Foreword

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We are honored to introduce *Ecology Law Quarterly*'s 2019–20 Annual Review of Environmental and Natural Resource Law. Now in its twenty-first year, the Annual Review is a collaborative endeavor by students and faculty. But the greatest contribution to the Annual Review is made by the editorial board and members of *Ecology Law Quarterly* (*ELQ*). *ELQ* continues to be the leading journal in the field because of their passion and commitment.

Three students deserve special recognition: Kaela Shiigi, Emily Miller, and Katie Sinclair devoted a substantial portion of their final year of law school to assisting and advising the student authors. This Annual Review is infused with their talent and insights. Along with her co-Editor-in-Chief, Mary Rassenfoss, Ms. Shiigi played a particularly important role, as she also shepherded the issue through to publication as she prepared for the bar exam and her post-graduation employment.

Finally, the Annual Review would not be possible without the extraordinary group of student authors whose work is profiled in this Foreword. Their aptitude and zeal for the law is evident from the scholarship they have produced. This year's Annual Review consists of eleven longer pieces, or Notes, and ten shorter pieces, or In Briefs. All of the In Briefs featured in this issue were written by first-year law students. These authors worked with law student mentors to produce stellar work during what most consider to be the most challenging year of law school. We commend them on their efforts and congratulate them on a job well done. The Note authors completed their pieces as part of a year-long environmental law writing seminar. Often starting with little background, each dove into a recent decision, worked tirelessly to understand its context and import, used the decision as a starting point to analyze a broader set of issues, developed a thesis, and wrote a polished Note, all within the space of an academic year. We are awed by their commitment, impressed with their final products, and grateful for the opportunity to work with them.

Environmental law is a broad field, and it intersects with other fields such as energy law and land use law. The range of topics covered in the Annual Review is a tribute to the diversity of the field. The contributions to this issue show how innovative legal analysis can both advance legal doctrine and identify pathways for improving policy. All of those who contributed to the issue deserve credit for continuing *ELQ*'s tradition of excellence over the past half century.

Law professors, students, legal historians, and countless other scholars seeking insight into the major developments in environmental, natural resources, and land use law will benefit from this Annual Review.

As this Foreword is being written, a grave threat to the environment is dissipating. Absent a total collapse of our democratic institutions, on January 20, 2021, Joseph Biden will become the forty-sixth president of the United States. Assuming the new administration is true to the spirit of the Democrats' 2020 campaign platform, the voices of the prior administration that called for the destruction of so many important environmental protections will be silenced. Federal agencies will once again join the fight to protect the environment, and the United States will reengage with other nations to combat climate change.

But the Trump administration has left its stain on federal efforts to protect the environment. Many of the decisions analyzed in this Annual Review were the direct result of the Trump administration's anti-environment agenda.

FEDERALISM AND THE ENVIRONMENT

The Trump administration's antipathy towards environmental protection nourished a long-existing trend: states stepping into the federal government's shoes to protect the environment. Since the bipartisan wave of environmental legislation in the 1970s, Congress has been much less inclined to enact new laws, even as new problems have come to light. Congressional inaction has created a vacuum for states to fill, which in turn has raised important questions about the extent to which states have the authority to address environmental concerns on their own. Issues of federal preemption are central to the legal validity of these state efforts. Although this is a technical—and for many, esoteric—area of the law, it can have pivotal importance for environmental policy.

The U.S. Supreme Court signaled what may be an important doctrinal shift in *Virginia Uranium v. Warren*.[1] In *Virginia Uranium*, the Court grappled with whether the Commonwealth of Virginia's ban on uranium mining was preempted under the Atomic Energy Act.[2] In three separate opinions, each joined by three Justices, the Court affirmed the ban. In "Unstable Elements: What the Fractured Decision in *Virginia Uranium* Means for the Future of Atomic Energy Act Preemption," Mary Rassenfoss, *ELQ*'s 2019–20 co-Editor-in-Chief, endeavors to make sense of the Court's fractured reasoning and integrate it into the Court's preemption jurisprudence.[3] Ms. Rassenfoss also explores what these decisions mean for states enacting their own environmental laws in the future.

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1. 139 S. Ct. 1894 (2019).
2. 42 U.S.C. §§ 2011–2021, 2022–2286i, 2296a–2297h-13 (2018).
3. Mary Rassenfoss, Note, *Unstable Elements What the Fractured Decision in* Virginia Uranium *Means for the Future of Atomic Energy Act Preemption*, 47 ECOLOGY L.Q. 243, 507 (2020).

PUBLIC LANDS MANAGEMENT

Despite a monumental investment of time and capital, as well as a win before the U.S. Supreme Court in 2020, the 604-mile Atlantic Coast Pipeline project was canceled. Intended to carry natural gas from West Virginia to North Carolina, the pipeline project repeatedly hit roadblocks. The decision to scuttle the pipeline hints at the long-term vulnerabilities of future oil and gas pipeline projects. In "The Atlantic Coast Pipeline and the Pipeline Pipe Dream," Nina Lincoff discusses one such hurdle in this project's path: the Appalachian Trail.[4] In *U.S. Forest Service v. Cowpasture River Preservation Ass'n*,[5] the U.S. Supreme Court held that the U.S. Forest Service could issue a permit to allow the pipeline to cross the Appalachian Trail. Ms. Lincoff argues that the granting of the permit stemmed from a failure to consider the historical evidence surrounding the origins of the trail. In her view, the conflict between the Appalachian Trail and the Atlantic Coast Pipeline raises a broader question about how the federal government balances the preservation of established communities and recreational spaces against oil and gas production in the face of climate change. Ms. Lincoff advocates applying a "feasible and prudent alternative" standard to similar energy projects in the future in recognition of the importance of these national trails.

But not every anti-environment decision was the Trump administration's fault. For over forty years, John Sturgeon had used a hovercraft to access his favorite hunting ground by traveling down the Nation River within the Yukon-Charley Rivers National Preserve, an area managed by the U.S. National Park Service. He was not about to let the federal government stop him. Mr. Sturgeon fought the federal government all the way to the U.S. Supreme Court and won, thereby securing his status as a folk hero in Alaska. Mr. Sturgeon's suit was premised on the federal Alaska National Interest Lands Conservation Act (ANILCA).[6] In a unanimous decision, the Court held in *Sturgeon v. Frost* that the Park Service lacked authority to regulate hovercraft on the Nation River.[7] In "Public Land Bargains, Revolutionary Rhetoric, and Building Trust," Rob Kutchin rationalizes ANILCA as a bargain between Alaska and the federal government limiting federal authority over public land in Alaska.[8] In doing so, Mr. Kutchin examines other such arrangements, identifies some of their potential problems, and presents a framework for assessing proposed public land bargains.

4. Nina Lincoff, Note, *The Atlantic Coast Pipeline and the Pipeline Pipe Dream*, 47 ECOLOGY L.Q. 243, 405 (2020).

5. 140 S. Ct. 1837 (2020).

6. 16 U.S.C. §§ 3101–3233 (2018).

7. 139 S. Ct. 1066 (2019).

8. Robert Kutchin, Note, *Public Land Bargains, Revolutionary Rhetoric, and Building Trust*, 47 ECOLOGY L.Q. 243, 371 (2020).

ENVIRONMENTAL REVIEW AND DISCLOSURE

Federal courts have been reluctant to step into the void left by congressional and executive inaction on climate change to ensure that the environmental impacts of fossil fuel projects licensed by the federal government are fully disclosed. This became particularly problematic as the Trump administration pursued its "energy dominance" agenda. But in *Diné Citizens Against Ruining Our Environment v. Bernhardt*, the Tenth Circuit ordered the U.S. Bureau of Land Management to vacate the National Environmental Policy Act (NEPA)[9] approvals and permits issued by the Bureau authorizing the drilling of wells in New Mexico.[10] In "Requiring Robust NEPA Analysis for Fossil Fuel Projects: A Promising Trend in the Tenth Circuit," Naomi Wheeler maps a trend in the Tenth Circuit in which the courts have held executive agencies accountable for failing to comply with NEPA.[11] She argues that courts in the Tenth Circuit are limiting the Trump administration's aggressive pursuit of fossil fuel development, in part by exposing the hypocrisy and logical inconsistencies of many executive agencies' environmental reviews under NEPA. Ms. Wheeler identifies strategies to capitalize on the trend to limit future fossil fuel development.

THE ENDANGERED SPECIES ACT AND JUDICIAL OVERSIGHT OF AGENCY ACTION

The Endangered Species Act (ESA)[12] is the crowning achievement of the wave of environmental statutes passed in the 1970s. In recent years, however, the effort to protect habitats and ecosystems has run up against a formidable foe: climate change. Our warming climate is already impacting global biodiversity. The extent to which climate change will affect any particular species, however, remains uncertain. These uncertainties complicate traditional enforcement of the ESA, which is typically deployed to combat existing, rather than future, threats to biodiversity. In "Can the Precautionary Principle Save the Endangered Species Act from an Uncertain Climate Future?," Natasha Geiling argues that federal agencies should look to the so-called precautionary principle to help guide listing decisions and critical habitat designations under the ESA.[13] Drawing on prior decisions interpreting the ESA and the concerns underlying it, Ms. Geiling argues that an ESA informed by the precautionary principle is both fundamentally faithful to its original purpose and necessary to retain the statute's power in the face of climate change.

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9. 42 U.S.C. §§ 4321–4327 (2018).

10. 923 F 3d 831 (10th Cir. 2019).

11. Naomi Wheeler, Note, *Requiring Robust NEPA Analysis for Fossil Fuel Projects A Promising Trend in the Tenth Circuit*, 47 ECOLOGY L.Q. 243, 579 (2020).

12. 16 U.S.C. §§ 1531–1544 (2018).

13. Natasha Geiling, Note, *Can the Precautionary Principle Save the Endangered Species Act from an Uncertain Climate Future?*, 47 ECOLOGY L.Q. 243, 305 (2020).

It is no secret that judges' perspectives on cases can be colored by their policy views. In her note, "Encouraging Reasoned Decision Making: *Kisor v. Wilkie* and the Future of *Auer* Deference," Chelsea Mitchell considers whether the framework crafted by the U.S. Supreme Court in *Kisor v. Wilkie*[14] could mitigate the impact of personal ideology when courts must decide whether to defer to agencies' interpretations of their own regulations.[15] She argues that in establishing a clearer analytical framework for lower courts, *Kisor* may reduce the influence of judges' subconscious biases when courts must decide whether regulations are "ambiguous" and which interpretations are "reasonable." While we will not know *Kisor*'s full impact for some time, Ms. Mitchell makes the case that the decision may have a significant impact on judicial decision making.

Under the nondelegation doctrine, Congress cannot delegate its legislative responsibilities to another branch of government, but Congress is allowed to leave the details to federal agencies. In *Gundy v. United States*, a plurality of the U.S. Supreme Court held that Congress properly enacted the Sex Offender Registration and Notification Act,[16] even though it called for the attorney general to decide whether the Act would be applied to sex offenders whose convictions predated the Act's enactment.[17] But Justice Gorsuch dissented, arguing that the law allowed the attorney general to write "his own criminal code." Gorsuch called for the Court to revisit the nondelegation doctrine, and Chief Justice Roberts and Justice Thomas joined in the Gorsuch dissent. The parameters of the nondelegation doctrine are important to the manner in which the federal government has crafted and enforced environmental laws through agency rulemaking. Gorsuch may have heralded the coming of a new age with respect to the nondelegation doctrine. Neither Justice Kavanaugh nor Justice Barrett was on the Court to hear *Gundy*, and there may now be a majority willing to significantly restrict agency rulemaking. In "*Gundy v. United States*: A Revival of the Nondelegation Doctrine and an Embrace of Cost-Benefit Analysis in Environmental Rulemaking," Kerensa Gimre discusses how cost-benefit analysis may be a useful tool for the Environmental Protection Agency (EPA) to justify its environmental regulations under a revived nondelegation doctrine.[18] She argues that cost-benefit analysis fits within Justice Gorsuch's proposed nondelegation framework and also allows the EPA unique flexibility to justify its rules. Although cost-benefit analysis is prone to manipulation, and policing its biases may disrupt the balance of power among the three branches of government, Ms. Gimre argues that cost-benefit analysis may be the best tool to meet the standards of a Court more skeptical of agency action.

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14. 139 S. Ct. 2400 (2019).

15. Chelsea Mitchell, Note, *Encouraging Reasoned Decision Making* Kisor v. Wilkie *and the Future of* Auer *Deference*, 47 ECOLOGY L.Q. 243, 443 (2020).

16. 34 U.S.C. § 20913(b) (2018).

17. 139 S. Ct. 2016 (2019).

18. Kerensa Gimre, Note, Gundy v. United States *A Revival of the Nondelegation Doctrine and an Embrace of Cost-Benefit Analysis in Environmental Rulemaking*, 47 ECOLOGY L.Q. 243, 339 (2020).

THE HOUSING CRISIS AND PROPERTY RIGHTS

California is experiencing an unprecedented housing shortage that is magnifying socioeconomic and environmental disparities. In an effort to increase affordable housing stock, California law requires an affordable housing component in many multi-family housing projects. Developers and property owners often balk at these mandates. The U.S. Supreme Court's decision in *Knick v. Township of Scott*,[19] which held that property owners can go directly to federal court if they believe the government has taken their property without just compensation under the Fifth Amendment's Takings Clause, could undermine California's efforts to address the housing shortage. Federal courts are not always familiar with state law and may be unduly sympathetic to property owners' takings claims. Randall Winston argues that *Knick* encourages property rights advocates to challenge California's affordable housing regulations. Focusing on rent control, inclusionary housing, and growth control measures, in "The Takings Are Coming: How Federal Courts Can Protect Regulatory Efforts to Address California's Housing Crisis," Mr. Winston explores why safeguarding these regulations is crucial to addressing the state's housing crisis.[20] He argues that a threatened reevaluation of takings claims can be avoided if federal courts look to California takings doctrine as a guide, given that the California state courts have far more experience with these housing-related issues.

TRANSBOUNDARY POLLUTION

The fundamental flaw in relying on one nation's courts to resolve disputes about environmental degradation is that sometimes pollution crosses international boundaries, rendering it difficult to decide who is responsible for the harms and which cleanup standards apply. In "On the Borderline: *Pakootas*, NAFTA, and the Problem of Transboundary Pollution," Natalie Collins addresses this problem through the lens of *Pakootas v. Teck Cominco*,[21] which stemmed from a release of hazardous substances on the Canada-U.S. border.[22] Ms. Collins considers the implications of the Ninth Circuit's analysis of the parameters of personal jurisdiction for future disputes involving climate change and transboundary pollution. She asks whether the U.S. legal system is the ideal forum for adjudicating transboundary pollution disputes like the one at issue in *Pakootas*. Ms. Collins concludes that a multilateral agreement, like the recently renegotiated U.S.-Mexico-Canada Agreement, would be a superior means of assigning liability and overseeing a remediation.

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19. 139 S. Ct. 2162 (2019).

20. Randall Winston, Note, *The Takings Are Coming How Federal Courts Can Protect Regulatory Efforts to Address California's Housing Crisis*, 47 ECOLOGY L.Q. 243, 625 (2020).

21. 905 F 3d 565 (9th Cir. 2018).

22. Natalie Collins, Note, *On the Borderline* Pakootas*, NAFTA, and the Problem of Transboundary Pollution*, 47 ECOLOGY L.Q. 243, 251 (2020).

ENERGY

Climate change is already causing a dramatic increase in the frequency of extreme weather events. Predictably, homes and businesses are left without electricity because of damage to the power grid *and* prophylactic shutoffs by utilities trying to manage risk. As the effects of climate change continue to manifest, extreme weather events will become even more common, putting additional strain on our nation's long-distance power grid. Transitioning to a more resilient grid that is able to resist, contain, and bounce back from local and regional disruptions is part of the solution. One component of resiliency is smaller power sources serving more localized end users. But electric generation in the United States is typically done on a large scale, and power plants usually are located far from end users. Although the market is slowly opening to smaller, localized power projects, most are still one-offs funded as pilot projects and community development programs. In "The PURPA Haze: Clearing the Way for PURPA Implementation in a Changed Energy System," Julietta Rose argues that the Public Utility Regulatory Policy Act[23] can be harnessed to incentivize utilities to procure power from small, localized renewable energy generators.[24] Ms. Rose argues that if the Federal Energy Regulatory Commission looks to the future of the grid, rather than trying to maintain a dying status quo, the Public Utility Regulatory Policy Act can be part of an effective federal strategy for a rapid transition to a resilient national energy grid.

The United States lags behind the rest of the world in developing offshore wind energy. Developers often cite regulatory burdens and excessive litigation as primary constraints on the industry. An offshore wind project requires several governmental approvals, and each provides opponents with an opportunity to stall, and perhaps even kill, the project. *Sierra Club v. Army Corps of Engineers*[25] highlights the extent to which the Clean Water Act[26] and its regulation of dredging pose a significant hurdle for the installation of offshore wind transmission lines. In "Transmission Impossible: The Case for a Nationwide Permit for Offshore Wind Transmission Lines," Robert Newell proposes a new nationwide permit, issued by the Army Corps of Engineers, to pave the way for offshore wind transmission lines.[27] The proposed permit would only authorize construction that does not constitute a "discharge of dredged materials," thus forgoing the need for approval under the Clean Water Act. By streamlining the permitting for this component of a project, Mr. Newell argues that offshore wind developers would have greater certainty and, thus, a better ability to attract

23. 16 U.S.C. §§ 2601–2645 (2018).

24. Julietta Rose, Note, *The PURPA Haze Clearing the Way for PURPA Implementation in a Changed Energy System*, 47 ECOLOGY L.Q. 243, 545 (2020).

25. 909 F 3d 635 (4th Cir. 2018).

26. 33 U.S.C. §§ 1251–1387 (2018).

27. Robert Newell, Note, *Transmission Impossible The Case for a Nationwide Permit for Offshore Wind Transmission Lines*, 47 ECOLOGY L.Q. 243, 475 (2020).

capital. In turn, the United States would more effectively foster an industry critical to our fight against climate change.

Congratulations to all of *ELQ* and, of course, to the featured student authors.