

# Foreword

*Holly Doremus and Robert D. Infelise*

It is our pleasure to introduce *Ecology Law Quarterly's* 2017–18 Annual Review of Environmental and Natural Resource Law. In its nineteenth year, the Annual Review is the product of collaboration among the student authors, ELQ's editors, Berkeley Law's environmental law faculty, and the Center for Law, Energy and the Environment.

Giula Gualco-Nelson and Elissa Walter, both of whom will soon be members of the bar, served as teaching assistants and advisors to the authors. They dedicated themselves to helping the authors master developing areas of the law and craft interesting and compelling papers. The now-graduated ELQ Co-Editors-in-Chief, Emily Renda and Wil Mumby, orchestrated the Annual Review's publication process. The incoming Co-Editors-in-Chief, Stephanie Phillips and Craig Spencer, have seen the issue through to final publication. We are grateful for their efforts.

But the most enthusiastic recognition must go to the authors, without whom the Annual Review would not exist. Researching in an unsettled area of the law, developing a thesis, and drafting a scholarly work over the course of a single academic year is no easy feat. We applaud their hard work.

The Annual Review also features a Book Review and In Brief comments on recent appellate decisions written by students in the midst of their first year at Berkeley Law. We commend these authors for their efforts during their very busy 1L and LL.M. year.

Law professors, students, legal historians, and countless other scholars seeking insight into the major developments in environmental, natural resource, and land use law during the past year will benefit from this Annual Review. We were honored to have the opportunity to work with the authors.

This year's contributions to the Annual Review critique developments emanating from the White House, the U.S. Supreme Court, three federal courts of appeals, the United Nations Framework Convention on Climate Change, and the New Zealand legislature. We do believe, however, that several themes emerge as described below.

## INTERNATIONAL DEVELOPMENTS

Climate change is a global threat, and reducing greenhouse gas emissions will require us to redouble our commitment to green energy. The Trump Administration's decision to turn its back on the Paris Climate Accord is a step backward. But because most of what we think of as American energy policy is set at the state level, there is much that can be done despite the White House's position. In "The Only Green That Matters Is the Green in Your Pocket: Advocating for Renewable Energy in Red States," Noah Guiney takes an interdisciplinary approach to energy policy.<sup>1</sup> He argues that instead of relying on dire predictions about the future of our warming planet to encourage a greater commitment to the development of green energy sources, the environmental community should frame the case for more wind and solar power in economic terms: renewable energy will cost ratepayers less. The author focuses on Texas and Arizona to demonstrate that under existing state law, green energy could actually generate cost savings. Mr. Guiney notes that despite its historic link to oil drilling, Texas is leading the way in domestic wind power production. Mr. Guiney contrasts the Texas experience with Arizona. The author argues that the Grand Canyon State has not been able to take full advantage of its potential for solar power, in large part because of the way the debate around solar has been framed.

New Zealand's Whanganui River has for centuries been a source of sustenance for the Māori tribes, but there is a spiritual dimension as well. The tribes' historic connection to the River was broken when these Indigenous tribes were forcibly removed from their traditional land along the River, and again when the River was dredged, thereby impairing traditional fishing. More recently, a hydroelectric dam commingled the Whanganui River and another river, a spiritual affront to the Māori. Recently, however, the New Zealand government recognized the River as an entity with rights and obligations similar to New Zealand citizens, as well as the tribes' connection to the River. In "An Indivisible and Living Whole: Do We Value Nature Enough to Grant It Personhood?," Allison Athens uses the developments in New Zealand to reflect on the status of nature in the United States generally, and the Columbia River Treaty in particular.<sup>2</sup> Borrowing from feminist theory and environmental philosophy, the author argues that the River itself should be afforded the right and powers to advocate for its own interests in the new round of negotiations involving the Columbia River Treaty.

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1. Noah Guiney, *The Only Green That Matters Is the Green in Your Pocket: Advocating for Renewable Energy in Red States*, 45 *ECOLOGY L.Q.* 157, 163 (2018).

2. Allison Athens, *An Indivisible and Living Whole: Do We Value Nature Enough to Grant It Personhood?*, 45 *ECOLOGY L.Q.* 157, 187–88 (2018).

## WATER RIGHTS

In “*Agua Caliente: A Case Study and Toolkit for Securing Tribal Rights to Clean Groundwater*,” Dana Bass examines the Agua Caliente Tribe’s decades-long dispute over water agencies’ use of low-quality imported water to replenish California’s Coachella Valley aquifer.<sup>3</sup> In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, the Ninth Circuit held that the Tribe had a right to the groundwater attached to its reservation.<sup>4</sup> The author explores the tools that the Agua Caliente and other tribes may use to best realize their groundwater management goals. Ms. Bass also emphasizes that the parties to any water rights dispute involving native nations should proceed in accordance with an expanded environmental justice framework that recognizes the attributes unique to the Native American experience.

## NATIONAL ENVIRONMENTAL POLICY ACT

Data from the World Economic Forum indicates that the United States trails peer economies in infrastructure quality and reliability.<sup>5</sup> An ongoing debate revolves around whether streamlining the preparation of an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) would allow for quicker infrastructure upgrades. In 2017, the White House issued a series of executive orders calling upon federal agencies to expedite the NEPA process for “high priority” infrastructure projects.<sup>6</sup> Yet, at the same time, recent judicial decisions suggest the federal courts will nevertheless strictly enforce existing standards of assessment and information sharing for NEPA compliance. Maribeth Hunsinger examines the tradeoffs between timely infrastructure development and environmental compliance to assess the potential for recent executive orders to expedite energy infrastructure development.<sup>7</sup> She argues that while streamlining EIS preparation can serve both development and environmental interests, the Trump Administration’s executive orders will likely compromise NEPA’s objectives of reasoned decision making and informed public comment. The author opines that policymakers should instead implement process improvements to expedite facility upgrades. Ms. Hunsinger articulates a series of process improvements, which, if applied specifically to facility

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3. Dana Bass, *Agua Caliente: A Case Study and Toolkit for Securing Tribal Rights to Clean Groundwater*, 45 *ECOLOGY L.Q.* 157, 227–28 (2018).

4. 849 F.3d 1262, 1264 (9th Cir.), *cert. denied*, 138 S. Ct. 468 (2017) (mem.).

5. See *2017 Infrastructure Report Card: America’s Grades*, AM. SOC’Y OF CIVIL ENG’RS, [www.infrastructurereportcard.org/americas-grades/](http://www.infrastructurereportcard.org/americas-grades/) (last visited Apr. 22, 2018); WORLD ECON. FORUM, *THE GLOBAL COMPETITIVENESS REPORT 2016–2017*, at 47 (2016), [http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobal.CompetitivenessReport2016-2017\\_FINAL.pdf](http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobal.CompetitivenessReport2016-2017_FINAL.pdf).

6. See Exec. Order No. 13,766, 82 Fed. Reg. 8657, 8657 (Jan. 24, 2017); Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,464, 40,466 (Aug. 15, 2017).

7. Maribeth Hunsinger, *Expediting Infrastructure Development without Conceding Reasoned Decision Making and Public Comment: Streamlining NEPA Compliance for Facility Upgrades and Expansions*, 45 *ECOLOGY L.Q.* 157, 253–54 (2018).

upgrades and expansion, may serve to accelerate project development while limiting adverse environmental impacts.

#### WILDLIFE PROTECTION

In *Humane Society of the United States v. Zinke*, the D.C. Circuit struck down an attempt by the U.S. Department of the Interior to delist the gray wolf in the Western Great Lakes area because the agency failed to consider the effects of the wolf's shrinking geographic range on the species' continued survival.<sup>8</sup> On the other hand, the court held that the Department's interpretation of "range" in the Endangered Species Act<sup>9</sup> as an animal's "current range" was reasonable and entitled to deference.<sup>10</sup> Amy Collier explores the implications of this decision in "This Land Was Made for You and Me"—And Then: Why and How the Department of the Interior Should Give Greater Consideration to the Gray Wolf's Historical Range."<sup>11</sup> The gray wolf's complex history—from abundance to devastation and, more recently, to resurgence—illuminates flaws in the Department's narrow interpretations of range and recovery under the Endangered Species Act. Ms. Collier explores traditional justifications for species preservation, as well as factors that support a broader geographic recovery of a species. In doing so, the author identifies a repertoire of principles that should inform future decisions about species' geographic restoration, and argues for a more purposeful consideration of a species' historical range.

Rural communities often bear the substantial costs of carnivore conservation, especially when it comes to wolves. In "Continental Divides: How Wolf Conservation in the United States and Europe Impacts Rural Attitudes," Holly Firlein explores the economic and emotional concerns of rural communities when it comes to wolves.<sup>12</sup> Ms. Firlein uses the Tenth Circuit's decision in *New Mexico Department of Game and Fish v. U.S. Department of the Interior*<sup>13</sup> as a springboard to argue that if left unaddressed, rural communities' concerns can undermine wolf conservation and the relationship between the federal government and rural communities. The author explores the flaws in prevailing coexistence strategies, which often focus on wolves' economic harms. Ms. Firlein advocates for surveys of rural attitudes so that wolf managers can better understand and address antipathy towards wolves. She argues that these surveys will not only generate useful data, but also provide an opportunity for wolf managers to repair their relationships with rural communities.

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8. 865 F.3d 585, 605–07 (D.C. Cir. 2017).

9. 16 U.S.C. §§ 1532(6), (20) (2012).

10. *Humane Soc'y*, 865 F.3d at 605.

11. Amy Collier, "This Land Was Made for You and Me"—And Then: Why and How the Department of the Interior Should Give Greater Consideration to the Gray Wolf's Historical Range, 45 *ECOLOGY L.Q.* 157, 289 (2018).

12. Holly Firlein, *Continental Divides: How Wolf Conservation in the United States and Europe Impacts Rural Attitudes*, 45 *ECOLOGY L.Q.* 157, 327 (2018).

13. 854 F.3d 1236, 1244–45 (10th Cir. 2017).

## TAKINGS

Wisconsin law employs an increasingly common zoning tool known as a “merger provision,” which treats adjacent, commonly-owned lots as a single, merged property barred from separate sale or development. In *Murr v. Wisconsin*, the U.S. Supreme Court’s analysis of the “denominator problem”—which arises when defining the baseline unit of property for assessing a regulatory taking—was made more difficult by the merger provision.<sup>14</sup> Using a multifactor test to determine the denominator in the context of the Murrs’ two adjacent waterfront lots, the Court found that in light of the lots’ uneven topography, their location along a heavily regulated river, and the state merger provision, the Murrs should have reasonably expected their lots to be merged in the takings analysis.<sup>15</sup> In “Reasonable Expectations: An Unreasonable Approach to the Denominator Question in Takings Analysis,” Danielle Nicholson questions both the Court’s new multifactor test and its application to the Murrs’ complex circumstances.<sup>16</sup> She argues that the Court’s purportedly objective focus on property owners’ reasonable expectations ignores the inherent ambiguities in grounding expectations in physical land characteristics and regulatory notice. Through a deeper dive into the Murrs’ specific circumstances, Ms. Nicholson illustrates how the test’s unwieldy application further disadvantages property owners in an already convoluted area of the law.

## ENFORCEMENT

EPA exists largely to enforce a host of federal laws designed to protect public health. But can EPA decide *not* to enforce the law based on a determination that an actor’s omission is too “trifling” to make enforcement worthwhile? In *Waterkeeper v. EPA*, the D.C. Circuit held that the answer is “no,” at least in the context of reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986.<sup>17</sup> The circuit court concluded that EPA could not use its so-called “*de minimis*” power to create exemptions to these requirements.<sup>18</sup> In “When the Exemption Becomes the Rule: Problems That *Waterkeeper v. EPA* Poses for Advocates of Reporting Requirements and Potential Solutions,” Bonnie Stender argues that though this decision underscored the importance of reporting requirements under CERCLA and EPCRA, it left the door open for agencies to rely on the *de minimis*

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14. 137 S. Ct. 1933, 1945 (2017).

15. *Id.*

16. Danielle Nicholson, *Reasonable Expectations: An Unreasonable Approach to the Denominator Question in Takings Analysis*, 45 *ECOLOGICAL L.Q.* 157, 353 (2018).

17. 853 F.3d 527, 537–38 (D.C. Cir. 2017).

18. *Id.* at 530.

doctrine to turn a blind eye on other reporting violations.<sup>19</sup> The author describes how the *Waterkeeper* court departed from the analysis undertaken by most previous courts, and explains why this creates a potential pitfall for advocates of reporting requirements in other federal acts. Ms. Stender then constructs arguments that reporting advocates can utilize to fight back against EPA's use of the *de minimis* doctrine, including theories related to environmental justice and prosecutorial discretion.

Again, congratulations to the authors.

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19. Bonnie Stender, *When the Exemption Becomes the Rule: Problems That Waterkeeper v. EPA Poses for Advocates of Reporting Requirements and Potential Solutions*, 45 *ECOLOGY L.Q.* 157, 395–96 (2018).