

# Superior Court Finds Issuance of Well Drilling Permit for Groundwater Extraction is Subject to the Public Trust Doctrine

In a July 15, 2014 order issued in the *Environmental Law Foundation v. State Water Resources Control Board* case, the Superior Court of California, County of Sacramento, found that the public trust doctrine protects navigable waterways from harm caused by groundwater extraction, and that a county is required to consider the public trust when issuing well drilling permits.

If this holding withstands the inevitable appeal, it will further extend the scope of the public trust doctrine and impose a potential new level of regulatory oversight on groundwater extraction.

## Background

The order arises from cross motions for judgment on the pleadings filed by Siskiyou County and the Environmental Law Foundation (“ELF”). ELF alleged that the Scott River, located in Siskiyou County (the “County”), is a navigable waterway and has experienced decreased flows caused in part by groundwater pumping. As a result of the decreased flows, the Scott River is often “dewatered” in the summer and early fall, injuring the river’s fish populations.<sup>1</sup> The County is responsible for issuing permits for wells used to pump groundwater. ELF seeks to compel the County to stop issuing well drilling permits until it complies with its duties under the public trust doctrine.

## Public Trust Doctrine

Under the public trust doctrine the State holds title to navigable waterways as trustee for the benefit of the People of California. The public trust doctrine protects the public’s right to use navigable waters for hunting, bathing, swimming, boating, recreation and environmental uses. In California, a waterway is navigable if it is capable of being used for recreational boating for at least part of the year.

Here, the court extended the finding in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 (“*National Audubon*”) that the public trust applies to diversions of water from a non-navigable surface tributaries impacting a downstream navigable river or lake. The court found there was no legal distinction between the extraction of water from non-navigable surface

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streams and the extraction of groundwater; both of which decrease the flow of navigable waters. The court emphasized that it is not holding that the public trust doctrine applies to groundwater itself; but rather, to the extraction of groundwater which adversely impacts a navigable waterway to which the public trust doctrine does apply.

## **Groundwater Regulation**

Unlike the diversion of surface water, groundwater appropriation is generally not regulated in California by statute or the State Water Resources Control Board. The County argued that the public trust doctrine cannot impose a duty to regulate groundwater. Rather, the legislature under Water Code section 10750 et seq., has given the County complete discretion to decide whether to regulate groundwater through a groundwater management plan. However, the court found that the public trust doctrine and California's statutory water rights system co-exist and there is no conflict between authorizing the County to adopt a groundwater management plan, and requiring it to comply with the public trust doctrine. Finally, the court determined that while the County has discretion whether to adopt a groundwater management plan, as a subdivision of the State, it does not have discretion to ignore its duties under the public trust doctrine when it issues permits to appropriate groundwater.

## **Conclusion and Implications**

The trial court order is not binding on anyone other than Siskiyou County; but it does suggest that courts may be willing to apply the public trust doctrine to groundwater extraction. The public trust doctrine does not prohibit permitting actions that harm public trust uses; but must be considered when allocating water resources, preserving trust uses whenever feasible. While local agencies consider impacts when issuing well drilling permits, they generally do not conduct a public trust analysis. How this would be done in practice by a local agency issuing a well drilling permit is unclear and raises a number of issues. First, is there a hydrologic connection between the groundwater and surface water? Second, would the proposed extraction have a potential negative impact on a surface water? Third, is the surface water a "navigable" waterway? Fourth, are State public trust resources negatively impacted, and how do local agencies make the determination? Finally, based on the balancing analysis required under the public trust doctrine, is it feasible to preserve trust uses? Anyone of these determinations appear to be ripe for a challenge alleging violation of the public trust.

<sup>1</sup> When ruling on a motion for judgment on the pleadings, the court accepts as true all factual allegations. To succeed on the merits, ELF must prove these facts.

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