

The Network Note August 2018

Next Conference: Sustainable Water Rights in Drought

The Stanford Law School will host the next *Dividing the Water* conference, on **April 10-13, 2019**. Conferees will consider how the law impacts our ability to manage water in sustainable ways during times of shortage. The faculty will include a mix of judges, academics, and water rights administrators. The conference will feature a field trip to the Monterey Peninsula, where several “on the ground” projects address the consequences of a long-standing water shortage.

Conference Scholarships Will Be Available – Stay Tuned
Scholarships will be available to judges whose States will not reimburse them for conference costs (including travel). A future *Network Note* and the *DTW* website will provide details on registration and scholarships.

AZ: Unquantified Reserved Rights & Development

In *Silver v. Pueblo Del Sol Water Co*, the Arizona Supreme Court held that the AZ Department of Water Resources (ADWR) is not required to consider unquantified federal reserve rights in determining an “adequate water supply.”

The Pueblo Del Sol Water Company (Pueblo) asked ADWR for an “adequate water supply” designation to support a proposed development in Cochise County, five miles from the San Pedro River. Pueblo planned to increase its groundwater pumping for the development. The US Bureau of Land Management (BLM) manages a national conservation area, which has unquantified reserved water rights in the River.

After Silver and BLM objected to Pueblo’s request, ADWR issued a draft decision finding adequate water and Silver appealed. An ALJ agreed with ADWR that Pueblo had water that was “continuously, legally, and physically available.”

On appeal, the trial court vacated the ADWR decision, holding that ADWR needed to consider BLM’s unquantified reserved water rights. The appellate court reversed, holding that the trial court erred in requiring consideration of the unquantified rights. It held, however, that DWR had a duty to use its “educated eye,” under the “physical availability” regulation, to estimate what BLM eventually may gain in an adjudication.

The AZ Supreme Court reversed both the trial and appellate court decisions. “ADWR is not required to consider unquantified federal reserved water rights under its physical availability or legal availability analysis.” The Court agreed

with all parties that the physical availability regulation did not require an estimation. Instead, it focused its analysis on “legal availability” and the “prior construction canon of statutory interpretation.” The Court noted that ADWR adopted its “legal availability” definition 12 years before the Legislature adopted it by statute. The dissent argued that the term was unambiguous and required analysis of unquantified rights.

CA: Public Trust Applies to Groundwater

The CA Court of Appeal held, in *Environmental Law Foundation v. SWRCB*, that the common law’s public trust doctrine applies to groundwater that affects the public trust in a connected surface stream.

This case arose in the Scott River Basin in the northwestern corner of California. The Scott River flows into the Klamath River, a critical stream for north coast salmon. A part of the Scott River was adjudicated in 1980, but did not cover the groundwater at issue here. The County of Siskiyou set up a new well permit system and regulation for groundwater used outside the basin. In 2014, the Legislature enacted the Sustainable Groundwater Management Act (SGMA).

In 2014, the trial court had granted ELF’s motion for partial judgment on the pleadings, ruling that the public had a right to use, enjoy and preserve the Scott River. “If the extraction of groundwater near the Scott River adversely affects those rights, the public trust doctrine applies.” Passage of SGMA led the County to argue that SGMA had supplanted the public trust doctrine. To expedite an appeal, the parties stipulated to further proceedings and withdrew all of their claims except for a request for declaratory relief as to the application of the public trust doctrine to groundwater extractions.

The Court of Appeal described the scope of its decision as “extraordinarily narrow,” addressing two issues – whether the public trust doctrine applied to groundwater and whether SGMA abrogated the doctrine’s application to groundwater. After reviewing the CA Supreme Court’s decision in *National Audubon* (1983), the court rejected the County’s arguments and concluded that SWRCB’s duty to protect the public trust is independent of its authority over the water right permit system. SGMA did not occupy the field and the public trust doctrine applies in parallel with SGMA. The County, as a subdivision of the State, shares responsibility for protecting the public trust in its groundwater management program. The court affirmed the trial court’s judgment.

Recent court decision? Something to share? Contact the *Network Note* Editor at ALFIII@sbcglobal.net