal reserved water rights but instead that the United States, acting in a proprietary rather than sovereign capacity, had been acquiring an ever-increasing number of state law water rights but was refusing to enter state court proceedings to either adjudicate or administer those rights. As the presense of the federal government increased in the river basins of the West, the proponents of the McCarran Amendment became increasingly alarmed that federal claims of sovereign immunity would effectively preclude state courts from enforcing state water law, thereby causing “the years of building the water laws of the Western States . . . [to] be seriously jeopardized.”

Far from a general waiver, the legislative history reveals that the sponsors of the McCarran Amendment intended to address only this narrow but politically explosive problem where the United States was claiming a “privilege of immunity that the original owner wouldn’t have.” Indian reserved water rights, which are reserved by the federal government in its sovereign capacity for the benefit of Indian tribes that have sovereign immunity independent of the United States, do not appear to have been considered or intended to be included by Congress as the McCarran Amendment was passed into law.

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Changes in oil and gas production technology in recent years led to a substantial increase in domestic oil and gas production. This production reduced the nation's dependence on imported fuel, but it has resulted in serious air pollution problems developing in rural areas of the western United States, including Indian lands. The lack of effective air pollution controls on new and existing oil and gas well operations has made it difficult to control emissions from this industry. This Article looks at the efforts being made to deal with air quality issues arising in Indian country that involve federal and tribal law. It includes an examination of air pollution controls in Utah's Indian country.

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John Ruple & Mark Capone

This Article reviews Environmental Impact Statements (EIS) completed in conjunction with Resource Management Plan (RMP) revisions conducted by the Bureau of Land Management (BLM) in Colorado, Montana, Utah, and Wyoming between 2004 and 2014. Based on our review of sixteen EISs, we found that RMP revisions increased application of more protective surface use stipulations by statistically significant amounts without causing a statistically significant change in either the number of jobs created or the pace of oil and gas development. In fact, both the number of jobs created and wells drilled increased slightly despite strengthened environmental protections. We also found that Draft RMP EISs that are completed on an accelerated timeline come with a heightened risk that supplementation will be needed. The delays associated with preparing a Supplemental EIS far outweigh the timesaving associated with fast-tracking Draft EIS preparation and provide a strong caution against rushing the NEPA process.

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This Article specifically examines whether a federal oil and gas lease cancellation is a Fifth Amendment taking, for which a party must be justly compensated. The consequences of the Secretary of the Interior's recent cancellation of the Solenex lease will be historic if upheld. The financial viability of federal oil and gas leases as assets would be significantly diminished, if not entirely shattered. In addition to the Takings Clause analysis, the article will demonstrate the uncertainty and lack of continuity created when energy, environmental, historical and cultural interests compete in federal oil and gas development. The finality and consistency lacking in the administrative system would make even the most courageous

wildcatter or tribal leader hesitant about the rules of the game and how to anticipate their application.