

# TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law and Policy  
October 21, 2013

## **Debt Limit Deal also Raises Spending Limit on Olmsted, Brings Hope to Monkey's Eyebrow**

Now that the Republic is getting back to business, the Army Corps of Engineers may be able to get back to work on the massive [Olmsted Lock and Dam Project](#) on the Ohio River between Olmsted, Illinois and Monkey's Eyebrow, KY, thanks to the recent legislation raising the debt ceiling. Somehow the new Act also increased the spending authorization on this over budget navigation project from \$775 million (in 1986 dollars) to \$2.918 billion in 2013 dollars. The howls of outrage about a "[Kentucky Kickback](#)" (Senator Mitch McConnell is from KY) could probably be heard on the moon.

Whether this is a waste of money or the nation's most important water resources project (as its champions contend), we should take this moment to remind our readers about the difference between an authorization and an appropriation. The first is permission to spend. The second is something to spend. The first does not automatically lead to the second, though in this case there is a very, very good chance that it ultimately will. However, there is an active discussion about [how much the barge industry should pay](#).

The second point to keep in mind is inflation. The \$775 million original authorization was in 1986 dollars. Adjusted to 2013 dollars that would be about \$1.4 billion. Now, going from \$1.4 to \$2.9 billion is still a big jump, and questions about just how the budget has been so magnificently blown are fair. We would point out that it is hard to get those real questions answered if most of the public discussion is aimed at things the Act did not really do and about the political universe and not the real one. And the real one has a place called Monkey's Eyebrow in it.

## **Now That's Real Power—Court Says Federal Power Act Preempts State Tort and Property Law**

Normally, under Louisiana law, when somebody upstream dumps a bunch of water on folks downstream you can expect a comeuppance for whomever turned on the tap. Louisiana tort and property law would, at least, give you a day in court to make your case. However, if that upstream person is a dam licensed under the Federal Power Act, then that just might not be the case. So says the U.S. Court of Appeals for the 5<sup>th</sup> Circuit in a [case](#) dealing with a hydropower dam on the Sabine River. In such cases, the Court says the license issued under the FPA sets the

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:

**October 24-25, 2013**

Lake Pontchartrain Basin Foundation  
**Basics of the Basin 2013**  
New Orleans, LA

**February 21-23, 2014**

Tulane Environmental Law Summit  
Tulane Law School  
New Orleans, LA

**Tulane Institute**  
on Water Resources Law & Policy

6329 Freret Street, Suite 155G  
New Orleans, LA 70118  
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[http://www.law.tulane.edu/tlscenters/  
waterlaw/](http://www.law.tulane.edu/tlscenters/waterlaw/)

standard of care and contrary state laws are preempted, even if the conduct allowed under the permit might constitute negligence under state law. The Court's opinion also contains a helpful reminder of the "dominant servitude" the federal government has over things that mess with navigable waters. In the short run, we expect the case to be most frequently cited by teenagers seeking to avoid being grounded by claiming that they were not really violating curfew but rather that they were only negligently compliant.

### **And in this Corner...Wyoming and Montana Head Back to Court over the Yellowstone River (and More)**

It seems that every week we run a piece about one state suing another over some difference of opinion over water. This week is no different. This week we travel north to the Yellowstone River and two otherwise pretty agreeable states, as [Wyoming and Montana return—yes we said return—to the United States Supreme Court](#) to take on the latest chapter in what is now a 6 year old case over whether Wyoming is using more water than the Yellowstone River Compact allows. That compact, inked in 1950, supposedly apportioned the waters of the Yellowstone River and its tributaries among the states and for certain purposes. Clearly, there have been unforeseen developments.

Previously, the Supreme Court has ruled in favor of Montana on the issues of whether Wyoming was using water to irrigate too many acres, ground water storage and ground water pumping. Wyoming has won a round on the question of whether its farmers may keep water saved through more water conservation. The latest round which is now heading to trial will focus on the issue of water use in coal-bed methane production. The issue may be narrow but the stakes could be big as this could be a preview of how ground water/surface water cases may be decided and how the growing role of hydro-fracking fits (or doesn't) into historical water rights and compacts. Stanford Law School's Barton Thompson Jr. has been selected by the Court to serve as a "special master" to conduct the [trial](#).

### **You Can't Always Get What You Want: In India, Water Cops Crack Down on Fugitive Hydrants**

The fact that a water source is important or even essential a community does not alone make it legal. That seems to be the lesson coming out of Karachi, India where the Karachi Water and Sewerage Board have been shutting down allegedly [illegal hydrants](#) that often serve as the only potable water supply source for neighborhoods. The result for some may be that not only can you not get what you want, you just might find that you can't get what you need.

### **New Orleans Voters Approve Sewerage and Water Board Revamp**

The effort to reform the water and sewer utility took to a big step forward on October 19 when voters approved a ballot measure that altered the composition of the New Orleans Sewerage and Water Board. The measure adds some professional qualifications for some board slots and removes City Council members. While this may improve the performance the Board it will almost certainly not remove it from the realm of politics.

### **Where Art and Water Meet—New Orleans Contemporary Arts Center and Edward Burtynsky's "Water"**

Believe it or not, there are aspects of water that are not conveyed best, if at all, by a white paper. If you need proof of that we suggest that you drop by the [New Orleans Contemporary Arts Center](#) and experience its new exhibit, "[Water](#)", a sweeping photographic survey by Edward Burtynsky of how water, shapes us and is shaped by us. This is the premier of the show which has drawn strong [reviews](#) both in and out of the art world. The show is a co-production of the New Orleans Museum of Art and the New Orleans Contemporary Arts Center.