

The dewatered Scott River west of Fort Jones, CA,
Sept. 2, 2009. Photo by Klamath Riverkeeper.
Flight by LightHawk.

If you follow California water law or environmental law, you probably have been aware that the Environmental Law Foundation has been pursuing a public trust claim based on groundwater pumping that affects the Scott River. Last week they gained a victory at the trial court level, with a ruling that endorses the principle that groundwater removals affecting flows in a navigable stream are subject to the public trust doctrine. Appeals are sure to follow, and it's still a long road to getting the Scott (and other California rivers) flowing more regularly, but this is an important step along that road. (Full disclosure — as you'll see if you read the decision, fellow Planeteer Rick Frank is on the plaintiffs' legal team.)

The principle that the public trust doctrine covers changes in navigable streams caused by groundwater withdrawals should survive on appeal. It follows straightforwardly from the classic *Mono Lake* case, National Audubon Society v. Superior Court, 33 Cal. 3d 419 (Cal. 1983). Since 1971, the California courts have recognized that the public trust doctrine protects the ecological as well as recreational and economic values of tidelands and navigable waterways. In *Mono Lake*, the state Supreme Court held that the public trust not only applies to direct incursions on those lands and waterways, it also necessarily "protects navigable waters from harm caused by diversion of nonnavigable tributaries." Protection of the navigable waters against direct filling or diversion would be meaningless if less direct actions were free to cause precisely the same harm. To the extent it supports flows in navigable waterways, groundwater is analogous to the non-navigable tributaries in *Mono Lake*. Groundwater withdrawals, like withdrawals from non-navigable tributaries, must be subject to the public trust doctrine if they disrupt flows in navigable waterways. As the court here put it:

> The public trust doctrine would prevent pumping directly out of the Scott River harming public trust uses. So too under National Audubon the public trust doctrine would prevent pumping a non-navigable tributary of the Scott River harming public trust uses of the river. The court finds no reason why the analysis of National Audubon would not apply to the facts alleged here. The court thus finds the public trust doctrine protects navigable waters from harm caused by extraction of groundwater, where

> the groundwater is so connected to the navigable water that its extraction adversely affects public trust uses.

The court declined to hold that groundwater itself is a public trust resource, or that groundwater with a hydrologic link to navigable waters is a public trust resource. That doesn't surprise me. Such a holding would go well beyond *Mono Lake*. It would take a very brave trial court to go there. But of course that means that the practical impact of the decision may be limited. For now, at least, the public trust doctrine will only be a constraint on groundwater pumping in situations where there is strong evidence that pumping draws water away from a navigable waterway.

Assuming the main principle holds up, there's still a lot to be worked out. This decision doesn't resolve the litigation; it only holds that plaintiffs have a chance to make their case. If they manage to win on the merits, there are still important and difficult questions about what relief they might get, and who ultimately will decide how the balance between irrigation and a healthy river will be struck.

As Vermont Law School professor John Echeverria has pointed out on his Takings Litigation blog, under *Mono Lake*, public trust uses need only be protected to the extent feasible. California's courts have not been anxious to make those determinations, preferring to leave them to expert agencies. Since what's feasible is often a judgment call, it matters who makes that call. In *Mono Lake* there wasn't a choice; it had to be the State Water Resources Control Board, which oversees surface water rights. *Mono Lake* triggered a protracted (and on-going) negotiation between the SWRCB and the LA Department of Water and Power over how the latter's water rights should be limited to protect the lake. A lot of that procedure seems to have been invented on the fly. But it's even less clear what would or should happen if the plaintiffs win this case.

Plaintiffs have sued both the SWRCB and Siskiyou County. They have not sought any relief against the SWRCB other than the declaration that the public trust applies. The County is contending that the SWRCB has no authority to regulate groundwater under the public trust doctrine. That issue will be heard early next year.

Perhaps the County should be careful what it wishes for. If the SWRCB lacks authority, that would leave only the County. The court in this decision has ruled that the County has enforceable duties under the public trust doctrine. This aspect of the

decision may well be right, but I don't think it's clearly supported by any state Supreme Court precedent. The closest I'm aware of is an appellate case, Center for Biological Diversity v. FPL, which suggests in dicta that a county with permitting responsibility for a wind turbine project would have been the right defendant for a public trust claim based on the impacts of that turbine on birds.

If the County does have to look out for the public trust when it issues well permits, it's going to have change its current practices dramatically. The County does currently require well permits, through its Environmental Health Division, but it doesn't seem to look at anything but how the well is drilled and that it is adequately set back from property lines. There's no requirement that an applicant show the relationship between the proposed well and nearby surface waters, nor is there (as far as I can tell) any provision for subsequent oversight of well operations. If plaintiffs win on the merits, the County will have a tough task on its hands to determine how to fulfill its public trust duties, and no doubt at a minimum the costs in time and money of drilling new wells in Siskiyou County will go up. But there's likely to be even more to it than that. In *Mono Lake*, the California Supreme Court required that the SWRCB revisit decades-old water rights decisions in light of their newly recognized impacts on public trust resources. In theory at least, Siskiyou county might have to revisit the permits for every well, no matter how old, that might be impacting flows in the Scott. (In this particular case, that may be a limited class, since the Scott River is one of the few in California that have been adjudicated, including nearby groundwater, and plaintiffs have declared that they are not concerned with wells within the zone of adjudication.)

Stay tuned. This is far from the end of the story.