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THE CENTERLINE

A Mixed Message from the Court of Appeals On Efforts to Protect the San Pedro River

On November 8, 2016, the Court of Appeals issued its Opinion in *Silver v. PDS*. Although the court vacated the trial court's decision in our favor, it remanded the matter back to the Arizona Department of Water Resources (ADWR) with instructions to consider the Bureau of Land Management's (BLM) reserved water rights, which was the result that we sought. Quite frankly, we are still trying to make sense of the decision.

To refresh your recollection, the Center filed the lawsuit in May, 2013, on behalf of Patricia Gerrodette. We sought judicial review of the ADWR's decision to grant an adequate water supply (AWS) designation to Pueblo del Sol, (PDS) a private water company that is proposing to deliver groundwater to a massive master planned community planned for Sierra Vista. ADWR's designation would allow PDS to pump groundwater for a housing and commercial development of up to nearly 7,000 homes, occupying all of the remaining developable land in Sierra Vista and pumping an amount equal to about one-third of the total annual natural groundwater recharge in the entire Sierra Vista subwatershed. The impact of this development would be devastating to the San Pedro River. Ms. Gerrodette objected to PDS's application when it was first submitted to ADWR, and appealed the decision in an administrative proceeding. The Center became involved at the judicial review phase

The case raises a critical issue that involves an intersection of federal and state law. Under state law, when deciding whether to grant an application for an AWS designation, ADWR must determine whether the proposed water supply will be physically, legally and continuously available for at least 100 years. In evaluating PDS's application, however, ADWR refused to consider the effect that express federal water rights held by BLM on behalf of San Pedro Riparian National Conservation Area would have on the "legal availability" of the proposed water supply even though federal law protects federal surface water rights from the adverse effects of groundwater pumping. Thus, if the pumping from the new development were to impair BLM's surface water rights -- which it most certainly will do given the current overdraft of the aquifer--then BLM would have the right to enjoin the pumping, thereby making the water legally unavailable.

In July 2014, Superior Court Judge Crane McClennen agreed with us and held that ADWR could not ignore BLM's superior water rights in determining the legal availability of groundwater for the proposed development. ADWR and PDS appealed and on November 8, 2016, the Court of Appeals issued its opinion. The decision by the Court of Appeals appears to be a mixed message. On the one hand, the court rejected the argument advanced by plaitntiffs that ADWR had erred in determining that an adequate water supply was "legally available." However, the court nonetheless concluded that ADWR could not ignore BLM's reserved water rights in its evaluation of PDS's application for an AWS designation.

The court remanded the matter back to ADWR and directed that "[o]n remand, the Department shall give educated consideration to the unquantified priority federal reserved water rights of BLM, until such amount is quantified in the General Stream adjudication." However, the court also held that "[t]he Department is not required to consider separately the potential impact of proposed pumping on area streams or the San Pedro River. Further, ADWR is not required to consider the potential impact of proposed pumping on either the San Pedro Riparian National Conservation Area or on the Conservation Area's water right." Since the "Conservation Area's water right" includes the federal reserved rights held by BLM, this portion of the opinion seems to "muddy the waters." It seems likely that some, or even all parties, will seek further relief, either clarification or Supreme Court review.

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B.K. v. McKay Update

Last year, the Center, along with Children's Rights and the law firm Perkins Coie, filed a lawsuit in federal district court on behalf of the 18,000 foster children in state custody alleging there is an acute lack of foster care homes and that the foster children in state custody were not receiving the health care services they need and that the system fails to preserve family relationships.

Initially, the State moved to dismiss the complaint which we successfully resisted. The next step is for us to file a motion to certify the plaintiffs as a class on behalf of all children in state custody.

Discovery has been ongoing over the last year with the production by the State of over a million documents. Discovery has been difficult with the State presenting numerous barriers to the timely production of much of our requested documents. We have proceeded aggressively with multiple depositions of document witnesses as well as deposition of the witnesses that we expect will challenge our Motion for Class Certification. We have generally been successful with various discovery issues brought to the Court .

Our three retained experts have provided very compelling reports in support of our Motion for Class certification. The schedule currently calls for all briefing to be completed on the Class motion by early January, 2017. Judge Silver will decide whether to hold an evidentiary hearing at that time. This will dictate whether we will have a decision on class certification in the spring. Discovery on the merits of the case is continuing with a trial date expected in 2017.

Salt River Found Non-navigable By ANSAC

On August 30, 2016 the Arizona Navigable Stream Adjudication Commission (ANSAC) made its final determination regarding the navigability of the Salt River. After 23 days of testimony and thousands of pages of evidence, the ANSAC held 3 to 1 that the river was not susceptible to navigation in its ordinary and natural condition on February 14, 1912 and, therefore, is not subject to the public trust doctrine.

Remarkably, the Commission reached this conclusion despite the fact that the evidence submitted by navigability proponents included over 30 historical accounts of people navigating the river both before and around the time of statehood, hours of testimony from people who boated the river recreationally and commercially, and videos of boating trips on the Salt in recent years —including one trip that used a replica historic boat like that used by the Kolb brothers to explore the Colorado River.

While the result was not unexpected in light of the Commission's similar conclusions regarding the Gila and Verde Rivers, it is disappointing given the overwhelming evidence that the river, in its natural condition, was not only susceptible to navigation, but was actually navigated.

The Commission's decision will not be final until it adopts a final written report setting forth the legal and factual basis for its determination. At that point, any party to the proceeding will have an opportunity to seek judicial review.

Ninth Circuit Agrees With Center that Air Quality Plan Must Include Meaningful Contingency Measures

The Center received a partial victory in September when the Ninth Circuit Court of Appeals ruled on its Petition for Review challenging EPA's approval of a revision to the Arizona State Implementation Plan for Particulate Matter in the Phoenix Area under the Clean Air Act known as the "5% Plan."

The Center filed its challenge to the 5% plan in July 2014 and appeared before the court to argue the matter in June 2016. Although we raised several issues with the Plan in our Petition, the most significant issue was the state's reliance upon the exceptional events rule to demonstrate "attainment" of the National Ambient Air Quality Standard (NAAQS) for PM-10. According to the monitors, the area had continued to violate the NAAQS, particularly during the monsoon season. Consequently, the state sought to have those violations excluded as "exceptional events." An exceptional event is defined as "an event that affects air quality; is not reasonably controllable or preventable; is an event caused by human activity that is unlikely to recur at a particular location or a natural event."

In the case of the 5% plan, the state could only demonstrate "attainment" if 127 exceedances that occurred over 25 days were excluded from the data as "exceptional events." If these exceedances were not excluded, 14 of the 16 monitoring sites that reported exceedances would be violating the standard by a significant measure. We argued that EPA's concurrence in excluding these data was an abuse of discretion. Unfortunately, the Court of Appeals disagreed and denied that portion of our Petition.

However, the Court did agree with us on another issue that involved the interpretation of a provision of the Clean Air Act. Specifically, the Act requires each plan to include "contingency measures" which are automatically implemented if the area fails to meet a milestone or deadline. The idea is that if and when a deadline is missed, these additional measures will "kick in" immediately to help protect the public health while the state undertakes the planning process to revise its plan and identify new, additional measures.

In practice, however, the plans approved by EPA almost never include measures that would "kick in." Instead, EPA has allowed Arizona (and other states) to satisfy this requirement by simply labeling already-implemented measures as "contingency measures" if the state does not rely on emission reductions from those measures in its "attainment demonstration." The attainment demonstration is just a modeled forecast that attempts to predict how and when the area will meet the applicable standard.

Thus, we argued, if a deadline or milestone is missed, that shows that the demonstration was incorrect and the fact that the state didn't include already-implemented measures in its modeling is at best irrelevant. Because EPA allowed the state to use already-implemented measures to satisfy the contingency requirement, there are no new measures available to automatically kick in.

The Court agreed holding that the plain language of the statute made clear that contingency measures referred to measures that will automatically be taken in the future not measures that have already been implemented. Because it involves an interpretation of the Clean Air Act, the court's decision has implications well beyond the 5% Plan. At a minimum it will govern EPA's actions within the Ninth Circuit, and could potentially extend to the entire country. The EPA and the state have filed a Petition for Reconsideration and have asked that the full court review that portion of the Court's ruling.

We are sad to report that the Center recently lost one of its longest-serving Board Members. Cornelius "Corny" Steelink passed away on Saturday, November 12, 2016 due to complications from recent heart surgery. Corny and his wife Joanne have been living in Pasadena recently, but he still remained on our Board and faithfully called in to every board meeting. Corny, an emeritus professor of chemistry from the University of Arizona, joined the Board in the 90s and the Center greatly benefitted from his expertise and commitment to social justice. He will be missed.

THANK YOU

The Center would like to thank
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