

TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law and Policy
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A New Take on Takings

Unlike the difference between, say, [flammable and inflammable](#), action and inaction are generally seen as opposites. When it comes to ‘takings’ jurisprudence, however, Maryland’s highest court isn’t so sure that difference matters.

Under the 5th Amendment, the government cannot ‘take’ private property without just compensation. Traditionally, courts interpreted this to require some affirmative government action that deprived a person of the economic value of their property, also known as an inverse condemnation. But in late January, the Maryland Court of Appeals (the highest court in the state) [ruled that a takings claim could go forward](#) against the state for its *failure to act*.

Gail Litz is suing Maryland claiming that the State took her property when it failed to enforce a consent decree requiring the town of Goldsboro to fix a long-running septic pollution problem. The failure to address the pollution, Litz contends, cost her the waterfront campsite business and property that had been in her family for decades. Litz will still have to prove her case, as the Court did not decide that there *was* a taking in this case, only that there *could be*: “An inverse condemnation claim is pleaded adequately where a plaintiff alleges a taking caused by a governmental entity’s...failure to act, in the face of an affirmative duty to act.”

Perhaps the majority was mindful of [Lord Krishna’s teaching](#) that “one who sees inaction in action, and action in inaction, is intelligent among men.” Or perhaps they were thinking of [Canadian rock gods Rush](#), who remind us that “if you choose not to decide, you still have made a choice.” A decision not to act can be at least as impactful as its opposite. Environmentalists are hopeful that the legal reasoning in this case could prevent governments from avoiding liability for failure to enforce existing laws.

(Side Note: We are happy to start the rumor that Liam Neeson will star in *Taken: 5th Amendment*. “I have a very particular set of investment-backed expectations...expectations that make me a nightmare for governments like you.”)

Mighty Morphin’ Power Rangia

The Army Corps of Engineers finished closing the last bays of the Bonnet Carre Spillway on Monday, Feb. 1st. For three weeks, the open Spillway diverted unseasonably high water from the Mississippi River into Lake Pontchartrain. Along with

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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:

[Tulane Environmental Law Summit](#)

New Orleans, LA
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[Center for Natural Resource Economics & Policy](#)

New Orleans, LA
March 20-22, 2016

[State of the Coast 2016](#)

New Orleans, LA
June 1-3, 2016

[Summit on Coastal and Estuarine Restoration](#)

New Orleans, LA
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the river water came tons of sediment that sent a [brown plume](#) into the blue of Lake Pontchartrain. The Lake won't stay turbid for long, however, thanks to the [mighty rangia clam](#).

Rangia clams are [filter feeders](#) that live just beneath the mud at the bottom of the lake. Once they dig in to the muck, they put up a small siphon to filter through the water for phytoplankton. These filter feeders also extract sediment and other suspended solids that they don't need. They take the excess grit that comes along with their meal and use mucous to bind it into little balls called pseudofeces (bust that word out at your next scrabble game).

These miniscule mollusks, vital to Lake Pontchartrain's ecology, might be more familiar to many in south Louisiana as roadbed material. Rangia shells are almost entirely calcium carbonate and were used for decades as road substrate. In the 1970s and 80s there weren't many left after barges outfitted with massive vacuum hoses sucked up virtually every square foot of the lake bottom hunting for the bivalves. The shells were transported all over the state and throughout the gulf (possibly via [clam caravan](#)) to build highways. It wasn't until the landmark case of [Louisiana v. Lee](#) that the dredging was halted. Since then, the rangia population has rebounded and biologists expect that the current clam crew will be able to filter the entire lake in three to five days.

Water Infrastructure: The Skeeter Beater

The [state bird of Louisiana/Minnesota/Alaska...](#) is [at it again](#), acting as vector for [yet another disease](#). The World Health Organization recently [declared a global health emergency](#) over the Zika virus, transmitted through the *Aedes aegypti* mosquito. Doctors have known about the Zika virus since 1947 and the disease itself is relatively mild and rarely deadly, with fever and joint pain being the most common symptoms. The real concern is the [link between Zika and microcephaly](#), a congenital birth defect that causes brain damage in newborns.

Mosquito-borne diseases have a [disproportionate impact](#) on the poor, especially in developing nations. The *Aedes aegypti*, requires stagnant water (not wetlands) to breed. This means that places with inadequate drainage infrastructure, generally not a boon to property values, are more susceptible. On top of that, people who don't have in-home access to tap water often store their water in [buckets and cisterns](#) that create breeding grounds inside the home. In most places there will, of course, always be standing water for mosquitoes, as countries [like Brazil](#) receive heavy rainfall. A vaccine, currently being researched, is the only sure way to stop the spread of Zika. Improving the way water is carried to and from neighborhoods, however, can greatly reduce the risk of exposure.

Reefer Sadness

If you don't subscribe to *Yacht & Boating World*, and you aren't following @superyachts on twitter...well perhaps you should decant that domestic lager into your outdoor water closet and [take stock of your life](#)? The remainder, pray don your reading monocle for this recap:

Paul Allen, co-founder of Microsoft, owner of the Seattle Seahawks and Portland Trail Blazers, and avid yachtsman, is in [hot water](#) after his 303-foot long yacht *Tatoosh* destroyed a protected reef in the Cayman Islands. According to the Cayman Department of Environment, the boat's anchor chain wiped out 80% of a specially designated coral replenishment zone, about 14,000 square feet of reef.

Coral reefs are some of the most [biologically diverse and economically valuable](#) ecosystems on the planet. They also provide critical protection for island nations as buffers against wave energy and erosion. The Cayman government could fine Allen up to \$600,000 for destroying the protected area. But the Caymans don't exactly have a reputation for being [tough on the wealthy](#), and last year a Carnival Cruise Line went un-fined (thought they [made a small donation](#)) for a similar incident. Further, Vulcan, Inc., Allen's investment company, stated that the crew was [directed to the anchorage](#) by the local port authority. Shifting winds may have pushed the yacht into the reserve, and *Tatoosh* might have been lighter after all those Seahawks [band-waggoners](#) jumped ship (yeah, we said it!). In any case, Cayman authorities should be happy this wasn't [Allen's 'big' yacht](#).