



TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy

Authors: Christopher Dalbom, Mark Davis, Haley Gentry, and Ximena De Obaldia

October 20th, 2023

PanaMaxed Out?

If there has been a soundtrack for the world of water reliant commerce, [More, More, More](#) would be at the top of the list. In the world of shipping, the mantra has long been: [bigger and faster is better](#). It has also been, if you come, they will build it, which explains how the prospect of bigger ships pushed ports and canal operators to get deeper and wider to accommodate each new generation of ships. Until now. Yes, the ships have come but increasingly what isn't coming is the water they need to navigate.

Without that water, all of the business models for shippers and ship builders really don't hold water. Case in point, the Panama Canal ([you may have heard of it](#)). [The number of ships being allowed to transit the Canal has been further reduced due to drought induced water shortages and the need to balance navigation's need for the fresh water that feeds the Canal with public supply and other uses](#). Normally, 36-38 ships would go through the Canal each day, but that was scaled back to 32 in August and now has been reduced to 31. Of course, this possibility always existed and became even more likely following the [expansion](#) of the Canal in 2016, but just like [rain follows the plow](#), surely rain would follow the ships. Nope! And the problem is not confined to [Panama](#).

The ["saltwater wedge" has gotten so much attention for threatening the water supply of metro New Orleans that it is another manifestation of how drought, navigation, and sea level rise have conspired to produce systemic threat](#) to public health, community wellbeing, and commerce (deepening the river channel to accommodate larger ships is a contributing factor in the migration of salt water upriver).

In South America, [drought in the Amazon basin has gotten so bad that the upriver port of Manaus, Brazil is barely a port anymore](#) (like things weren't tough enough for [Fitzcarraldo](#)). Does this mean the maritime sector is chastened and singing the blues? Probably not, but their soundtrack is likely to have [What's Going On?](#) in much heavier rotation (mercy, mercy me, it's not just [the Ecology](#)).

Lessons from L.A. LA Land

Los Angeles (L.A.) and Louisiana (LA) may not seem to have a lot in common, but when the [L.A. Times saw salt water threatening communities in coastal Louisiana, they didn't just see trouble for New Orleans \(and Tulane Law School\). They saw themselves](#); both cities are dependent on river deltas. For the Big Easy (or the Large Straightforward as Artificial Intelligence sometimes puts it), that is the Mississippi River Delta. For L.A., that is the delta of Sacramento and San Joaquin Rivers. Wait, what? To be clear, L.A. is not located anywhere near those rivers, but thanks to the California Aqueduct (and years of political and hydrological hijinks), the water that keeps that delta alive also helps keep L.A. alive—as well huge agribusiness operations.

The Times makes the dazzlingly correct observation that a healthy delta nourishes vital fisheries but also keeps salt water in San Francisco Bay from moving up the rivers where it could jeopardize water supplies further inland (here's looking at you, Stockton). But being dazzlingly correct does not make the observation obvious. In fact, rivers reaching the sea have been seen in western states (which follow the water-scarcity shaped doctrine of [prior appropriation](#)) as evidence that their waters were wasted by not being diverted for other uses. Indeed, the big idea

on the table—and the reason behind the editorial—is the “[Delta Conveyance Project](#)” which would take the Sacramento River directly south bypassing the delta completely. That would come with real consequences, and those could be hard, if not impossible, to deal with on the back end. As the *Times* points out, New Orleans and the Mississippi (and let’s not forget Plaquemines and St. Bernard Parishes) is People’s Exhibit 1 that deltas matter. [There is just no tap dancing around that.](#)

You May Ask Yourself, How Did We Get Here?

Americans are justifiably proud of our nation’s system of law and justice. So much so that we often use the terms as if they inseparable, like [Lewis and Clark](#) or [Crockett and Tubbs](#). In reality, while they are undoubtedly related, they are imperfect partners that are sometimes at odds—like [Martin and Lewis](#), [One Direction](#), and pretty much any law firm you can think of.

Water law in particular struggles with the need to be predictable and orderly while also being fair and just—water is essential to human survival and prosperity. Need proof? Glad you asked. Dare we say that the westward expansion of the United States was an intrepid and inspired chapter in the forging of our nation. Dare we also say that it posed fundamental challenges for a nation founded on the principle that “all men are created equal” and possessed of the inalienable right to life, liberty, and the pursuit of happiness. That expansion may have necessarily involved displacement and accommodation but how—and how well— that was done is still an open point. That’s clearly true with regard to western waters and who has rights to access and use them.

The explosive growth of many western states can be tied directly to how much water a state could command and when and how they could assert and defend their rights. It has never been a cordial process but at least states, like the seven served by the Colorado River, had political and legal standing to compete in the arena. That has not been the case for Native Americans who, even when their rights have been acknowledged, have been dealt out of the bargains quantifying and prioritizing their rights. If that had been the result of negligence or willful inaction, the case for the allocation of water rights might be considered a harsh but just result. But if a new [report published by ProPublica and the High Country News](#) is correct, their exclusion was very much intentional and very much pushed for by a number of western states.

The states not only advocated in their own interests but prevailed in pushing the Federal government to not assert Native American rights, despite law and treaty obligations. As the increasingly thirsty but dry west heads toward some fundamental revisitations of water rights, this tension between law and justice is going to become more pronounced, and time is running out to get things right. That is not only the conclusion of the report, but also is one shared by [Supreme Court Justice Neil Gorsuch in his dissent in the most recent Colorado River case, Arizona v Navajo Nation](#) (2023). Embracing this history may afford us a [once in a lifetime chance to not only understand how we got here but where we might go](#). This is one situation where the partnership between law and justice deserves much better.

Coming Up:

Tulane Environmental Law Summit, New Orleans,
February 23 & 24, 2024 (save the date!)

Water jobs:

[Senior Research Fellow](#); Tulane Institute on Water Resources Law and
Policy; New Orleans, LA (Applications due today!)

[Senior Associate, Ocean Governance](#); Pew Charitable Trusts;
Washington, DC

[Outreach Coordinator](#); The Coalition to Restore Coastal Louisiana; New
Orleans, LA

[Development Coordinator](#); The Coalition to Restore Coastal Louisiana;
New Orleans, LA

[Staff Attorney](#); Western Watershed Project, Multiple Western States

[Nonprofit Administrator](#); Utah Diné Bikéyah, UT

[Water Advocacy Manager](#), Grand Canyon Trust, Flagstaff AZ



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 legal stewardship of water.

6325 Freret Street, 1st Floor

New Orleans, LA 70118

504-865-5982

tulanewater.org

