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. Nevertheless, 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 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 upset a century of understanding of the control and regulation of water rights in California," 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.

— James Wheaton

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 in this case that natural resources should be protected for the public’s benefit. The state Supreme Court has recognized the doctrine, but it is not codified in state statutory law.

Invoking the public trust doctrine would raise a 1980 court settlement that divided out water rights to farmers near the Scott River, and it would be unenforceable for a court hundreds of miles away to deal with that, Wheaton 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.


The appeal is still pending before the 3rd Appellate District, County of Siskiyou v. Superior Court of Sacramento, CO47532 (Cal. App. 3rd Dist.), filed June 23, 2010.
No matter is too great: Practical lessons for litigating a complex case

By Marwa Elzankali

Over the past 11 years of my practice, I have handled a wide variety of cases, from commercial disputes (big and small), to class actions, to prosecuting and defending civil rights cases. I have represented clients in state court and federal court, before local, state, and federal administrative agencies, and in both state and federal appellate courts. Through it all, the ultimate lesson learned consistently is that with some diligence, tenacity, strategic thinking, persistence, and the power of positive relationships, no matter is too great or too complicated.

Diligence: Any seasoned lawyer knows the key to litigation is preparation. Being prepared means know your client; know all the players; know your opening statement; know as much as the facts as possible; and know the law. Ask detailed questions and get all of your client’s documents. Also, do your homework! With online tools like Westlaw, Google, and Wikipedia, there is no shortage of information available to the public and to you.

Find similar cases, call the lawyer in charge and learn from his or her experience.

You might be amazed at the number of admissions and helpful (or harmful) statements you can find on a party’s Web site, blog, social networking page, or in news articles. Do not forget to look at a party’s public filings with a federal, state, and local government agency. A simple search in a federal or state court might turn up similar litigation a party of interest is or was involved in.

But look beyond your own research. Talk to someone who has done this before. Most lawyers can be very generous with their time when they want to share their experience and expertise. Find similar cases, call the lawyer in charge and learn from his or her experience. The wealth of information available today can give you a head start before the burden of formal discovery attach.

Of course, one of the greatest benefits of a diverse practice is that it teaches you to ‘always think outside the box.’ At first glance, you may see the law is complex against your client, or the facts look pretty bad. But take a closer look and ask yourself this. Perhaps there is a fact or a subtle exception to the law specifically dealing with the same situation. The paint being – dig deep into the issues before you give up on the case. It might be that your client’s case necessarily falls into your specific category.

Strategic thinking: You should have multiple parties, multiple individual and multiple state agencies. I hope you have more than one appropriate jurisdiction where a single action can legally be filed, or it may be that resolving your client’s situation requires more than one action filed in different courts. Strategic thinking necessitates that you always consider the big picture and look at the entire matter as a whole, not in bits and pieces. Ask yourself: Where are you and your client located; and where are the other parties? Consider how much money you may save if you can get your client to cooperate and help you build a case.

Persistence: Litigation can take many years to come to any resolution, and in the course of the litigation, you might have your major win at an unexpected set back. The key is to not give up or be discouraged if things do not go exactly as planned. Have your homework in place. If you have the facts on your side, you have the best case you can. Do not be afraid to appeal. Keep on top of the case, and be ready to appeal if needed.

Positive relationships: Never underestimate the power of working a relationship with your colleagues, your client, your opposing or co-counsel, witnesses, or with court personnel. Know that you can always turn to your colleague and represent your client’s best interests, without being abusive or taking advantage of anyone.

Of course, if you have a complex case, you need to have a complex strategy. You need to have a team that can help you. This is where your research comes in. You need to find companies that have handled similar cases. You need to find experts who can help you. You need to find attorneys who can help you. You need to find judges who can help you.

Water rights take center stage in court case

Continued from page 1

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

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

Walton disagreed that the case should 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,” Walton said. “That has to be analyzed separately.”

Whether a ruling under the narrow issue of whether the government could have had a more widespread impact is up for grabs, 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 that the property rights to water with land, but it would be a disaster for everyone else.”

Echeverria disagreed that the case would have such an impact.

“Water was the physical, if not the legal property of the state, and private water rights are subject to limitations and usages that are reasonable,” Echeverria said. “This is a very different case.”

Echeverria is involved in California cases dealing directly with the issuance of water rights in order to protect fish from pollution and water quality issues. In one case, a U.S. Court of Federal Claims judge ruled that water rights were a taking, and the government settled the case with water rights holders of the Tularosa Lake Basin Water Storage District for $26 million without appealing.

Echeverria represented the environmental non-profit Natural Resources Defense Council, which argued in amicus briefs the idea that likely limits were a taking. He is arguing the same thing in a similar pending case, United States v. California, which is the latest in a line of cases that have resulted in the state of California being forced to pay millions of dollars to protect fish.

“People are outraged at Mr. Echeverria’s salary and still find him not guilty of the charges,” James W. Spern said.

Los Angeles District Attorney’s Office spokeswoman Sandi Gibbons declined to comment, saying prosecutors intended to make their arguments in court.

By Laura Ernke

Prosecutors in public corruption cases must show that officials either knew or should have known about the crime. That’s the decision Supreme Court ruled Monday.

The decision holds public officials to a higher standard than what the government argued in a case before the Supreme Court, ruled Monday.

At least one defense attorney objects to a major public corruption case was already well under way when the ruling was issued.

Under the standard, public officials accused of criminal corruption can claim ignorance of the law as a defense even if prosecutors can demonstrate that the lack of knowledge was criminally negligent.

But the new rule is a clear departure from the old standard, which was based on the belief that officers and employees of public officials are sufficiently knowledgeable about the laws that govern their conduct to be held accountable for their actions.

Monday’s decision, which came in a case where a former county attorney for the Superior Court, was upheld by the California Court of Appeal, the first time the court spelled out the “mental state” that is required to prove misappropriation of public funds under Penal Code section 424.

Although the attorney general’s office defended the ruling as a narrow impact on public corruption cases, the campaign law attorney for embattled former city of Los Angeles City Administrator Bruce Mallenbush struck a deal with prosecutors. By admitting he misappropriated public funds, he agreed not to seek more than $60,000 in public money. Mallenbush avoided prison and the plea ensured his pension, the Los Angeles Times reported.

The Supreme Court decided the case before the high court, said he couldn’t comment on the Bell case but that ignorance of the law doesn’t often come up as a defense in public corruption cases.

"Most prosecutions involve pretty blatant misuse of public money, and I don’t think there’s going to be a question," Zali said.

Zali is a civil rights lawyer who has represented civil rights groups and individual civil rights activists in various legal challenges to state and local governments. His firm, Zali Law, was involved in the case that Zali is referring to, which was filed in 2005 by several groups and individuals who accused the City of Bell of misappropriating public funds.

The ruling comes in a case where a former county attorney for the Superior Court, was upheld by the California Court of Appeal, the first time the court spelled out the "mental state" that is required to prove misappropriation of public funds under Penal Code section 424.

Although the attorney general’s office defended the ruling as a narrow impact on public corruption cases, the campaign law attorney for embattled former city of Los Angeles City Administrator Bruce Mallenbush struck a deal with prosecutors. By admitting he misappropriated public funds, he agreed not to seek more than $60,000 in public money. Mallenbush avoided prison and the plea ensured his pension, the Los Angeles Times reported.

The Supreme Court decided the case before the high court, said he couldn’t comment on the Bell case but that ignorance of the law doesn’t often come up as a defense in public corruption cases.

"Most prosecutions involve pretty blatant misuse of public money, and I don’t think there’s going to be a question," Zali said.

Zali is a civil rights lawyer who has represented civil rights groups and individual civil rights activists in various legal challenges to state and local governments. His firm, Zali Law, was involved in the case that Zali is referring to, which was filed in 2005 by several groups and individuals who accused the City of Bell of misappropriating public funds.