

# INTRODUCTION TO NATURAL RESOURCES ISSUE, VOLUME 75

## A TRADITION OF SCHOLARSHIP IN NATURAL RESOURCES LAW

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Volume Seventy-Five of this *Law Review* continues the tradition of publishing an annual natural resources issue.<sup>1</sup> For the past quarter-century, with few exceptions, the *University of Colorado Law Review* has dedicated at least one issue each year to natural resources and environmental law topics.<sup>2</sup> Some of the natural resources issues have been symposia on particular themes such as Energy Development in the Rocky Mountains,<sup>3</sup> Water Resources Allocation,<sup>4</sup> Natural Resources Theory,<sup>5</sup> and Race, Class, and Environmental Regulation.<sup>6</sup> One issue included selected papers presented at a Natural Resources Law Center conference on public lands that was held at the Law School.<sup>7</sup>

The *Law Review's* special interest in natural resources and environmental law topics has attracted authors from among the foremost scholars in those fields, many of them repeatedly publishing their work here. For instance, Joseph Sax, formerly a University of Colorado law professor, has written three articles in the *Review*.<sup>8</sup> Other leading professors in this field who are frequent contributors include Dan Tarlock, who has

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1. The *Law Review's* interest in the field of natural resources law began long before the emergence of the "environmental law" branch of the field having to do with statutory protection of environmental values. It has used the rubric "natural resources" to encompass succinctly a range of topics concerning use and conservation of resources like minerals, water, and public lands, as well as the topics arising under statutory regimes for protection of the environment.

2. No issues were devoted to natural resources in volumes 52, 54, & 55.

3. Symposium, *Energy Mineral Development and the Rocky Mountain Environment*, 51 U. COLO. L. REV. 459 (1980).

4. Symposium, *Water Resources Allocation*, 53 U. COLO. L. REV. 471 (1982).

5. *Focus on Natural Resources Theory*, 61 U. COLO. L. REV. 213 (1990).

6. Natural Resources Issue, *Race, Class, and Environmental Regulation*, 63 U. COLO. L. REV. 839 (1992).

7. Symposium, *A New Era for the Western Public Lands*, 65 U. COLO. L. REV. 193 (1993).

8. Joseph Sax, *Problems of Federalism in Reclamation Law*, 37 U. COLO. L. REV. 49 (1964); Joseph Sax, *The Legitimacy of Collective Values: The Case of the Public Lands*, 56 U. COLO. L. REV. 537 (1985); Joseph Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257 (1990).

written four,<sup>9</sup> George Coggins, who has written five,<sup>10</sup> Oliver Houck, who has written four,<sup>11</sup> and Michael Blumm, who has written three.<sup>12</sup>

*Law Review* editorial boards have emulated the interests of students and faculty as well as the Law School's reputation for excellence in deciding to produce entire issues in natural resources law. As the editors wrote in Volume Fifty-Six, one of the early natural resources issues, the decision to have

an issue devoted to natural resources and environmental topics—should have been obvious from the beginning. After all, the University of Colorado School of Law houses the Natural Resources Law Center, the Rocky Mountain Mineral Law Foundation, the National Wildlife Federation, and sponsors numerous conferences, independent research projects, and other scholarship in natural resources fields.<sup>13</sup>

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9. A. Dan Tarlock, *Western Water Law and Coal Development*, 51 U. COLO. L. REV. 511 (1980); A. Dan Tarlock, *Western Coal in Context*, 53 U. COLO. L. REV. 315 (1981); A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381 (1985); A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871 (1992).

10. George Cameron Coggins, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165 (1978-1979); George Cameron Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. COLO. L. REV. 229 (1981); George Cameron Coggins, *Multiple Use, Sustained Yield Planning on the Public Lands*, 53 U. COLO. L. REV. 411 (1982); George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 307 (1990); George Cameron Coggins, *Eleven Reasons to Disregard this Commentary on the Brave New Era in Western Public Land Law*, 65 U. COLO. L. REV. 401 (1994).

11. Oliver Houck, *Hard Choices: The Analysis of Alternatives under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773 (1989); Oliver Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993); Oliver Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases in Environmental Law, Never before Published*, 65 U. COLO. L. REV. 459 (1994); Oliver Houck, *Unfinished Stories*, 73 U. COLO. L. REV. 867 (2002).

12. Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695 (1989); Michael C. Blumm & Brett M. Swift, *Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407 (1998); Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and its Implications*, 73 U. COLO. L. REV. 173 (2002).

13. *Natural Resources Issue*, 56 U. COLO. L. REV. 317 (page before table of contents) (1985).

The strength of the *University of Colorado Law Review* in the field, however, runs even deeper than the institution of a natural resources issue. Its roots are in the predecessor *Rocky Mountain Law Review*, which began publication in 1928. The *Review* was renamed the *University of Colorado Law Review* in 1962, after several other law schools in the region had started their own journals, but it continued the numbering of volumes begun by the *Rocky Mountain Law Review* so that Volume Thirty-Five was the first to be published under the present name. From the beginning, the *Review* carried a good number of articles on water law, mining, and public lands. It was then, after all, the only law journal being published in the entire region. Reflecting on the early days, the editors of Volume Fifty-One noted that the states of the region had been “preoccupied with many of the same issues: mineral exploitation, agriculture based upon irrigation, the grazing of cattle and sheep, the development of recreational industries, and establishment of transportation facilities across thinly populated areas, over mountains, and through arid stretches.”<sup>14</sup>

Volume One gave the *Review* an impressive start. A recent graduate named Moses Lasky published the first five episodes of his epic, eight-part article entitled *From Prior Appropriation to Economic Distribution of Water by the State Via Irrigation Administration*.<sup>15</sup> He began the study as a student at the University of Colorado and submitted the tome to Professor Felix Frankfurter as part of his graduate work at Harvard Law School. The revolutionary thesis championed by Lasky was that prior appropriation, the water law regime dominant in the West, “has been dying for fifty years.”<sup>16</sup> He opined that it was destined to be replaced by administrative systems, drawing on principles from the then-nascent field of administrative law. Some sixty-two years later University of Colorado School of Law Professor Charles Wilkinson wrote that “prior

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14. Gordon L. Alcott, *Beginning the Second Fifty Years: A Tribute*, 51 U. COLO. L. REV. 1, 6 (1979).

15. Moses Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration*, 1 ROCKY MTN. L. REV. 161 (1929); Moses Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration—Part V*, 1 ROCKY MTN. L. REV. 248 (1929); Moses Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration—Parts VI-VIII*, 2 ROCKY MTN. L. REV. 35 (1929) [hereinafter Lasky, *Parts VI-VIII*].

16. Lasky, *Parts VI-VIII*, *supra* note 15 at 57.

appropriation is dead."<sup>17</sup> Serendipitously, Wilkinson holds the Moses Lasky Professorship. And as it turns out, both Lasky and Wilkinson prematurely heralded the demise of prior appropriation, at least in Colorado.

The first volume also included an article on the interstate controversy over the Colorado River.<sup>18</sup> Having twice published articles on the law of the Colorado River in these pages more recently,<sup>19</sup> I was duly humbled to see the author mention in the latter article, dated 1928, the idea of creating a Colorado River basin authority<sup>20</sup>—an idea for which I have sometimes accepted a degree of credit, if not originality.<sup>21</sup>

Volume One carried articles on the cession of lands that were included within Rocky Mountain National Park and other parks, and the related jurisdictional consequences.<sup>22</sup> Subject matter like this was hard to find elsewhere. Accordingly, the early days of the *Law Review* saw articles on topics like the Colorado River, federal and state control of water, mining, irrigation, Colorado water law, groundwater, and soil conservation.

After the name of the *Review* was changed, publication of leading articles on natural resources continued. Although the institution of natural resources issues concentrated the focus of entire issues, individual articles on natural resources and environmental topics have always appeared frequently throughout the year. Some of the most influential pieces included a major article on groundwater by David Harrison and Gustave Sandstrom,<sup>23</sup> an article on beneficial use in water

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17. Charles F. Wilkinson, *In Memoriam: Prior Appropriation, 1848-1991*, 21 ENVTL. L., at v (1991).

18. Russell Denison Niles, *Legal Background of the Colorado River Controversy*, 1 ROCKY MTN. L. REV. 73 (1929).

19. David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573 (1997); David H. Getches, *Competing Demands for the Colorado River*, 56 U. COLO. L. REV. 413 (1985).

20. Niles, *supra* note 18, at 99.

21. See DAVID H. GETCHES, A COLORADO RIVER BASIN AUTHORITY: OPPORTUNITY FOR SHARING RIVER BASIN MANAGEMENT AND RESOURCES, IN BOUNDARIES AND WATER: ALLOCATION AND USE OF A SHARED RESOURCE 2 (Natural Resources Law Ctr., Univ. of Colo. Sch. of Law ed., 1989).

22. William Sherman Bell, *The Legal Phases of Cession of Rocky Mountain National Park*, 1 ROCKY MTN. L. REV. 35 (1929); William Sherman Bell, *The Trend: Jurisdiction over Ceded Territories*, 1 ROCKY MTN. L. REV. 272 (1929).

23. David L. Harrison & Gustave Sandstrom, Jr., *The Groundwater-Surface Water Conflict and Recent Colorado Water Legislation*, 43 U. COLO. L. REV. 1

law by Stephen Williams,<sup>24</sup> then a University of Colorado law professor and now Judge for the United States Court of Appeals for the District of Columbia, and an article on geothermal energy.<sup>25</sup> The influence of articles on natural resources and environment that are published in the *University of Colorado Law Review* is partly shown by the fact that they are frequently cited in other journals. An article by Eric Freyfogle has been cited in fifteen other law review and journal articles for its perspectives on how a Leopoldian land ethic can change views of ownership.<sup>26</sup> William Rodgers's article on environmental law and biology has been cited in thirty-one journals and law reviews, and has been influential in introducing scientific thinking and evolutionary biology into legal analysis.<sup>27</sup>

It does not strain modesty to suggest that the *Law Review's* longstanding penchant for publishing articles on natural resources and environmental law has contributed to the development of the field. Natural resources law was familiar to readers of the *Law Review* long before it became part of curricula at most law schools. Natural resources did not begin to blossom as a field until after World War II.<sup>28</sup> Some of the first courses were created at this law school.<sup>29</sup> Environmental law was born even later, toward the end of the 1960s; the first courses appeared in law schools in the early 1970s.<sup>30</sup>

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(1971).

24. Stephen F. Williams, *Optimizing Water Use: The Return Flow Issue*, 44 U. COLO. L. REV. 301 (1973).

25. Kenneth R. Bjorge, *The Development of Geothermal Resources and the 1970 Geothermal Steam Act—Law in Search of Definition*, 46 U. COLO. L. REV. 1 (1974).

26. Eric T. Freyfogle, *The Land Ethic and Pilgrim Leopold*, 61 U. COLO. L. REV. 217 (1990).

27. William H. Rodgers, Jr., *Where Environmental Law and Biology Meet: Of Pandas' Thumbs, Statutory Sleepers, and Effective Law*, 65 U. COLO. L. REV. 25 (1993); see Fred P. Bosselman, *Replaying the Tragedy of the Commons*, 13 YALE J. ON REG. 391, 401 n.70 (1996) (book review).

28. See Clyde O. Martz, *The Study of Natural Resource Law*, 1 J. LEGAL EDUC. 588 (1949).

29. Professor Clyde Martz was a trailblazer in writing the first teaching book in the field, and in starting to teach courses that had not been taught except in a few schools in the country. CLYDE O. MARTZ, *CASES AND MATERIALS ON THE LAW OF NATURAL RESOURCES* (1951). See David H. Getches, *Preface: On Natural Resources as an Area of the Law*, 53 U. COLO. L. REV. 195 (1982).

30. James L. Huffman, *The Past and Future of Environmental Law*, 30

Even as the fields of natural resources and environmental law burgeoned, articles in the field rarely appeared in most law journals. This *Law Review* was an exception. Eventually, there emerged some thirty journals specializing in environmental and natural resources law. They include the University of Colorado's *Journal of International Environmental Law and Policy* which began publication in 1990. The proliferation of specialty journals that occurred in the 1980s surely reflected an awareness of the growing number of important issues in the field. But it also reflected a continuing reluctance by the editorial boards of many respected law reviews to accept and publish articles in the field. An article in the *Journal of Legal Education* sampled seventeen major law reviews for two years each in the 1960s and again in the 1990s.<sup>31</sup> It showed that the major journals published no articles at all in environmental law for the years examined in the 1960s.<sup>32</sup> By the 1990s acceptance of scholarship in the field increased only slightly with merely nine articles in a two-year period published in all major law reviews.<sup>33</sup> In light of these data showing that non-specialty law journals tend to ignore scholarship in the field of natural resources and environmental law, the consistent recognition by the *University of Colorado Law Review* of the importance of scholarship in the field is a significant contribution.

Back when this Law Review began publishing under the masthead of the *Rocky Mountain Law Review* the subject matter was already interesting as some of the examples above indicate. As the field has expanded from natural resources to natural resources and environmental law it has become all the more fascinating and intellectually stimulating. The multiple intersections with other fields sometimes make the issues hard to classify. But when the subject matter is the natural world—land, air, water, minerals—the issue belongs to this field.

Anyone who doubts the breadth and the intellectual engagement that the field holds need only peruse this issue. Contributors Professor Oliver Houck, Justice Greg Hobbs of the Colorado Supreme Court and Professor David Thomas consider

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ENVTL. L. 23, 28 (2000).

31. William J. Turnier, *Tax (and Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship*, 50 J. LEGAL EDUC. 189, 194 (2000).

32. *Id.* at 196.

33. *Id.* at 195.

an array of topics: stories of human, political, and physical tensions underlying landmark environmental cases, the struggles and progress of Colorado's clean air efforts, and how history and precedent inform the issue of compensation for regulatory takings. The student contributors, Maureen Eldredge, Lain Strawn and Katherine Burke, discuss topics ranging from the interaction of the Interstate Commission Termination Act with local land and resource control, the difficult issues arising from groundwater pumping in Colorado, and the possibility of legal causes of action for identified species to enforce the Endangered Species Act.

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Turning seventy-five is an occasion for the *University of Colorado Law Review* to celebrate more than venerability. The *Review's* hallmark commitment to publishing important scholarship in natural resources law gives it a distinction few other non-specialty journals share. While attracting provocative and influential articles from all sectors of the law, this *Review* has been an especially hospitable venue for articles on natural resources topics from its first issue to this one. As the importance of natural resources conservation, sustainable development, and wise use increase in importance to society, the tradition of devoting entire issues committed to the subject deserves to be perpetuated.