



19STCP01176 *Santa Barbara Channelkeeper v. SWRCB et al.*

March 11, 2020 Tentatives re Final Status Conference

Public Audio And/or Video Access To Trial:

Please be prepared to advise the Court as to the extent to which your chosen hybrid live/virtual trial platform will allow non-participating parties and interested members of the public to observe without being active participants. Will there be a limit on the number of registrants who can listen? Will video be available or only audio? How do you plan to communicate this availability to interested parties and members of the public? Will any charges be imposed on such registrants?

Possible Participation By Ojai Valley Groundwater Management Agency:

I believe this public entity is on notice of this case, but to the Court's knowledge it has never made an appearance in this case. Is there any reason to believe it will do so as Amicus Curiae or otherwise? If not, why not?

SWRCB Position Re City Of Ojai's Claim To Appropriative Rights:

In prior filings the City of Ojai claims that it perfected appropriative riparian rights to takes from the Ventura River and then to divert (export) such water to spreading grounds in the Ojai Basin (presumably with a SWRCB permit to do so since this was post-1914 take) and that having done so, it uniquely owns the disposition of such diverted water after its first beneficial use such that any flow of such water back into surface water is legally irrelevant since City of Ojai has exclusive rights to such water even if it has actually lost physical control of some of it. Does SWRCB agree that this is a legally correct position by this historic water diverter?

Cross-Defendant Whitman et al. Request To Have Early Hearing On Motion To Strike: Denied. City of Buena Ventura given until April 19, 2022 to file Fourth Amended Cross-Complaint

These cross-defendants asked to follow up on the Court's comments when the Motion For Judgment On The Pleadings of these parties was heard on Feb. 8, 2022 by challenging the City of Buena Ventura's (hereafter City of Ventura) claim to Pueblo Water Rights by litigating the Pueblo Rights as part of the Phase I trial, which is limited to the factual issue of interconnectedness of the surface flows with one or more of the underlying groundwater basins. While the Court was admittedly doubtful that the existence or non-existence of Pueblo Rights would be relevant to the Phase I trial, it gave these parties the opportunity to provide an Offer Of Proof of such facts that they wished to offer which would make Pueblo Rights factually relevant (even though these parties had not filed a timely or untimely Notice Of Intent To Participate In Phase I Trial). Instead, the Court got a thinly disguised Motion For Reconsideration re-arguing the various points made in the previously decided Motion For Judgment On The Pleadings but no Offer Of Proof, as such.

These Cross-Defendants have failed to show that there is anything specific to the existence or non-existence of Pueblo Rights which should inform the factual analysis of interconnectedness in the Phase I trial. Instead, the Court will give City of Ventura until April 19, 2022 to file a Fourth

Amended Cross-Complaint with revised pleadings of the Pueblo Rights claim. ***To avoid a vast deluge of new filings with the Clerk, the Court will also provide that parties which have previously appeared and responded to the Third Amended Cross-Complaint do NOT have to file a new responsive pleading, and they may instead, by inaction, stand on the Answers previously filed.*** Any appearing cross-defendant which does want to challenge the sufficiency of the new pleading by City of Ventura, specific to the issue of Pueblo Rights only, may file a demurrer or other appropriate responsive pleading in the time otherwise allowed by code.

Factual Issues To Be Tried At Upcoming Trial:

Having reviewed the several trial briefs and motions in limine, the Court has some preliminary comments.

1. Two Different Formulations Of The First Fact Issue To Be Decided:

The factual issue of interconnectedness of the surface water flows with one or more of the underlying groundwater basins can be seen as two or more alternative questions, and the decision as to which is the correct question to decide is a question of law. To allow for efficient appellate review, the Court is presently inclined to answer each of the following two questions once the trial is completed:

- a) Are the surface flows of the Ventura River and its tributaries connected to one or more of the underlying groundwater basins absent human intervention during the months of April to October under current climate conditions? If so, is connectedness shown as to each such groundwater basin or, if not, as which such groundwater basins is connectedness shown?
- b) Are the surface flows of the Ventura River and its tributaries in their current conditions connected to one or more of the underlying groundwater basins under current climate conditions? If so, is connectedness shown as to each such groundwater basin or, if not, as which such groundwater basins is connectedness shown?

The first iteration assumes totally natural conditions and no interference by humans, but it is time limited to the annual period when diminished flows in Reaches 3 and 4 of the Ventura River give rise to plaintiff's original claim in this case. If a certain groundwater basin is connected in its wholly natural state to surface flows in February or March, but not in July, for example, that connectedness would appear irrelevant to the issues presented in this case, and there is no law of the case which would suggest that City of Ventura can proceed against persons with interests in groundwater basins not so connected. If there is no human interference to be assumed, there is no reason to factor in possible mitigating water storage impact on river flows in the summer season.

Conversely, the second iteration looks at the question of interconnectedness based on actual facts as currently existing, reflecting over 150 years of human exploitation of the water resources in this watershed and in these groundwater basins. California law historically treats groundwater rights as divorced from surface water rights unless they are connected in fact, and it is not clear to this Court whether a purely theoretical connection (i.e., pre-existing conditions absent historic human takes) is relevant if there is no material connectedness at the present time as a factual

matter. If the groundwater and surface flows are not, in the relevant recent past, connected, one needs to find a legal policy reason to deem them connected nevertheless for purposes of legal analysis. Declining to do so tends to preserve the correlative rights of groundwater users in a given basin as legally separate from the competing interests of riparian owners, leading to simplification of the legal process, presumably a desirable result. If theoretical connectedness is enough, then presumably there may be some reason to modify this question, similar to how the first iteration is time limited, to narrow the inquiry to the question of connectedness limited to the months of April to October. Conversely, if the question is limited to current connectedness, in fact, not theoretical connectedness possibilities, there seems little or no reason to impose a seasonal limit to the question since human intervention creates the opportunities for storage to smooth out the availability of water during traditional dry seasons. Actual connectedness in February may be reason enough to consider whether a given groundwater basin's current time-limited connectedness to a surface flow can, nevertheless, have an impact on the availability on non-consumptive, in-flow resources at some other point in the calendar year, e.g., summer.

You will note that I have not at this time stated what, if any, adjective or adverb should modify or limit the concept of "connected" or "connectedness." Some parties, e.g., Garrison Group, state that "sufficient" and "material" should be the limiting terms. The Court does not believe that it has made a definitive ruling in this regard, but it will need to do so eventually. Even if there is no limiting term on the concept of "connected" for purposes of this question, the following question(s) unquestionably require some consideration of materiality.

2. Mixed Question(s) Of Fact & Law To Be Decided Next:

Regardless of whether the correct formulation of Question 1 is Iteration "a" or "b," there are closely related, but distinct, mixed questions of fact and law which then need to be decided. The first is:

Whether including the claimants to riparian rights "in an interconnected surface water body" in a legal proceeding "is ***necessary for the fair and effective determination*** of the groundwater rights in a basin" within the meaning of C.C.P. § 833(c)? (emphasis added)

As argued by various parties aligned with City of Ojai, it is also clear that City of Ventura is proceeding with something of the converse relationship front of mind, i.e., that to obtain effective determination of competing rights to surface water there is a need to include claimants to the underlying groundwater. The Legislature has given us a clear test for the first question via the statute quoted above, but the formulation of suitable procedures to adjudicate issues left to the trial court via the decision in *Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, remains a matter of the common law, meaning that this Court should use its best judgment to develop a procedure which is fair and resolves the relevant question(s). Absent a statute or caselaw on point, the Court would phrase the related question as follows (borrowing the language of C.C.P. § 833(c)):

Whether including the claimants to groundwater rights underlying an interconnected surface water body in a legal proceeding is ***necessary for the fair and effective determination*** of the riparian rights? (emphasis added)

The answer to these two questions should be the same, but the Court takes the time to provide the alternate phrasing, based on its right and duty to do so as a common-law court, to make clear that the concept that inclusion of various parties who wish to be left alone is “necessary for the fair and effective determination” of the litigation is the correct test whether the groundwater dispute is driving the litigation or the surface-water dispute is driving the litigation.

The bottom line is that this separate question allows – and requires – the Court to ask if there is something about the connectedness of the surface and subterranean water which justifies roping in parties who wish to consider their water rights as separate and disconnected. If the phrase “necessary for fair and effective determination” is to mean anything, the extent of connectedness should exceed a one-drop flow from surface to groundwater or vice versa. How much is required will be determined in due course once the evidence is presented. Further briefing on the issue would also probably be helpful to the Court; this should probably include an exegesis on the relevance (or not) of the common-law “common source” doctrine.

3. Questions Not Relevant To Phase I Trial:

Various briefs suggest that parties expect to litigate if current uses are unreasonable. That is not relevant to a determination of connectedness.

Similarly, any proof that a given user or group of users’ pumping from a given basin is insufficient to impact downstream flows does not address the question of the connectedness of that basin, in the aggregate, to the downstream flows; that is the relevant question.

Other briefs suggest that the impact of current pumping, in the aggregate, in a given basin may be relevant to the question of connectedness. Insofar as aggregate pumping informs the answer to Iteration “b” above, e.g., by an expert’s conclusion that such pumping has consistently left the groundwater basin’s height at a level that it does not contribute to a “gaining” stream, then it may be relevant to connectedness insofar as Iteration “b” is the correct formulation of the question. It is less clear that an expert’s opinion that current pumping in a given basin, in the aggregate, is not causally related to the impaired conditions of Steelhead Trout in Reaches 3 and 4 of the Ventura River is answering the relevant question of connectedness, as such. Connectedness should be shown via flow rates in the surface stream at various locations and the contribution of X acre-feet of surface flow to a given groundwater basin or the contribution by such groundwater basin of Q acre-feet to a gaining stream. Whether the fish are doing well or not introduces compounding and confounding factors which may be detached from the question of where the water does or does not go.

4. Challenges To Various Experts Via MIL’s:

Further Tentatives will be provided once I have a chance to review the written Oppositions, due today.