

# ENVIRONMENTAL LAW

## Lewis & Clark Law School

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### ARTICLES

- Separation of Powers and Federal Land Management: Enforcing the  
Direction of the President under the Antiquities Act ..... 765  
*Kelly Y. Fanizzo*

This article examines whether a third party can sue to compel an executive agency to comply with a presidential proclamation. In 2001, President Clinton designated a half-million acre national monument in southeastern Arizona and ordered the Bureau of Land Management to study whether cattle grazing would harm the monument's significant historic and scientific sites. When the BLM failed to complete the study, a non-profit conservation group sued the agency to implement Clinton's orders. The group asked the court to exercise its authority under the Administrative Procedure Act to compel agency action. This article argues that judicial review should be available when third parties challenge agency compliance with the President's direction pursuant to the Antiquities Act. The propriety of this review is supported by Congress' delegation of withdrawal authority to the President and by the broad deference given by the courts to the exercise of presidential discretion at the time of the monument designation. Set against the backdrop of preserving our national cultural heritage, this article highlights the respective, and at times overlapping, roles of the executive, legislative, and judicial branches in federal land management.

- Have Washington Courts Lost Essential Nexus to the Precautionary  
Principle? *Citizens' Alliance For Property Rights v. Sims* ..... 829  
*Brian T. Hodges & Daniel A. Himebaugh*

The essential nexus test requires the government to establish a cause-and-effect connection between property development and an identified public problem before placing conditions on development. The precautionary principle, however, endorses regulation of land use in the absence of causation. This Article shows how Washington State courts have allowed the precautionary principle to encroach upon the essential nexus test, focusing on the recent Washington Court of Appeals case of *Citizens' Alliance for Property Rights v. Sims*.

Dirty Dishes, Dirty Laundry, and Windy Mills: A Framework for Regulation of Clean Energy Devices .....	859
<i>LaVonda N. Reed-Huff</i>	

This article proposes a framework for federal regulation of clean energy devices. It addresses the parallels between the government's interests which led it to occupy a space in the regulation of satellite dish placement and the government's interests in encouraging Americans to conserve energy and incentivizing the creation of "green" energy technology. It proposes using the federal rules regulating the placement of small satellite dishes as a framework for federal regulation of clean energy devices and addresses issues of nuisance and constitutional takings in the event any federal regulation were to preempt private nuisance actions.

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Suction Dredge Mining: The United States Forest Service Hands Miners the Golden Ticket.....	1021
<i>Adrienne DelCotto</i>	

Recreational suction dredge mining is a popular method of gold mining in the Pacific Northwest. In this Chapter, Ms. DelCotto examines the environmental impacts of suction dredge mining on riparian reserves and aquatic resources in the Siskiyou National Forest. Ms. DelCotto discusses the laws controlling suction dredge mining in national forests, including the broad discretion the Ninth Circuit grants to the Forest Service, and proposes new legislation and land designations to more effectively protect forest resources from the negative effects of suction dredge mining.

Delineating Deference to Agency Science: Doctrine or Political Ideology?.....	1057
<i>Laura Anzie Nelson</i>	

Science and policy weave together to support many federal agency decisions. However, upon an administrative challenge, the judiciary is left to decipher which threads of a decision are factually based, deserving more deference, and which are policy determinations, linked to the statutory interpretation and owed more scrutiny. Focusing on four recent cases, Ms. Nelson identifies the different context in which this problem arises and how different judges articulate the court's standard of review. The author's empirical survey reveals that the Ninth Circuit Court of Appeals has an imprecise analytical mechanism to distinguish between science and policy and instead creates a pattern of ideological

voting. Ms. Nelson proposes a step-by-step approach in drafting judicial opinions to more openly discern science from policy before applying a standard of review.

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