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Roderick Walston, of Best Best & Krieger LLP, represents Siskiyou County in a dispute involving the Scott River.

Courts tackle water ownership

A Sacramento County case could determine if river is 'real property.'

By Fiona Smith
Daily Journal Staff Writer

The Scott River, which tumbles off the Cascade Mountains in the far north region of California, is not a large or well-known river. Nonetheless, it is at the center of a legal fight over a fundamental question: Who owns the water flowing in the state's rivers?

The answer is being debated in a lawsuit brought by Oakland nonprofit Environmental Law Foundation against the California Water Resources Control Board and Siskiyou County, alleging that they are harming fish in the Scott River by failing to control groundwater pumping nearby.

Before reaching that issue, Siskiyou County officials have taken the case in a new direction by trying to get the suit moved from Sacramento to Siskiyou. They argue that the Scott River is "real property" — which consists of land or things attached to land, such as buildings. Under state venue statutes, disputes over real property must be heard in the county where that real property is located.

The premise that a river should legally be treated like a piece of property could open the door to essentially privatizing a public resource, said James Wheaton, president and legal director of the Environmental Law Foundation. That could mean the government would have to make hefty payments to

water users if it cuts their supplies, he said.

"Never has a court held that water in its natural state is real property, and if Siskiyou County were to succeed in getting that declaration, it would completely upend a century of understanding of the control and regulation of water rights in California," Wheaton said.

Holding that the water body is real prop-

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— James Wheaton

erty merely assures that the right of those who live nearby and have a vested interest in the river will be able to participate in a case that could affect their water rights, said Roderick Walston, an attorney with Best Best & Krieger LLP who is representing Siskiyou County. Without that assurance, a dispute over a water body located in one county could be heard anywhere in which someone who holds a water right happens to live, Walston said.

The Environmental Law Foundation's underlying case alleges the state and the county are failing to exercise their authority under the public trust doctrine to protect salmon that live in the river. The public trust doctrine is the idea that natural assets should be protected for the public's benefit. The state Supreme Court long has recognized the doctrine, but it is not codified in state statutory law.

Invoking the public trust doctrine would disrupt a 1980 court settlement that doled out water rights to farmers near the Scott River, and it would be unprecedented for a court hundreds of miles away to deal with that, Walston said.

The case was originally filed in Sacramento because that is where the California Water Resources Board is located, Wheaton said. Moving it to Siskiyou County could create an unfair home court advantage, he said.

Sacramento Superior Court Judge Lloyd Connelly refused to move the case north earlier this year, rejecting the real property argument, and Siskiyou County appealed, *Environmental Law Foundation v. SWRCB*, 34-2010-80000583 (Sacramento Super. Ct., filed June, 23, 2010). The appeal is now pending oral argument at the 3rd Appellate District, *County of Siskiyou v. Superior Court of Sacramento*, CO67252 (Cal. App. 3rd Dist.,

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Water rights take center stage in court case

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filed Feb. 1, 2011).

If the appeals court sides with Siskiyou, it could create a precedent that others could use to argue that any government limitation on water rights, such as to protect fish, would be a constitutional taking of property that the government would have to pay for, Wheaton said.

"If water became real property, then potentially any limitation or control on the use of water for the public good would become a compensable taking," Wheaton said. "That's something that property rights zealots would love, but it would be a disaster for everyone else."

Walston disagreed that the case would have such an impact.

"You could have a water body be real property, but that doesn't mean the right to use water is real property," Walston said. "That has to be analyzed separately."

Whether a ruling under the narrow issue of venue statutes could have widespread impact is up for debate, said John Echeverria, a professor at Vermont Law School.

If a court were to equate a water body — such as the Scott River — with land, "it's inevitable that this precedent would be used to argue for a more expansive understanding of rights in water," Echeverria said.

Under California law, landowners have much more leeway in how

they use their property than those who hold water rights, Echeverria said. The state owns the physical molecules of water in the state, and private water rights are subject to limitations enshrined in the state Constitution, including that water must be put to a reasonable and beneficial use, he said.

Echeverria is involved in California cases dealing directly with the issue of whether government limitations on water rights in order to protect fish would amount to a taking under the Fifth Amendment. In 2004, a U.S. Court of Federal Claims judge ruled such limits were a taking, and the government settled the case with water rights holders of the Tulare Lake Basin

Water Storage District for \$16 million without appealing.

Echeverria represented the environmental nonprofit Natural Resources Defense Council, which argued in amicus briefs against the idea that such limits were a taking. He is arguing the same thing in a similar pending case, *Casitas Municipal Water District v. U.S.*, CV05-168 (Fed. Cl., filed Jan. 26, 2005).

These suits, and now the Scott River case, are all tackling the fundamental issue of "how far property rights in water go and where the public right stops and the private right begins," Echeverria said.

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