

# Water Law Review

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Sarah A. Rice

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## EDITOR'S NOTE

It is my pleasure to present to you the first issue of Volume 21 of the *Water Law Review*. It is my hope that Volume 21 will continue the *Water Law Review's* longstanding place serving as a catalyst for broader discussions in water law. Water law occupies an incredibly important place in local, national, and international discussions as it is both contentious subject and a pacifier. The *Water Law Review* strives to find its role in this ongoing discussion through providing information that will foster a focus for the legal issues that plague the political, economic, and environmental landscapes of water law. As many who have studied and practiced water law know, water is not merely a thing, but a cultural milieu.

Once again, and with the assistance from the water law community, Volume 21 strives to facilitate the forum on important water law issues. The *Water Law Review* has a strong tradition of publishing progressive content meant to elicit further discussion. I invite you to read the four articles published in this issue as well as the timely content of water cases, conferences, legislation, and ideas our staff tirelessly collects.

In our first article, *History of the Referee, Division Engineer, State Engineer, and Water Court Consultation Process Under the Water Rights Determination and Administration Act of 1969*, Greg Hobbs, Christopher Hudson, and Hannah Oakes provide an overview of the portion of the 1969 Act that considered the need for an integrated administration of diversions within the state. The authors give a brief history of the 1969 Act itself while providing a more in-depth look at the recognition of the many parties and processes involved in diversions. As Colorado quickly approaches the 50th anniversary of the 1969 Act, it is important to remember the work of the many people who contributed to it. The authors provide insightful history into some of these key players and their contributions.

Next, authors Benjamin Bryce and Robert Skousen examine the toxic algal bloom problem in *Bloomin Disaster: Externalities, Commons Tragedies, and the Algal Bloom Problem*. Mr. Bryce and Mr. Skousen argue that algae-causing nutrient pollution and effective non-regulation is causing serious risks to human health, the environment, and the economy. Throughout the article, Mr. Bryce and Mr. Skousen examine federal and state regulation voids that lead to algal blooms in interstate watersheds. The authors examine the policies and challenges associated with preventing algal blooms while offering specific proposals to overcome the challenges of regulating interstate waterways. Mr. Bryce and Mr. Skousen assesses the algal bloom problem through the familiar idea of commons tragedies. Ultimately, the authors argue that there is a need for stronger federal regulation of agricultural nonpoint source nutrient pollution in larger interstate watersheds.

We are pleased to also publish Mr. M. Reed Hopper's article, *Running Down the Controlling Opinion in Rapanos v. United States*. Mr. Hopper, a Senior Attorney with the Pacific Legal Foundation who represented John Rapanos in *Rapanos v. United States*, argues that the Supreme Court's split vote in *Rapanos* leaves a range of ambiguity in which lower courts must decide the controlling opinion defining the scope of the Clean Water Act. Mr. Hopper argues that the standard for interpreting fractured decisions set forth in *Marks v. United States* is readily adaptable to the *Rapanos* decision thus making the Scalia plurality controlling. Mr. Hopper

outlines the various approaches circuit courts have taken and argues that they have misconstrued *Marks* or misinterpreted *Rapanos*.

Rounding out our featured articles is *Water Transfers Litigation and EPA's Water Transfers Rule* by Peter D. Nichols. The article seeks to make sense of the EPA's Water Transfers Rule after a series of cases challenged its application to National Pollutant Discharge Elimination System permitting. Mr. Nichols argues that the blanket NDPES permitting of water transfers may be at an end, but with the series of cases coming out of the circuits, there may still be questions in the future. With a petition for *certiorari* before the Supreme Court, Mr. Nichols argues that this issue is certainly not at a close.

Finally, we hope you find useful our student writings on recent cases, legislation, conferences, literature, and developments from around the country. The *Water Law Review* strives to provide timely content to our readers while also giving our staff the opportunity to explore water law through various lenses. Our print content, combined with our robust online content, keeps our readers well informed of the various water issues and policy around the nation and world.

With that said, I would like to give a special thank you to the dedicated staff of the *Water Law Review*. You need only to look at each one of their individual focuses in law school to realize how many areas of law water truly touches. As always, thank you for your continuing patronage to the *Water Law Review*. We hope that our 21st volume continues to strive for excellence, quality, and value to the water law community.

Sarah A. Rice  
Editor-in-Chief