

Can Groundwater Permitting Affect the Public Trust?

The California Court of Appeal recently upheld a lower court decision that, [as we previously discussed](#), expanded the scope of the "public trust doctrine" to include groundwater. In *Environmental Law Foundation v. State Water Resources Control Board*, the appellate court held that agencies permitting groundwater pumping must consider how pumping may harm "public trust interests."

The court rejected arguments that the Sustainable Groundwater Management Act, or SGMA, replaced any duty to consider impacts to these "public trust interests" from groundwater pumping. Unlike the lower court's ruling, this ruling carries appellate authority to which lower courts throughout the State could follow as precedent. Because of this, agencies and groundwater pumpers should take notice of this significant ruling.

So, what is the "public trust"? As applied to water, it's the concept that the public has a right to use surface water for commerce, navigation, fishing, and recreation. We, the public, enjoy these rights as "gifts of nature's bounty." Because these interests and the uses they allow belong to the public, the State has a duty to hold them in trust and protect them from private interests whenever feasible. The public has an interest in navigable waters, like rivers and lakes, at which the public may boat, swim, or fish.

But groundwater is below surface and unnavigable. So how could the public trust doctrine apply to groundwater? According to the appellate court, it's all about the hydrological connection. The pivotal fact in *Environmental Law Foundation* was not that groundwater was being pumped, but that the groundwater pumping was lowering the water levels of the Scott River, a public trust resource.

In *Environmental Law Foundation*, it was undisputed that groundwater was hydrologically connected to the navigable Scott River. Because groundwater pumping lowered river levels, the appellate court held that the county—here, the trustee of the public trust—had a duty to consider how groundwater pumping impacted the Scott River.

Notably, the decision only answers the threshold question of

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whether permitting agencies like counties should consider the public trust related to groundwater pumping. The decision does not, however, explore how local agencies should apply a public trust analysis when deciding to issue well drilling permits or how to implement SGMA. Local agencies must now consider whether groundwater is hydrologically connected to, and whether pumping potentially impacts, public trust resources like rivers and lakes.

As we wade into this new legal territory, agencies and permittees must stay apprised of how this law evolves. Should you have any questions or concerns regarding how the public trust and groundwater affect you, please contact our Water Law attorneys, Nathan Metcalf and Sean Herman.

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