

# TUWaterWays

Water News and More from the Tulane Institute on Water Resources  
Law & Policy  
March 8, 2018

## Getting Judgey With It (I apologize for nothing!)

Montana and Wyoming are still figuring out how to interpret the 68 year old Yellowstone River Compact. In February, the Supreme Court ruled that Wyoming had prevented enough water in the Tongue River from reaching Montana in 2004 and 2006. Although officials from both states say the ruling will provide clarity implementing the Compact, Montana has spent more than \$5 million on this case and will receive from Wyoming over \$38,000 in damages and interest and \$67,000 in court costs. Presumably it was all worth it because, at the very least, Montana will have this precedent next time Wyoming is being withholding.

Five years ago, Texas brought a suit against New Mexico for not delivering enough Rio Grande water and not complying with the Rio Grande Compact. In an unusual move, the United States intervened to join Texas as a plaintiff essentially saying “hey, New Mexico is hurting federal interests along the border, as well.” This week, the Supreme Court held that the United States could remain in the suit as a plaintiff even though the Special Master conducting the case’s hearings recommended otherwise. This case has already had proceedings galore, and now hearings conducted by the Special Master can now continue to cover the dispute itself, so everyone, including the Feds, will be back before the justices at some point in the next, um, couple of years (?).

Three years after Nebraska paid Kansas \$5.5 million for violating the Republican River Compact, Colorado will now pay Nebraska \$4 million for its violation of the same Compact. These two states didn’t wait for a special master or the Supreme Court to decide their dispute and reached this settlement on their own (however, it likely couldn’t have happened without Kansas’ case being determined first).

Enough of the river compacts of the interior American West, let’s head to beautiful Maui! It’s all good there, right? Well, it’s the wells. Four injections wells that send treated wastewater deep into the ground, to be specific. Last month, the Ninth Circuit Court of Appeals held that because that discharged water makes it out of the groundwater into the ocean pretty quickly and foreseeably, those wells need Clean Water Act permits. Some, like those who fear nutrient pollution’s effects on Maui’s coastal habitats, are happy about this, others, like the County of Maui and those who are operating wastewater injection wells all across the country, are terrified that these indirect discharges will now be regulated like other point source discharges. The County has petitioned for a rehearing. Expect to hear more about this issue.

One area where the Clean Water Act will continue to not be applied is to water transfers – the transfer of water between different

The Tulane Institute on Water Resources Law and Policy is a program of the Tulane University Law School.

The Institute is dedicated to fostering a greater appreciation and understanding of the vital role that water plays in our society and of the importance of the legal and policy framework that shapes the uses and stewardship of water.

## Coming up:

March 9-10, 2018

[23<sup>rd</sup> Annual Environmental Law and Policy Summit](#)

Tulane Law School

New Orleans

March 27-28, 2018

[The 12 Annual Louisiana Water Conference](#)  
Baton Rouge, LA

## Water jobs:

[Senior Director of Communications](#)

Chesapeake Bay Foundation

Annapolis, MD

[Coordinator](#)

Raise the River Coalition

Not location specific

[Water Policy Analyst](#)

Kyl Center for Water Policy

Phoenix, AZ

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bodies of water. The George W. Bush era rule determined that the EPA would not require a permit to move water from one body to another via pipe or tunnel or whatever as long as there isn't an industrial, municipal, or commercial use of that water somewhere in between the two water bodies. Because the water in some bodies is more polluted than in others, various parties have repeatedly challenged this rule, but in February the Supreme Court declined to review a Second Circuit decision that deferred to the EPA's rulemaking. So, for now anyways, if someone wanted to, oh I don't know, move sediment laden water from the Mississippi River into the wetlands of Barataria Bay or Breton Sound, procuring a Clean Water Act water transfer permit is one thing they wouldn't have to do.

In California, a tech billionaire is following in David Geffen's footsteps and trying to eliminate public access to a San Mateo County beach where he bought an 89 acre property. Though he has already lost in state courts multiple times and has been denied a Supreme Court hearing already, he's petitioning again. While it's unlikely that the Court hears the case, the potential is there for a decision that would prioritize private property over that state's constitutional rights to a public waterways. Meanwhile, the state government is making sure all Californians know their rights to the state's waters.

### Floods are a Bummer. Be Ready for More and More Bummers, Man.

A recent winter storm brought not just thundersnow, but flooding, as well – especially during high tides. A new report by NOAA finds that many coastal cities can expect the kinds of floods now associated with storms to become a weekly occurrence that's associated with regular old high tides. Of course, these high tides and rising seas won't only impact cities. A new report finds that more than 200 US military installations have experienced flooding from storm surges and only 30 had reported flooding just ten years ago.

Just how resilient to climate change and extreme weather communities in the US can be varies greatly, and a new survey from the EPA takes into account a wide variety of factors and found that regions with the least resilience are the High Plains, the Southeast, and Appalachia. On the other hand, the study found that Kodiak Island, home to 14,000 people and 3,500 bears, is the most resilient county in the country – largely due to its abundant and pristine natural resources.

It turns out that naturally functioning ecosystems and habitats are a real asset in adapting to climate! Thousands of homeowners in Houston surely learned that lesson last summer upon finding out they lived in floodplains, and their development surely harmed the city's ability to be resilient in the face of record breaking rains. On the other hand, it might not be that site specific. For instance the head of the National Flood Insurance Program said this week that if you live anywhere in the entire state of Florida, regardless of the flood risk zones delineated by his program, you need flood insurance. Of course, widespread flooding this week from Michigan to Missouri and Kentucky shows that increasing resilience and adaptability to flooding isn't an issue restricted to coasts or tropical storms and hurricanes. We all clearly need to be ready for our exposure to flooding to keep increasing. Good thing there's some sweet tunes for that.

### Tulane Environmental Law Summit Starts Tomorrow!

Please join us tomorrow, Friday March 9th for the 23<sup>rd</sup> Tulane Environmental Law Summit. We'll have two days of good, old fashioned environmental law learning for you. This annual, student run, event is free to public. Hope to see you there!