SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

NORTH GUALALA WATER COMPANY, Petitioner, vs. STATE WATER RESOURCES CONTROL BOARD, Respondent.	Case No. SCUKCVG 01861 (Consolidated with North Gualala Water Company v. State Water Resources Control Board, Case No. SCUK CV PT 0390347) MINUTE ORDER

This is a petition for a writ of mandate in these consolidated cases. The record shows that North Gualala Water Company, hereinafter referred to as "Petitioner", is a small semi-rural water company. It has historically drawn water to serve its customers from the North Fork of the Gualala River. At some point in the past, it drew water directly from the North Fork of the Gualala River pursuant to a permit. Petitioner drew water from the river going back to at least 1965. In order to resolve a protest by the Department of Fish & Game (DFG), Petitioner agreed to permit term limitations which limited their right to divert water when necessary to maintain in-stream flows for fish life. Sometime later in 1978, in response to a petition for change in the place of use dating back to 1974, Petitioner agreed to a change in the terms of Permit No. 14853. The change in question was Term 9, which states as follows:

"For the protection of fish and wildlife, permitee shall during the period:

(a) from November 15th through February 29th, bypass a minimum of 40 cfs;

(b) from March 1st through May 31st bypass a minimum of 20 cfs;

(c) from June 1st through November 14th bypass a minimum of 4 cfs.

The total stream flow shall be bypassed whenever it is less than the designated amount for that period."

In 1989, Petitioner developed production well No. 4 and later in 1996, production well No. 5. Petitioner believed that production well No. 4 was not drawing from the river. One of their reasons for taking water from the wells rather than directly from the river was to improve the quality of the water and reduce water treatment costs. This was partially in response to activity by the Department of Health Services enforcing water quality to the customers of the Petitioner. Both wells are located in Elk Prairie in the alluvium a few miles inland from the mouth of the Gualala River and just upstream from the confluence of the Little North Fork of the North Gualala River. Well No. 4 appears to be about 180 feet from the river itself. Well No. 5 is also within 200 feet of the river.

Again in 1992, a group of Protestants alleged that the production wells were in fact drawing water from the river because they contended the water was coming from the subterranean stream, which is connected to the river itself. In 1993, Petitioner, while disagreeing with the contentions of the Protestants, applied for a permit to include well No. 4 in the diversion permit, reserving their right to challenge the ground water classification at a later date. A similar action was taken with respect to well No. 5 in 1994.

The basis of Petitioner's belief was in part a report from Luhdorff & Scalmanini, Engineers, which concluded that the ground water under Elk Prairie is not recharged from the North Fork of the Gualala River but is rather a subsurface flow from an adjacent Franciscan formation. Respondent did not agree with that and took the position that a permit subject to Term 9 was necessary to operate wells No. 4 and well No. 5.

The conditions allowing Petitioner to pump water through its wells under the limitations of Term 9 eventually became the subject of a petition for a writ of mandate, which was filed in the Superior Court in July of 2001. Eventually that action was stayed by Judge Richard Freeborn to allow the Petitioner to petition the State Board for a ground water classification hearing. Subsequently a ground water classification hearing was held before the Respondent Board in June 2002. In February 2003, the Board issued Order No. 2003-0004, which ruled that the water from which Petitioner was drawing to its wells was part of a subterranean stream and subject to a water rights permit with terms and limitations as set forth therein. A petition for reconsideration was denied.

In this petition for writ of mandate, the Petitioner seeks to have the Court overturn the Respondent's determination that the water is part of a subterranean stream. Essentially, the Petitioner's position is that water they are drawing is percolating ground water. If in fact the water that the Petitioner is drawing from is percolating ground water, then the parties concede that the Respondent Board would not have jurisdiction over it and, therefore, there would be no right of regulation or control by the Respondent Board in the activities of the Petitioner with respect to Wells 4 and 5 and presumably, any other wells they may drill in the adjacent area. (See AR 1495:14, 15 re proposed wells No. 6 and No. 7)

I. THE STANDARD OF REVIEW

In reviewing the decision of an administrative agency, the question is whether the Court is to apply the independent judgment test or the substantial evidence test. See *Bixby v. Pierno* (1971) 4 Cal.3d 130 (the independent judgment test); *Topanga Assoc. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506 (the substantial evidence test). In the latter test, the Court must review the record to see if there is a reasonable factual basis for the Board's action. It can only overturn the Board's action when, after review of the entire record, no reasonable person would have made a decision or reach the conclusion made by the agency. See *Young v. Gannon* (2002) 97 Cal.App.4th 209, 225; *Newman v. State Personnel Board* (1992) 10 Cal.App.4th 41. The Court, after reviewing Water Code Section 1126, CCP Section 1094.5, and cases cited thereunder concludes that the standard to be applied to this case is the substantial evidence case. See *Bank of America v. State Water Resources Control Board* (1974) 42 Cal.App.3d 198, 207.

Not only does the substantial evidence test seem to be supported by case law, but it makes more sense when the nature of the inquiry is considered. This type of case is heavily dependent on scientific data. It requires knowledge of geologic and hydrologic principles that is particularly suited to a Board that hears these matters on a consistent basis. Moreover, the Respondent Board has available to it expert staff not generally available to a trial court. In summary, it deals with a highly specialized subject matter where the Board's experience and expertise should be given great deference. Thus, the conclusion that the substantial evidence test is herein appropriate.

II. THE ORDER DETERMINING THE GROUND WATER CLASSIFICATION AND THE RESULTANT LIMITATIONS ON THE PERMIT MUST BE UPHELD

This case is determined by whether or not the ground water being pumped by the Petitioner in its wells was properly classified. Proper classification determines both the jurisdiction of the Respondent Board and their resulting right to regulate the taking of water pursuant to its statutory authority. Likewise if the Respondent Board has jurisdiction, not only must it consider the rights of the Petitioner, but the rights of any protesting parties and the broader public interest, including environmental and recreational considerations under the Public Trust doctrine. (*National Audubon Society vs. Superior Court of Alpine County* (1983) 33 Cal.3d 419, 433.

Whether Respondent Board Has Jurisdiction.

California Water Code Section 1200 provides:

> "Whenever the terms stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels."

This section defines water that is subject to appropriation and thus subject to Respondent's authority. Ground water which is not part of this definition of Section 1200 of the Water Code is referred to as "percolating ground water". The early case of *Los Angeles v. Pomeroy* (1899) 124 Cal. 597 (which preceded the adoption of Water Code Section 1200) established definitions for percolating ground waters and other water sources. To define the type of water is to define whether or not the Respondent Board has jurisdiction over the water. It is clearly settled that percolating ground water is not subject to this Water Code Section and is not subject to the control of Respondent Board. This emanates from both the statute and the earlier case of *Los Angeles v. Pomeroy*,

supra, at p. 632. Percolating ground water has been defined as ground waters that are not in a subterranean stream (*Los Angeles v. Pomeroy, supra*, at p. 628). Percolating ground waters are generally in the common sense of the term ... "vagrant wandering drops moving by gravity in any and all directions". See *A Treatise on the Law of Irrigation and Water Rights* by Clesson S. Kinney, 2nd Ed. Vol. 1 Section 1193, p.2162. In K*atz v. Walkinshaw* (1903) 141 Cal. 116. A new type of percolating waters was recognized, i.e. percolating waters supplying the flow of a stream as opposed to the vagrant wandering type. Presumably, this latter type of sub-surface water is percolating water that feeds a stream but is not strictly a sub-surface stream. All agree that under the historic standard set forth in *Los Angeles v. Pomeroy*, supra, that the following conditions have to exist for a body of water to be a sub-surface stream:

1. A sub-surface channel must be present.
2. The channel must have relatively impermeable bed and banks.
3. The course of the channel must be known or capable of being determined by reasonable inference.
4. The ground water must be flowing in the channel.

The law presumes that ground water is percolating ground water unless the contrary is shown. *Los Angeles v. Pomeroy*, supra, p.626. [1]

1. Is there is a channel? There is support in the record that the sub-surface flow is in a channel. First of all, the evidence discloses that alluvium is filling the bottom of the canyon to a depth of 170 feet. AR4-0629. Beneath the alluvium is Franciscan bed rock AR7-1037-1041. The topography is such that the alluvium is surrounded by hills

[1] The trial court must accept this as binding on it since it comes from the Supreme Court. One has to wonder, however if a factual distinction can be made between the facts in *Pomeroy* and this case where the ground water in question at the point of extraction is less than 200 feet from the river and clearly within the alluvial plain of the river.

and logic suggests that water, which everyone concurs is flowing generally to the southwest, has to be in the plain. See AR4-0627 (geologic cross-section).

2. Is there an impermeable bed and banks? The test if not whether the bed and banks are completely impermeable but relatively impermeable. The administrative record is replete with references that the overlying alluvium is 2.5 to 3 times higher than the surrounding bed rock. AR7-1042, AR8-1292.

3. Is the course of the channel known or capable of being ascertained by reasonable inference? Again the answer is yes. See AR7-1049, AR8-1294.

The Adminstrative Record supports this. AR7-1042, lines 5-13.

4. Is ground water flowing in the channel? Yes, this is not seriously in dispute. Petitioner's main contention is that the flow of subterranean water is to the southwest and that it is largely from the Franciscan bedrock, not that groundwater is not flowing in the channel. (See Petitioner's brief filed before Respondent Board. AR 1480, 1496-1497)

There is both evidence that militates against these conclusions and items of evidence that supports and corroborates these conclusions. For example, Petitioner's expert conceded that Franciscan bedrock has to be fractured to have any permeability. AR8-1260. Also, there is some general evidence that Franciscan bedrock contains aquifers, but no specific evidence that in that area there is an aquifer. AR8-1264. Moreover, aquifers are rare in Franciscan bedrock. AR8-1265. Petitioner's expert testified that the predominant flow of ground water is perpendicular and not parallel to the river but conceded that it goes in a general southwest direction into the stream; and after that, he doesn't know where it goes. AR8-1279. Also, there are no other wells in Franciscan bedrock in the Elk Prairie area. AR8-1282. There is also testimony that the source of recharge is in dispute. Some say from the alluvial prairie upstream (AR8-

1294), others from the bedrock, but that amount from the bedrock is a minor amount AR8-1320. In any event, no one seems to be able to quantify the amount of water allegedly coming from the bedrock as opposed to other sources. Mr. Scalmanini states that the ground water flows toward the river and there is no inducement of infiltration from the surface flow by pumping of the production wells AR4-0598. Other persons have testified that pumping effects the surface flows. AR8-1361. One witness reported a drop of 8 inches in the surface flow which was characterized as a "demonstrable hydraulic response" after a pumping test. AR7-1050, lines 7-22.

Petitioner also makes much of the fact that the river has a "gaining reach". That is, at a certain location between two points in the river, the downstream surface flow is more than 1.5 cfs than the area upstream. AR4-0608.

An increase in the water flow downstream does not necessarily negate the proposition that the water is flowing in an underground channel. It simply means that water from one or more sources is moving downstream in response to changes in the gradient and is greater at that location than it is upstream. This is consistent with the ground water flowing in a southwesterly direction. AR8-1366. Petitioner acknowledges partial discharges into the channel from a combination of bedrock source and the alluvium. AR 0595, 0598.

Petitioner makes much of the fact that there is no "contracted" channel at the point where the water is being drawn. This is not persuasive. Water code §1200 does not speak of a "contracted" channel. *Pomeroy*, supra, does, but it should be noted that the *Pomeroy* case was decided a decade or more before Water Code §1200 or its predecessor was enacted. The Court believes that when the Supreme Court used the language referring to "contracted" and "bounded" it was making the point that this was in

connection with whether the flow was "defined" as opposed to "meandering". (See *Los Angeles vs. Pomeroy, supra,* p. 633) Moreover, the topographical evidence submitted to the Board clearly shows the alluvium as bounded on all sides by hills that are incrementally increasing in height, as one would expect in an alluvial river valley.

The Court is not persuaded that the Petitioners have failed to exhaust their administrative remedies. The Court also does not find any estoppel on the part of Petitioner to challenge term 9 since they clearly complied under protest and reserved their right to contest the groundwater classification. With respect to the dispute over the applicability of term 9 of the permit; the Court finds that the interpretation adopted by the Board is consistent with their right to regulate and thus is a valid condition that must be complied with.

CONCLUSION

The test here is whether the operation of production wells No. 4 and No. 5 have an impact on the North Fork of the Gualala River. The evidence discloses that it does. The Supreme Court says that pumping in a well close to a stream impacts the stream, however slight. (See *Larsen v. Appolonis* (1936) 5 Cal.2d 440, 444). Common sense suggests this is the case. The only question is the degree of the impact. Once the fact of the impact is established, then the Respondent Board has jurisdiction over the matter. It must then exercise its jurisdiction pursuant to the statutory mandate and decisional law, including the factors delineated in *Audubon, supra* concerning matters of the public trust. To find no jurisdiction in the Board in this case would be to close the door to regulation even if the number of production wells subsequently increased tenfold. This would obviously result in the diminution or even the total destruction of the fish and wildlife,

which are dependent on a minimum flow in the river. This is a result no one would want and the legislature never intended.

Accordingly, the petition for writ of mandate is denied. Respondent shall have cost of suit. Counsel for Respondent shall prepare any findings and a form of judgment not inconsistent with this opinion.

Dated: November 8, 2004.

Leonard J. LaCasse

LEONARD J. LaCASSE
Judge of the Superior Court

PROOF OF SERVICE BY MAIL

I , Dan Garcia, declare:

I am employed in the County of Mendocino, State of California; I am over the age of eighteen years and not a party to the within action. My business address is P. O. Box 996, Ukiah, California 95482.

I am familiar with the County of Mendocino's practice whereby each document is placed in an envelope, the envelope is sealed and placed in the office mail receptacle. Each day's mail is collected and appropriate postage affixed thereto and deposited in a U.S. mailbox at or before the close of each day's business.

On the date of this declaration, I served copies of the attached document on the below listed persons by placing a true copy thereof, in the United States mail, addressed as follows:

Alan B Lily, Esq
1011 Twenty Second Street
Sacramento, Ca 95816-4907

Mark W Poole, Esq
455 Golden Gate Ave, Suite 11000
San Francisco, Ca 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this **10** day of **November** 2004 at Ukiah, California.

Dan Garcia