

TUWaterWays

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

[May 7, 2021](#)

Weighing in on Water Disputes

The Middle Claiborne Aquifer has been the source of contention for two of the states it straddles, [Mississippi](#) and [Tennessee](#), for over a decade. [Mississippi](#) first filed a complaint back in 2006 claiming that Memphis was unlawfully pumping water from the aquifer, over which [Mississippi](#) claims full ownership. However, the aquifer lies under multiple states, so [Tennessee](#) alleged that [Mississippi](#) could not claim sole ownership for the groundwater and that [Tennessee](#) should be allowed to utilize it, too. The District Court dismissed the suit and the U.S. 5th Circuit Court of affirmed, agreeing with the District Court that, because the water from the aquifer is an interstate water source and has never been apportioned between the states, the case should instead be brought as an equitable apportionment original jurisdiction suit of the Supreme Court. Only once the water is apportioned can one state sue another for overuse.

So, [Mississippi](#) filed a bill of complaint with the Supreme Court, who then appointed a Special Master to review the case. Last year, the Special Master released a [report](#) finding in favor of [Tennessee](#), and now [Mississippi](#) has asked the Court to consider its argument that it has sole ownership over the water, which the Court will hear arguments on this Fall. And last week, the Biden Administration Department of Justice (DOJ) weighed in on the dispute, filing an [amicus curiae brief](#) in support of [Tennessee](#). The DOJ says that [Mississippi](#) cannot claim sole ownership over the groundwater, and that the aquifer should be subject to equitable apportionment by the Supreme Court. The Biden Administration isn't the only entity supporting [Tennessee](#) on the matter, as a coalition of eight states also filed its own [amicus curiae brief](#) alleging that [Mississippi's](#) claim will set a dangerous precedent of uncertainty for other states who share aquifers with neighboring states.

One has to wonder about the [strategy](#) down there in [Jackson](#) this whole time. The issue that kicked this all off was Memphis' water use lowering aquifer levels below the reach of wells on the [Mississippi](#) side – an issue that could be properly addressed through the equitable apportionment that the Magnolia State doesn't want. Rather, it has seemed that they would rather have [Memphis](#) still draining the groundwater but paying [Mississippi](#) for the privilege. The Supreme Court's decision on this case will have widespread implications throughout the United States, especially as cases of this sort become more common as drought increases water disputes.

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.

Coming up:

[ABA Resiliency National Institute](#); May 12-19

[EPA Small Drinking Systems Webinar Series: Harmful Algal Blooms and Algal Toxins](#); May 25

[Webinar: Community-enabled Lifecycle Analysis of Stormwater Infrastructure Costs](#); May 26

[State of the Coast 2021](#); June 2-4

[Comments due for Mid-Barataria Sediment Diversion Draft Environmental Impact Statement](#); June 3

Water jobs:

[Legal Fellowship – Tribal and Federal Natural Resources Mitigation Law and Policy](#); Environmental Policy and Innovation Center; Washington, D.C.

[Federal Policy Manager – Plastic Pollution Campaign](#); Oceana; Washington, D.C.

[Director, Sustainable Land Science](#); Conservation International; Arlington, VA

[Lands and Rivers Senior Policy Analyst](#); Western Resource Advocates; New Mexico

[Vice President of Regional Conservation](#); American Rivers; Washington, DC

[Designer/Planner](#); Center for Planning Excellence; Baton Rouge, LA

[Law Clerk](#); San Francisco Baykeeper; San Francisco, CA

[Buffalo Creek Watershed Coordinator](#); Audubon Society of Western Pennsylvania; Sarver, PA

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New Rules Incoming?

Last week the American Bar Association held its annual conference on Environmental and Energy Law, which some of us here at Chateau d'Eau had the pleasure of attending. And there was an entire session dedicated to our favorite topic – water! When asked a question regarding 2019's historic [County of Maui v. Hawaii Wildlife Fund](#) decision, in which the Supreme Court created a new standard for groundwater contaminant traceability for Clean Water Act ("CWA") permitting purposes, called the "functional equivalent" test, the panelists discussed the potential opening for a new EPA rule clarifying and codifying that decision. Some states and environmental groups have been calling for the EPA to bulk up the *County of Maui* decision. The Trump Administration quickly issued guidance on the matter when the Supreme Court's decision was published, but this guidance actually left states with more questions than answers. Therefore, many hope that the formal rulemaking process will better clarify the decision for states implementing CWA permits. The EPA will be reviewing that Trump guidance and making a decision whether to initiate the formal rulemaking process with President Biden's early executive order on environmental protection in mind.

The panelists also discussed one of our favorite subtopics - [that's right, you guessed it](#) – WOTUS! The Biden Administration has already expressed its intention to rework the definition of WOTUS from the Trump Administration's controversial Navigable Waters Protection Rule. However, the EPA does not plan on totally scrapping the Trump rule and going back to the Obama-era WOTUS definition. Instead, it will likely try to find some sort of middle ground. However, as some panelists pointed out that, [the middle](#) is not an easy place to find when there are so many competing interests. The scope of the role of the federal government is very polarizing, and states, property rights groups, and environmental organizations all have their own opinions on what should be regulated as a WOTUS and what shouldn't. A panelist who worked on the Biden-Harris transition team believed he had some insight into the Biden Administration's three key focuses with reworking the Trump WOTUS rule will be. Those three issues from the Trump rule are the exclusion of ephemeral streams, the exclusion of many wetlands, and the permanent permit exclusion for prior cropland. All of this hopefully aids the administration's [big new conservation plan](#). These rulemakings from the Biden Administration will likely take quite a while, but we'll be here for all your future WOTUS updates. Lucky!

Futuristic Tech to Look into the Past

Researchers used a relatively new laser technology called LiDAR (light detection and ranging), to [reveal](#) ancient Mayan civilizations complex infrastructure systems in the Yucatan Peninsula. One of the discoveries that the LiDAR made was of various types of ancient reservoirs constructed to store water for the communities. Most of the Yucatan Peninsula sits on limestone, which is a porous rock that is not conducive to holding onto standing water of any kind. The Mayans also lived in a raised, hilly area which made water even more difficult to store. Therefore, they built cisterns to collect rainwater and reservoirs with channels, some hundreds of meters long, to drain into them and enlarge the drainage area. Based on the lidar maps, it appears that the majority of the homes in the community were not in close proximity to the reservoirs, so researchers believe living near them may have been discouraged (presumably because [people are disgusting](#)). Isn't technology fun when it's not [terrifying](#)?!

High and Dry

Back out to the Colorado River and the wild west for this story. As all you dear readers know, the western U.S. has been in an ongoing drought, which puts even more pressure on the Colorado River's limited waters. Now, with the River's largest reservoir at just 38% full, the first federally-declared [water shortage](#) is inevitable. Although this will likely affect all of the states that rely on the Colorado for water supply, Arizona is going to be the first in line for water cuts and bear the brunt of this shortage. The state agreed to that as terms in exchange for federal funding for a [canal system](#) that delivers water to its major cities. Farmers across the state will take the greatest hit from these cuts and have been preparing by fallowing land (yeah, [Arizona has farms](#)). But, if you live in Arizona, there is no need to [freak out](#) just yet, the state is confident that its Drought Contingency Plan will be instrumental in dealing with losing about 1/5 of its entitled water. And, the water cuts shouldn't affect cities or homes, or any of the water delivered to Native American tribes through the canal system.