

Groundwater Case Law Update

Presented to the Petaluma Valley GSA

October 25, 2018

Scott Morris



Key Concepts and Terms

- Reasonable and Beneficial Use
- Public Trust
- Balancing Test
- Navigable Water



ELF Context

- *ELF* concerns permitting of new groundwater wells near the Scott River in Siskiyou County
- The Scott River is a tributary to the Klamath River
- There are coho salmon in the Scott and Klamath Rivers
- There is extensive agriculture in Siskiyou County that relies on groundwater pumping for irrigation.
- The County has an ordinance for permitting new wells

The Scott River



Salmon at the mouth of the Scott River



Mike Hupp, Dawn Patrol Images



Siskiyou County Agriculture



Key Holdings in *ELF*

- Question 1: Does the Public Trust apply to groundwater extraction on a navigable river?
 - Yes. Counties have a duty to consider the public trust before authorizing new groundwater wells, if groundwater extractions might impact public trust resources.

Key Holdings in *ELF*

- Question 2: Does enactment of SGMA mean the County or the State Water Resources Control Board (“Water Board”) does not have to comply with the Public Trust?
 - No. SGMA did not take the place of the Public Trust. The County has to comply with SGMA and the Public Trust, together.

ELF fact v. fiction

- The Judge who wrote the opinion in *ELF* said the ruling is “extraordinarily narrow.”
- Some may think *ELF* stands for the broad idea that the public trust applies to groundwater.
- But the trial court made clear: “the court does not hold the public trust doctrine applies to groundwater itself. Rather, the public trust doctrine applies if extraction of groundwater adversely impacts a navigable waterway to which the public trust doctrine does apply.” (emphasis added). The appellate court agreed.
- Future litigation is likely, and the rule could become more expansive.



SGMA Sustainable Management Criteria related to Public Trust

- Sustainable groundwater management is the management and use of groundwater without causing undesirable results:
 - Chronic lowering of groundwater levels/overdraft
 - Reduction of groundwater storage
 - Seawater intrusion
 - **Degraded water quality**
 - Land subsidence
 - **Depletion of interconnected surface waters that have significant and unreasonable adverse impacts on beneficial uses of the surface water**



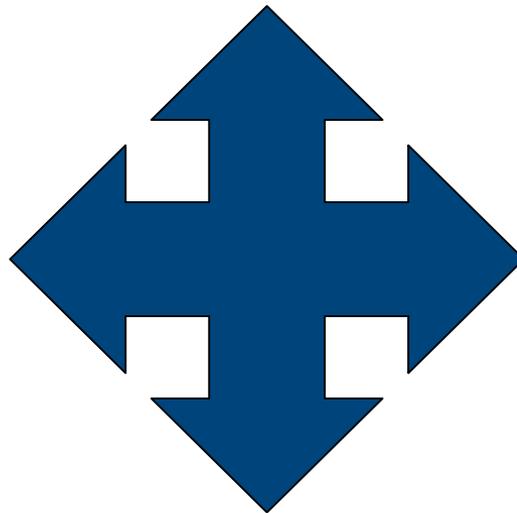
Groundwater Dependent Ecosystems

- SGMA has requirements to identify and consider impacts to Groundwater Dependent Ecosystems (GDEs).
 - GDEs are ecological communities of species that depend on groundwater emerging from aquifers or on groundwater occurring near the ground surface. (23 Cal. Code Regs. section 351 (m))
 - *ELF* narrowly applies to groundwater extraction impacting surface water that has public trust values.
 - Consider whether the Public Trust could apply broadly to groundwater extraction that impacts GDEs.

Agencies Must Comply with All Laws Simultaneously

Reasonable Use

Water Rights



Public Trust

SGMA

Evolution of Public Trust/ Water Law 1

- *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419
 - California Supreme Court held diversions by City of LA from non-navigable tributaries to Mono Lake were subject to the public trust doctrine because of the impact of the diversion on Mono Lake, which is navigable.
 - *ELF* extends this concept of permitting considerations to non-navigable water sources such as *groundwater* as relevant to the impact on public trust resources (fish) in a navigable water (the Scott River).

Evolution of Public Trust/Water Law 2

- *National Audubon* also held that the public trust doctrine co-exists with California's reasonable and beneficial use doctrine, and water rights permitting and licensing.
 - *ELF* extends this concept to SGMA and Groundwater

Further Development of the Public Trust Doctrine

- What is Feasible?
 - Determined by the “trustee agency” in light of the “public interest”
 - *SWRCB Cases* (2006) 136 Cal.App.4th 674, 778.
 - Not clearly defined
- Decisions by State vs. Agencies vs. Counties
 - County is a legal subdivision of the State, references to the State include Counties
 - *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 175-176.)



Bottom Line: Public Trust Issues Remain Important

- If groundwater is interconnected to a navigable river with public trust resources, the County or Water Board must consider whether the new water extractions will impair those resources, and balance the harm with the benefit of additional water use.
- Chain of potential impacts vs. direct impacts.
- Trend toward increased holistic analysis and wider geographic scope of interdependent water systems.
- County makes its own decisions, case law and public trust doctrine do not dictate a specific outcome.

Balancing Test



VectorStock®

VectorStock.com/1805890



Potential Case Implications

- Increased consideration of indirect Public Trust impacts on navigable waters from Well Permitting
- Closer monitoring of groundwater levels (already happening due to SGMA)
- Identification of Groundwater Dependent Ecosystems (already happening due to SGMA)
- Permitting becomes increasingly discretionary rather than ministerial
- Well permitting review more like CEQA process?

Considerations for Sonoma County GSAs

- *ELF* applies now, before SGMA deadlines
- Additional litigation risk
- Increased importance of including ecosystems and Public Trust considerations in GSP development to increase collaboration with stakeholders and reduce litigation risk
- Consider proactively identifying navigable waters that are interconnected with groundwater and have public trust resources in Sonoma County.
- How does the County consider and balance public trust resources with other water demands during permitting?
- Consider review of ordinances, are well permits still ministerial if you consider public trust, and balance harms/benefits?
- Other public trust uses like recreation = more stakeholders.



Our Favorite Public Trust Benefit... Recreation on the Russian River



1850's



Today

Thank You!

For more information, please visit us
at www.kmtg.com
or email Scott Morris directly at
smorris@kmtg.com

