

# ENVIRONMENTAL LAW

Lewis & Clark Law School

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## ESSAY

- Judicial Regrets and the Case of the Cushman Dam ..... 397  
*William H. Rodgers, Jr.*

This essay is a criticism of the Ninth Circuit's *en banc* decision in *Skokomish Indians v. United States*. Professor Rodgers finds particular fault with the court's understanding of Indian treaty rights as "something given" and its conclusion that fishing was not a "primary purpose" of the Stevens treaties.

## ARTICLES

- The Promise and Limits of Negotiated Rulemaking: Evaluating the  
Negotiation of a Regional Air Quality Rule..... 415  
*Daniel P. Selmi*

This article undertakes an in-depth analysis of a successful negotiated rulemaking by a regional air quality agency in the state of California. Professor Selmi's conclusions about the negotiation generally confirm the expectations of those commenters who advocate the increased use of negotiated rulemaking.

- Using Plenary Power as a Sword: Tribal Civil Regulatory  
Jurisdiction under the Clean Water Act after  
*United States v. Lara*..... 471  
*Anne E. Tweedy*

This article argues that, based on the Supreme Court's decision in *United States v. Lara*, the Clean Water Act ("CWA") should be read to reinvest tribal sovereignty over water quality. The article examines the pre-*Lara* requirements for tribes to be accorded Treatment as a State status ("TAS") under the CWA; the *Lara* decision, including its context and implications; and the TAS provisions of the CWA, including their plain language, legislative history, and statutory context.

## CLEAR THE AIR

<i>Gonzalez v. Raich</i> , the “Comprehensive Scheme” Principle, and the Constitutionality of the Endangered Species Act.....	491
<i>Michael C. Blumm &amp; George A. Kimbrell</i>	

Professor Blumm and Mr. Kimbrell write to supplement their recent article on the constitutionality of the Endangered Species Act's take provision in light of the Supreme Court's recent decision in *Gonzales v. Raich*, which upheld federal authority to regulate medical marijuana permitted by states. They maintain that since *Raich* validates the comprehensive scheme principle under which the Fifth Circuit upheld the ESA's constitutionality, the Act's constitutionality is no longer open to serious question. They also predict that Judge John Roberts' elevation to the Supreme Court will not threaten to change that result.

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