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COURT TAPS 1914 LAW IN WELL WATER DISPUTE

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Blowing the dust off 19th century court opinions and pre-World War I law, a state appeal court appears to have strengthened the authority of state regulators to control pumping from underground water sources.

Wednesday's 1st District Court of Appeal ruling largely upheld the State Water Resources Control Board's definition of when it can exercise authority to determine how much, and at what times of year, water can be pumped from underground sources. *North Gualala Water Co. v. State Water Resources Control Board*, 2006 DJDAR 6714.

The issue is a particularly critical one in California, which is the only western state to regulate above-ground and subterranean waters differently. Subsurface water supplies are becoming increasingly important to serve California's growing population in an era when most above-ground sources such as rivers have already been divided up.

"There are a lot of wells being sunk around the state," said Michael Lauffer, the water board's chief counsel.

Below-ground water generally is far less controlled by state actions, because historically it has been considered a part of individual landowners' property.

That's except where the water is part of an underground stream "flowing through known and definite channels." Lawmakers in 1914 enacted that wording into state water law and until now the courts haven't interpreted the provision.

"We've tapped out the surface waters; people are increasingly turning to groundwater and in many respects people are turning to groundwater that may be in subterranean streams," Lauffer said. "For that reason, the decision's going to be really important for shoring up our statewide ability to look at those kinds of water uses."

He said such authority was important in order to protect downstream water users, as well as fish and wildlife, which may be harmed by depleted groundwater flows into above-ground rivers and streams.

But lawyers representing groups of water districts said the decision also placed important boundaries on state authority. Andrew Hitchings, an attorney for the Northern California Water Association, said the court rejected an "expansive view of the board's jurisdiction."

The ruling came in a case brought by the North Gualala Water Co. It had challenged the state water board's jurisdiction in requiring the company to get permits restricting its ability to pump water from two wells near the North Fork Gualala River. The company supplies about 1,000 customers in and around the coastal community of Gualala.

Mendocino County Superior Court Judge Leonard J. LaCasse had rejected the company's arguments.

The appeal court upheld a four-part test the water board adopted in 1999 to determine when it had the power to regulate pumping from underground water sources. Under that test, a subsurface channel must be present; the channel must have a relatively impermeable bed; the channel's course must be known or can be determined; and water must be flowing in the channel.

In deciding the issue, the appeal court pored over court cases going back to 1871. Justice Sandra L. Margulies expressed some frustration at the ancient nature of the source material.

"As the present case illustrates, classification disputes in this field quickly take on an Alice-in-Wonderland quality because the legal categories (e.g., 'subterranean streams flowing through known and definite channels,' 'percolating water') are drawn from antiquated case law and bear little or no relationship to hydrological realities," Margulies wrote.

"Because the Legislature has shown little inclination to reformulate this area of law, we are left to try to construe and apply a legal classification that is borrowed from cases decided more than 100 years ago," she added.

Justices James J. Marchiano and Douglas E. Swager joined Margulies in the ruling.

Margulies relied heavily on an 1899 California Supreme Court case, *City of Los Angeles v. Pomeroy*, 124 Cal. 597. She said that case employed the identical

language later adopted by the Legislature in the water law. A hundred years later, it also provided the basis for the water board's adoption of its four-part test.

She concluded that the water board's position was more consistent with the Pomeroy ruling than was the Gualala Water Co.'s argument. The company had cited several instances where it contended the state board had deviated from the Pomeroy outline.

Margulies also held that the board's test was "consistent with the language and intent" of the 1914 law, and that the board made all the findings necessary that the Gualala groundwater satisfied the test.

At the same time, Margulies warned that the board's interpretation could lead to an "overbroad application" of the test in future cases. The law, for instance, should not be construed to give the state jurisdiction over water that "wanders independently of the banks of the putative channel."

She also rejected the trial judge's suggestion that the board automatically would have jurisdiction upon a showing that the Gualala wells affected the river's surface flows. She found no indication that the board had used any such test in making its decision.

The appellate court was careful to "limit and qualify a lot of the language used by the trial court, which we thought was useful," said Alfred Smith of Nossaman, Guthner, Knox & Elliott in Los Angeles. Smith represented the California Water Association, a group of privately owned water suppliers.

Hitchings, a lawyer with Sacramento's Somach, Simmons & Dunn, said the panel rejected the suggestion that the state would "automatically have jurisdiction based upon some new [surface water] impacts-based type test."

But that's still an open question, Lauffer said, because the court noted the water board didn't use such a test in the Gualala situation.

"This case doesn't foreclose that possibility," he said. "It doesn't endorse the possibility, either. It's just a non sequitur."

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