

CASE NO. C067252

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA**

THIRD APPELLATE DISTRICT
DIVISION ____

COUNTY OF SISKIYOU

Petitioner,

vs.

SUPERIOR COURT OF THE COUNTY OF SACRAMENTO

Respondent,

ENVIRONMENTAL LAW FOUNDATION,

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,

INSTITUTE FOR FISHERIES RESOURCES

STATE WATER RESOURCES CONTROL BOARD

Real Parties in Interest.

Sacramento Superior Court Case No. 34-2010-80000583

APPEAL FROM THE SUPERIOR COURT FOR SACRAMENTO COUNTY

HON. Lloyd Connelly

**REAL PARTIES IN INTEREST ENVIRONMENTAL LAW FOUNDATION,
PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS
AND
INSTITUTE FOR FISHERIES RESOURCES
RETURN TO ALTERNATIVE WRIT BY ANSWER AND
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
PETITION FOR WRIT OF MANDATE**

James Wheaton (SBN 115230)
Danielle Fugere (SBN 160873)
Jennifer Maier (SBN 251276)
ENVIRONMENTAL LAW
FOUNDATION
1736 Franklin Street, 9th Floor
Oakland, California 94612
Tel: (510) 208-4555
Fax: (510) 208-4562

Glen H. Spain (SBN 88097)
PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS
INSTITUTE FOR FISHERIES
RESOURCES
Northwest Regional Office
PO Box 11170
Eugene, OR 97440-3370
Tel: (541) 689-2000
Fax: (541) 689-2500

Richard Michael Frank
(SBN 63482)
University of California,
Davis
School of Law
Davis, CA 95616
Tel: (916) 217-1292
Fax: (510) 643-2672

Attorneys for Real Party in Interest

TABLE OF CONTENTS

	Page
ANSWER.....	1
MEMORANDUM OF POINTS AND AUTHORITES	7
I INTRODUCTION	7
II. STANDARD OF REVIEW	13
III. THE TRIAL COURT PROPERLY DENIED SISKIYOU COUNTY’S MOTION TO TRANSFER VENUE	16
A. THERE IS NO BASIS FOR A MOTION TO TRANSFER VENUE UNDER CALIFORNIA CCP §392(A)(1) WHERE AN ACTION DOES NOT SEEK THE RECOVERY OF REAL PROPERTY, A DETERMINATION OF REAL PROPERTY RIGHTS, OR ALLEGE INJURY TO REAL PROPERTY	16
1. ELF’s Action Does Not Seek a Determination of Right or Interest in Real Property	17
2. ELF’s Petition Does Not Allege Injury to Real Property	20
B. WATER IN ITS NATURAL STATE DOES NOT CONSTITUTE REAL PROPERTY AND THEREFORE CANNOT PROVIDE THE BASIS FOR A MOTION TO TRANSFER VENUE UNDER CALIFORNIA CCP §392(A)(1).	21
1. Water Cannot be Owned and Is Therefore Not Property	21
2. The County’s Reliance on Dicta Regarding Water Ownership in Pre-1929 Cases Is Unavailing	24
3. The County Improperly Relies on Irrigation Cases for the Proposition that Water in Its Natural State Is Property	28
4. California Civil Code §658.3 Provides A Real Property Interest in the Use of A Watercourse Appurtenant to Land ..	29

C.	AFFIRMING THE TRIAL COURT’S DENIAL OF THE COUNTY’S MOTION WILL HAVE NO EFFECT ON VENUE FOR FUTURE STREAM ADJUDICATIONS	31
IV.	THE TRIAL COURT PROPERLY DENIED THE COUNTY’S DEMURRER FOR LACK OF SUBJECT MATTER JURISDICTION	33
A.	THE SUPERIOR COURT OF SISKIYOU COUNTY DID NOT RETAIN CONTINUING JURISDICTION OVER THE SUBJECT MATTER OF ELF’S PETITION	34
1.	ELF’s Petition and the Decree Do Not Involve the Same Subject Matter	35
a.	The Subject Matter of ELF’s Petition is Whether the State and County Have Authority to Manage Interconnected Groundwater Resources Under the Public Trust Doctrine	35
b.	The Trial Court Properly Found that the Scope of the Decree Does Not Reach All Sources of Interconnected Groundwater.....	36
c.	ELF’s Petition Does Not Involve Instream Flow Requirements for the Scott River.....	38
d.	The Trial Court Properly Found that the ELF Petition Would Not Affect Existing Water Rights	39
e.	ELF’s Action Will Not Establish Different Regulatory Standards That Would Conflict with the Decree... ..	40
B.	SACRAMENTO SUPERIOR COURT HAS PROPER JURISDICTION TO INTERPRET THE LEGAL SCOPE AND THE SUBJECT MATTER OF A DECREE FROM ANOTHER COUNTY	42
C.	THE RULE OF CONCURRENT JURISDICTION DOES NOT PRECLUDE SACRAMENTO SUPERIOR COURT FROM HEARING ELF’S ACTION.....	45
V.	CONCLUSION.....	49

VERIFICATION.....50
CERTIFICATE OF COMPLIANCE.....51
PROOF OF SERVICE.....52

TABLE OF AUTHORITIES

CALIFORNIA STATE CASES

	Page
<i>Apartment Ass’n of Los Angeles v. City of Los Angeles</i> (2001) 24 Cal.4th 830	23
<i>Beyer v. Tahoe Sands Resort</i> (2005) 129 Cal.App.4th 1458	30
<i>Browne v. Superior Court</i> (1940) 16 Cal.2d 593	46, 47
<i>Calhoun v. Callejo City Unified School Dist.</i> (1993) 20 Cal.App.4th 39	13
<i>Childs v. Eltinge</i> (1973) 29 Cal.App.3d 843	45
<i>City of Berkeley v. Superior Ct.</i> (1980) 26 Cal.3d 515, 521	18
<i>City of Long Beach v. Mansell</i> (1970) 3 Cal.3d 462, 482	18
<i>Copeland v. Fairview Land & Water Co.</i> (1913) 165 Cal. 148	29
<i>Dobos v. Voluntary Plan Administrators, Inc.</i> (2008) 166 Cal.App.4th 678	14
<i>Donahoe v. Rogers</i> (1914) 168 Cal. 700	16,17
<i>Eddy v. Simpson</i> (1853) 3 Cal. 249	22
<i>Environmental Charter High School v. Centinela Valley Union High School Dist.</i> (2004) 122 Cal.App.4th 139	14
<i>Fawkes v. Reynolds</i> (1922) 190 Cal. 204.	22

Fontaine v. Superior Court (2009) Cal.App.4th 830	13
<i>Ford Motor Credit Co. v. Superior Court</i> (1996) 50 Cal.App.4th 306	13
<i>Fremont Indem. Co. v. Fremont General Corporation</i> (2007) 55 Cal.Rptr.3d 621	15
<i>Gilbert v. City of Sunnyvale</i> (2005) 130 Cal.App.4th 1264, 1275	14
Gouskos v. Aptos Village Garage, Inc. (2001) 94 Cal.App.4th 754	13
<i>Holmes v. Lerner</i> (1999) 74 Cal.App.4th 442	15
<i>Horsemen’s Benevolent & Protective Assn. v. Valley Racing Assn.</i> (1992) 4 C.A.4th 1538	15
<i>Ivanhoe Irr. Dist. v. All Parties</i> (1960) 53 Cal.2d 692	19
<i>Jurupa Ditch Co. v. San Bernardino County</i> (1967) 256 Cal.App.2d 35	22
<i>Kidd v. Laird</i> (1860) 15 Cal. 161	11, 22, 26, 27
<i>Kindig v. Palos Verdes Homes Ass’n.</i> (1939) 33 Cal.Ap.2d 349	23
<i>Lux v. Haggin</i> (1886) 69 Cal. 255	26
<i>Marks v. Whitney</i> (1971) 6 Cal.3d. 251	19
<i>Marriage of Kacik</i> (2009) 179 Cal.App.4th 410	20

<i>Nat'l Audubon Society v. Superior Court</i> (1983) 33Cal.3d 419	7,22
<i>O.W.L. Foundation v. City of Rohnert Park</i> (2008) 168 Cal.App.4th 568	14
<i>Palmer v. Railroad Com. Of Cal.</i> (1914) 167 Cal. 163	22
<i>People v. Brady</i> (1991) 234 Cal. App. 3d 954	21
<i>People v. California Fish Co.</i> (1913) 166 Cal. 576	19
<i>People v. Kwok</i> (1998)63 Cal.App.4 th , 1236	21
<i>People v. Licas</i> (2007) 41 Cal.4th 362	20
<i>People v. Murrison</i> (2002) 101 Cal. App.4th 349	23
<i>People v. Preyer</i> (1985) 164 Cal.App.3d 568, 573	13
<i>People v. Shirokow</i> (1980) 26 Cal.3d 301	22
<i>People v. Tapia</i> (2005) 129 Cal.App.4th 1153	23
<i>Relovich v. Stuart</i> (1931) 211 Cal. 422	28
<i>Roddenberry v. Roddenberry</i> (1996) 44 Cal.App.4th 634	14
<i>San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n</i> (1939) 34 Cal.App.2d 159	28, 29

<i>Schimmel v. Martin</i> (1923) 190 Cal. 429	22, 27, 28
<i>Stanislaus Water Co. v. Bachman</i> (1908) 152 Cal. 716	22
State Bd. Of Equalization v. Superior Court (2006) 138 Cal.App.4th 951, 954	13
<i>State of California v. Superior Court</i> (2000) 78 Cal.App.4th 1019	Passim
<i>Steiner v. Thexton</i> (2010) 48 Cal.4th 411	15
<i>Troxell v. Troxell</i> (1965) 237 Cal.App2d 147	13
<i>United States v. State Water Resources Control Bd. (Racanelli)</i> (1986) 182 Cal.App.3d 82	23
<i>Wrin v. Ohlandt</i> (1931) 213 Cal. 158	13

CALIFORNIA STATUTES

Code of Civil Procedure

§ 392.....	17, 20, 25
§ 392(a)	21, 25
§ 392(a)(1)	16, 20, 21, 32
§ 400.....	13, 14
§ 401.....	45
§ 1085	45

California Civil Code

§ 654.....	26
§ 655	26
§ 658	26, 30
§ 658(3).....	29
§ 662	30
§ 670	26

Water Code

§ 2500.....	32
§ 2501.....	46
§ 2750	32

The Environmental Law Foundation, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources (collectively "ELF") file their Return to the Alternative Writ by way of this Answer and Memorandum of Points and Authorities in Opposition to the County of Siskiyou's Verified Petition for Writ of Mandate as follows.

ANSWER

INTRODUCTION

The unnumbered paragraphs set forth in the Introduction are statements, characterizations, opinions, contentions, and/or conclusions of fact and law. ELF alleges that no response is required. To the extent that a response is required, ELF denies the allegations.

STATEMENT OF THE CASE

The Parties

1. ELF admits the allegations of paragraph 1.
2. ELF admits the allegations of paragraph 2.
3. ELF admits the allegations of paragraph 3.

Appendix of Exhibits

4. ELF admits that an Appendix of Exhibits was submitted by Petitioners and that the Appendix contained a series of documents. ELF lack sufficient information or belief to admit or deny the remaining allegations of paragraph 4, and on that basis deny all remaining allegations in the paragraph.

Procedural History of Case

5. ELF admits that petitioners/plaintiffs Environmental Law Foundation, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources filed a First Amended Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief in the Sacramento County Superior Court on October 14, 2010. ELF admits that the respondents/defendants are the State Water Resources Control Board ("Water Board") and the County of Siskiyou ("County").

6. ELF admits that their Petition requests an order from the Court declaring that groundwater which is hydrologically connected to navigable surface flows, can and must be managed and protected in a manner to protect the Public Trust resources of surface Public Trust waters, such as the Scott River. ELF admits that their Petition requests alternative and preemptory writs or preliminary and permanent injunctions compelling Respondent Siskiyou County to cease the issuance of well drilling permits for groundwater not previously adjudicated within the Scott River sub-basin until such time as they are not in violation of their public trust duties. ELF admits that the Scott River and its interconnected groundwater are located in Siskiyou County. The remaining allegations in paragraph 6 are Petitioner's statements, characterizations, opinions, contentions, and/or conclusions of fact and law. ELF alleges that no response is required. To the extent that a response is required, ELF denies the remaining allegations of paragraph 6.

7. ELF admits that on January 30, 1980, the Siskiyou County Superior Court issued a decree adjudicating specific rights in the Scott River. ELF denies that the decree adjudicated “all water rights in the Scott River, including rights to ‘interconnected groundwater.’” ELF alleges that the decree expressly excluded some interconnected groundwater located beyond certain boundaries as set forth on the map appended to and incorporated into the decree. The remaining allegations in paragraph 7 are Petitioner’s statements, characterizations, opinions, contentions, and/or conclusions of fact and law. ELF alleges that no response is required. To the extent that a response is required, ELF denies all remaining allegations in paragraph 7.

8. ELF admits that the cited language in paragraph 8 is one of many paragraphs contained in the Decree. All remaining allegations in paragraph 8 are Petitioner’s statements, characterizations, opinions, contentions, and/or conclusions of fact and law. ELF alleges that no response is required. To the extent that a response is required, ELF denies all remaining allegations of paragraph 8.

9. ELF admits the allegations of paragraph 9.

Trial Court Decision

10. ELF admits that on January 21, 2011, after oral argument on the County’s demurrer and motion to transfer venue, the Sacramento County Superior Court, Judge Lloyd G. Connelly presiding, issued an order from the bench overruling the County’s demurrer and denying the County’s motion to transfer

venue. ELF admits that a minute order of Judge Connelly's decision was issued. ELF admits that Judge Connelly's ruling is set forth on pages 62-71 of the Reporter's Transcript, and further that the court expressly permitted the parties to prepare a proposed order including and incorporating the transcript in lieu of a written ruling. The remaining allegations in paragraph 10 are Petitioner's characterizations of facts and, to the extent a response is required, ELF denies the remaining allegations. ELF denies that Petitioners have accurately set forth the court's reasons for its decision in the Memorandum of Points and Authorities attached to Petitioner's writ.

TIMELINESS OF PETITION

11. ELF admits that the County's petition for writ of mandate is timely.

PETITIONER'S LEGAL ARGUMENTS AND CLAIMS

12. The allegations in paragraph 12 are Petitioner's statements, characterizations, opinions, contentions, and/or conclusions of fact and law. ELF alleges that no response is required. To the extent that a response is required, ELF denies all allegations of paragraph 12.

AVAILABILITY OF REMEDY FOR WRIT REVIEW

13. Paragraph 13 consists of legal conclusions and does not require a response. To the extent that a response is required, ELF denies all allegations of paragraph 13.

NECESSITY FOR STAY OF PROCEEDINGS

14. The allegations in paragraph 14 are moot by virtue of the stay issued by this Court. The allegations are Petitioner's statements, characterizations, opinions, contentions, and/or conclusions of fact and law. ELF alleges that no response is required. To the extent that a response is required, ELF denies all allegations of paragraph 14.

15. The allegations in paragraph 15 are moot by virtue of the stay issued by this Court. The allegations are Petitioner's statements, characterizations, opinions, contentions, and/or conclusions of fact and law. ELF alleges that no response is required. To the extent that a response is required, ELF denies all allegations of paragraph 15.

AFFIRMATIVE DEFENSES

1. The Petition fails to state sufficient facts to constitute a cause of action for transfer of the case to Siskiyou County.

///

///

///

///

///

///

///

PRAYER FOR RELIEF

WHEREFORE, ELF prays for relief as follows:

1. The request for writ of mandate be denied and this Petition dismissed with prejudice;
2. That Petitioner be awarded nothing by its Petition;
3. That ELF be awarded cost of suit incurred herein;
4. That ELF be awarded attorneys fees incurred herein;
5. For such other and further relief as the Court deems just and proper.

Dated: 18 March 2011

Respectfully Submitted,

Attorneys for Real Parties
Environmental Law Foundation,
Pacific Coast Federation of
Fishermen's Associations, and Institute
for Fisheries Resources

MEMORANDUM OF POINTS AND AUTHORITES

I. Introduction

In the Petition below (“ELF’s Petition”), Real Parties in Interest¹ seek declaratory relief to determine whether the Public Trust Doctrine governs public agencies’ management of groundwater that is hydrologically connected to surface Public Trust waters, using the Scott River as an example. The theory is a simple explication of the Public Trust Doctrine, conceptually similar to the Supreme Court’s application of the Doctrine to non-navigable tributaries in the *Mono Lake* case. *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419. The only relief sought is a declaratory judgment against the State Water Resources Control Board (“State Water Board”) and Siskiyou County (“County”) that they have the authority under the Doctrine to manage groundwater to protect surface waters, and an injunction against the County to cease issuing new permits for wells for groundwater that is *not* part of an adjudication of the Scott River entered in 1980 (“Decree” or “Adjudication”). No individual water rights holder, extractor, or landowner is named in ELF’s Petition, and no adjudicated water rights will be affected by the case. ELF’s Petition seeks to determine only the authority of public agencies with regard to interconnected groundwater generally;

¹ Environmental Law Foundation, Pacific Coast Federation of Fishermen’s Associations and the Institute for Fisheries Resources (collectively, “ELF”) are Real Parties in Interest in this Court and Petitioners below. To avoid confusion they will be referred to as “ELF” throughout this brief.

no rights or property of any individual or entity is at issue at.² Only if the Court below determines that the Doctrine does apply, and the Water Board decides to use that authority and take some action to discharge its responsibilities to protect Public Trust resources in some future proceeding itself, or in the Superior Court in Siskiyou County, might anyone's existing or future water rights be affected. The fact that some *future, speculative* action *might* affect specific rights in the County is no reason to transfer *this* action.

The County presents two issues in its Petition before this Court (“County’s Petition”) – venue and jurisdiction – in its effort to move this case to Siskiyou County Superior Court. Both issues, however, are premised on false or erroneous assertions of fact and law.

The venue issue hinges on application of Code of Civil Procedure section 392(a)(1), which governs cases “[f]or the recovery of real property, or of an estate or interest therein, or for the determination in any form, of that right or interest, and for injuries to real property.” To take advantage of that statute, the County makes a remarkable assertion – that “‘water’ is a form of ‘real property.’”

(County’s Petition at 2.)

² In this regard, County’s Petition in this court is at least misleading. The first sentence says the case concerns “whether a court of one county can properly adjudicate rights and interests in a water body located in another county. . .” The Petition below does *not* seek an adjudication of water rights in a stream. It seeks only to determine public agencies’ authority to regulate or manage a public resource.

Before discussing the interesting question of whether water is or is not property, however, the venue statute has no application here. As noted, the action below does not seek a “determination” of anyone’s interests in the water, nor is any injury to the water alleged. No person’s water rights will adjudicated in Sacramento; only the authority of the state to manage a public resource is at issue. If and when it has been decided that the State has that authority, it may choose to exercise it in ways that affect water use and water rights, but would properly do so in Siskiyou County Superior Court. That is not this case. ELF’s petition also does not allege any injury to any water. The only allegation of injury to the Scott River is derived from harm to Public Trust resources reliant upon the water, particularly fish. But injury to fish is not an “injury to real property.” Fish are wild animals, not real property.

Invoking section 392 is also incorrect because water is not “real property, for two reasons. First, water is not and never has been property, much less real property. While it is true that a person can have water rights – the right to take water from surface and underground sources – the person thereby gains only a usufructuary right to put the water to reasonable and beneficial use. While that right can be treated as a form of property (that is protected by courts; to which there is exclusive use; and which can be sold), it is the right, not the water, in which the person has a property interest. That right does not give the person a proprietary ownership over the water in the body from which it comes. To assert ownership in the water itself erases the distinction between water in its natural

state from water that has been severed and placed in a ditch, a pipe, a tank, or a bottle. The latter types of water can be owned, sold, and otherwise treated as property. But water in its natural state, which this case addresses, has none of those characteristics. The Public Trust has no application at all to water that has been removed from the natural environment. Trust obligations, duties and protections do not flow with the water to its new place, be it a ditch or a bottle. Therefore property issues and cases relating to water that has been taken and put to use have no relevance to this case.

The second flaw in the premise is related to and reinforces the first. Water in its natural state cannot be owned at all. Not by the state, not by an individual. Incapable of being owned, it is not property at all.³ This is so fundamental under California law that it is surprising that the County avers otherwise.⁴ In a case

³ “Certain things are not the subject of actual or lawful ownership and are ordinarily not considered property. Thus there is no ownership. . .of water in a stream or other body of water.” Witkin, 13 Summary of California Law XVIII *Personal Property*, § 1.

⁴ The County is itself somewhat divided on this issue. The County seems to recognize the lack of ownership of water (*see* County’s Petition at pp. 21-22, discussing the difference between the non-possessory, usufructuary interest in a water right, and possessory rights, which define what constitutes property.), yet in the same paragraph turns on a dime and asserts that the “corpus” of the water is in fact real property. *Id* at 22. But the cases it cites for this proposition all have to do with water that has been removed from its natural course and placed into “reservoirs, ditches and canals.” As noted, that is not what this case is about at all.

If anything more were needed, the case law is very clear and negates the County’s assertion: “the State does *not* have a property interest in the corpus of the waters.” *State of California v. Superior Court* (2000) 78 Cal.App.4th 1019, 1032 (emphasis in original).

nearly as old as the State itself, the Supreme Court held “[r]unning water, so long as it continues to flow in its natural course, is not, and cannot be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself.” *Kidd v. Laird* (1860) 15 Cal. 161, 179-180. In a case 140 years later, another court canvassed all the statutory and case law authority on the subject and arrived at the same conclusion: “There is no private ownership of ground or flowing water.” *State of California* (200) 78 Cal.App.4th 1019, 1024. Incapable of being owned, water cannot possibly be real property.

The County points to a single example of the mischief that will result if the venue statute is not applied here: that general stream adjudications could occur “in any county,” rather than where the adjudicated watercourse is found.⁵ That statement is plain wrong. A stream adjudication is governed by Water Code section 2750, which requires it occur in the county court where the stream system being adjudicated is located. An adjudication performed by the Water Board *must* be filed in “the superior court of the county in which the stream system, or some part thereof, is situated.”

⁵ County’s Petition at 2; 20-21; this reinforces the falsehood that the Petition below is seeking a water rights adjudication.

The County's second effort to move this case to its home court uses jurisdiction. Alleging that the 1980 Decree occupies the field for all cases that might affect private water rights in the Scott River, the County makes two errors.

The first is to misread the scope of the 1980 adjudication. The Decree by its terms adjudicated groundwater interconnected to the Scott River, within the confines of boundaries on a map prepared by the State Water Board.⁶ The County's Petition here repeatedly and erroneously claims the adjudication covered *all* groundwater in the Scott River. It did not.⁷

The second is to misread ELF's Petition below. It states in the clearest terms that it seeks relief *only* with regard to *un-adjudicated* water; i.e. water that is not subject to the Decree. (First Amended Petition, App. at 205-207 ¶¶ 33, 35 and

⁶ The Petition quotes the language of the Decree's jurisdictional limitations once, but consistently mischaracterizes it. The Decree defines its reach as: "all rights to groundwater that is interconnected with the Scott River as delineated on the State Water Resources Control map" (App. at 21); and "that area adjacent to the Scott River as delineated on the SWRCB map. . ." (App. at 22). The County consistently drops the qualifying language referring to the map's boundaries.

The Water Board prepared the adjudication and the map, is a defendant in this action and also opposes transferring the action to Siskiyou. The Board supplied detailed information about the limits of the adjudication it performed and the map that governed it, which the court below cited to in its decision (App. at 379).

⁷ See County Petition at 9 for an example of the County's elimination of the language in the Decree that limits its scope to the boundaries on the map: "In 1980 the Siskiyou County Superior Court issued a final decree adjudicating *all* water rights in the Scott River interconnected groundwater. . ." (Emphasis added). See also County Petition at 29 [The Decree. . .adjudicates *all* rights to [the water resource's] use."] (emphasis added).

39.) It is axiomatic that the Court in Siskiyou did not adjudicate or retain jurisdiction over water that it did not adjudicate.

This Court should deny the petition for a writ and lift the stay.

II. Standard of Review

A party aggrieved by an order denying a motion for a change of venue may petition the appellate court for a writ of mandate to direct the superior court to transfer venue. Civ. Code Proc. Sec. 400; *Calhoun v. Callejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 42. In such cases, the court reviews the petition under an abuse of discretion standard. *Fontaine v. Superior Court*, 175 Cal.App.4th 830, 836; *State Bd. Of Equalization v. Superior Court* (2006) 138 Cal.App.4th 951, 954; *Ford Motor Credit Co. v. Superior Court* (1996) 50 Cal.App.4th 306, 308 (citing *Wrin v. Ohlandt* (1931) 213 Cal. 158, 159). The court abuses its discretion when it exceeds “the bounds of reason, all of the circumstances before it being considered.” *Gouskos v. Aptos Village Garage, Inc.* 94 Cal.App.4th 754, 762 (quoting *Troxell v. Troxell* (1965) 237 Cal.App.2d 147, 152). “In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review.” *Id.* (quoting *People v. Preyer* (1985) 164 Cal.App.3d 568, 573-574). Therefore, this Court should grant the County’s Petition for Writ only if it finds

that the Sacramento superior court abused its discretion in denying the motion to transfer venue.

Despite having sought extraordinary review from this Court under California Code of Civil Procedure section 400, the County asserts that a de novo standard of review applies to its petition for writ under section 1085.⁸ All of the cases cited by the County in support of a de novo standard of review discuss cases in which a traditional writ of mandate is brought pursuant to section 1085.

(County's Petition at 17 (citing *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 586; *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1275; *Environmental Charter High School v. Centinela Valley Union High School Dist.* (2004) 122 Cal.App.4th 139, 145)). The County cannot have it both ways. Since this is a Petition for Writ of Mandate brought pursuant to section 400, this court should grant the writ only if it finds that the trial court abused its discretion.

Even if the court does not evaluate the jurisdictional issues raised by the County on demurrer pursuant to the standard of review for Code of Civil Procedure section 400, the substantial evidence test⁹ should be used for any

⁸ C.C.P. §400 is specifically reserved for a petition for writ of mandate following a superior court's grant or denial of a motion for change of venue, not for appeal of a demurrer on jurisdiction.

⁹ Under the substantial evidence test, the appellate court reviews the record to determine whether the trial court's judgment is supported by substantial evidence. *Dobos v. Voluntary Plan Administrators, Inc.* (2008) 166 Cal.App.4th 678, 683. Substantial evidence is evidence that is reasonable, credible, and of solid value." *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.

factual issues decided. A demurrer is traditionally reviewed de novo because, on a demurrer, the court’s function is limited to deciding issues of law. *Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111. Factual issues are reviewed using the substantial evidence test. *Steiner v. Thexton* (2010) 48 Cal.4th 411, 417 fn 7. In the instant case, evidentiary issues were raised when the lower court heard arguments on and interpreted the State Water Resources Control map referenced in the Decree, to determine the scope of the Decree. The interpretation of a writing is a question of law where extrinsic evidence is unnecessary, but is characterized as a question fact where parol evidence is necessary. *Horsemen’s Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1559. Here, the court used the map and oral arguments to make a determination on the scope of the Decree as a basis for overruling the County’s demurrer. Therefore, to the extent that the map is considered extrinsic evidence, and raises questions of fact, this Court should review the trial court’s finding under the substantial evidence test.

///

///

///

“Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence.” *Ibid.* The court must “resolve all conflicts in the evidence and draw all reasonable inferences in a manner that upholds the challenged order. *Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.

III. The Trial Court Properly Denied Siskiyou County's Motion to Transfer Venue

The County's effort to transfer this action to its home county rests on two incorrect legal premises: that this action seeks a determination of individual rights or interests in water, and that "water is real property." Section 392(a)(1) requires an action be transferred only if it is: "[f]or the recovery of real property, or of an estate or interest therein, or for the determination in any form, of that right or interest, and for injuries to real property." At the outset, ELF's petition does not seek a determination of anyone's right or interest in any water. It seeks only to determine whether the state has authority, under the Public Trust Doctrine, to protect Public Trust resources and purposes. No private interests are at issue; only public agencies' powers and responsibilities toward public resources. Nor does the Petition below allege injury to any water, but only to non-property resources dependent upon water. Moreover, even if the action does impact private "rights or interests" in water, within the meaning of C.C.P. § 392(a)(1), under California law water is not considered "real property" within the meaning of that statute or any other statute. The Court should therefore affirm the Sacramento Superior Court's denial of the County's motion to transfer pursuant to this section.

A. There is No Basis for a Motion to Transfer Venue under California CCP §392(a)(1) Where An Action Does Not Seek the Recovery of Real Property, A Determination of Real Property Rights, Or Allege Injury to Real Property

Before addressing the interesting issue of whether water is "real property," it is worth noting that this action is not subject to section 392 for the simple reason

that it does not seek “the recovery. . .[or a] determination in any form, of [a] right or interest, [or] for injuries to” anyone’s water. In order to determine whether section 392 applies, the Court must consider the allegations of the Petition and the possible judgment that may be rendered against the defendant. *Donahoe v. Rogers* (1914) 168 Cal. 700, 700. ELF’s petition seeks no relief related to water rights. ELF’s Petition makes no request for “recovery,”¹⁰ a “determination” of any right to use of water, nor does it allege any “injury” to that right or to water. ELF’s Petition will not affect any existing water rights and any discussion of “water rights” as real property is simply not relevant to this case.

1. ELF’s Action Does Not Seek a Determination of Right or Interest in Real Property

ELF is not seeking any determination of water rights, public or private, to the Scott River or its interconnected groundwater. The Scott River is adjudicated and ELF is not seeking to disturb that Decree or re-adjudicate the stream system — a point that the County ignores, but which the ELF’s Petition makes clear. (App. at 205, ¶31.)¹¹ ELF’s Petition below is emphatically not a request to decide any person’s water rights, public or private. ELF is seeking a *declaration* from the Court that the SWRCB and the County have the *authority* under the Public Trust Doctrine to *manage* the interconnected groundwater at issue to protect the trust

¹⁰ All parties agree that the action does not seek any “recovery” of real property.

¹¹ “Petitioner’s do not request a re-opening of the 1980 adjudication” (App. at 205, ¶ 31; *see also* ¶¶ 33, 35, and 39 [Petition only seeks relief regarding non-adjudicated water or water rights.]

purposes. (App. at 204-205, ¶ 30.) Any relief granted on that request for declaratory relief will not disturb already decreed water rights, nor any other vested rights. All current appropriators and landowners will retain whatever rights they were given under the Decree or by virtue of their rights under other law. The second element of relief – an injunction against the County until it adopts some mechanism to recognize its Public Trust obligations in issuing well permits – is expressly limited only to new well-drilling permits and then only for an interest in water that has not been adjudicated. (App. at 207, ¶ 39.) Therefore no rights or interests in real property are to be determined by this lawsuit, and none will be affected by it.

The County mischaracterizes ELF’s claim by stating that ELF seeks a determination of the public’s right or interests in the interconnected groundwater. (County’s Petition at 18.) A declaratory judgment from the Court that the State Water Board and County have authority over groundwater is not equivalent to a determination of a right or interests. The Public Trust Doctrine establishes that the State holds title to public trust resources “not in its proprietary capacity but as trustee for the public.” *City of Berkeley v. Superior Ct.* (1980) 26 Cal.3d 515, 521. Courts have also held that the State cannot have a property interests in the corpus of the water, even under the Public Trust Doctrine:

Confirming this view is the statement in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482, to the effect that the State's "ownership" of lands such as tidelands which it holds in public trust "is not of a proprietary nature." (Italics added.) If the nature of the State's "ownership" of waters does not even reach the level of

ownership "in trust," as is suggested by *Ivanhoe Irr. Dist. v. All Parties, supra*, 53 Cal.2d 692 surely it has no proprietary element at all. *State of California*, 78 Cal.App.4th at 1031.

If the Public Trust Doctrine does not give real property rights to the State in actual land, it is impossible that the Doctrine gives the State that proprietary interest in water. Therefore it does not follow that a declaration that various public entities agencies have the authority to manage groundwater would thereby create a determination of rights to, or ownership of, the groundwater in the State or the public.

The cases cited by the County are not helpful in resolving this issue because they are cases that relate only to the public's right of access to the public trust resources. County Petition at 18 (citing *Marks v. Whitney* (1971) 6 Cal.3d. 251; *People v. California Fish Co.* (1913) 166 Cal. 576). The County claims that since ELF's petition alleges "the public trust doctrine holds that the public has an 'easement' in navigable waters for 'public uses'ELF seeks a determination of the public's 'right or interest' in the interconnected groundwater." (County's Petition at 18.) This argument is seriously flawed. This case is not about "easements" or rights of access. While the Public Trust Doctrine does protect the public's ability to access trust resources, that is not the issue before this Court. No rights of access to public trust waters are at issue here. ELF is not seeking an access easement in order for the public to access the groundwater. Instead, ELF seeks a declaration that the State Water Board has authority to manage the interconnected groundwater to protect the Public Trust resources in the Scott

River.¹² (App. at 204-205, ¶ 30.) The County confuses the issues actually presented in ELF’s complaint with mischaracterizations of those issues and misinterpretations of state law.¹³

2. ELF’s Petition Does Not Allege Injury to Real Property

The County argues that ELF has alleged “injury” to the Scott River and its interconnected groundwater in order to invoke Section 392(a)(1). (County’s Petition at 18.) Again, this mischaracterizes both ELF’s action and the public trust resources at issue in this case.¹⁴ There is no allegation of injury *to the water* in the Scott or to the groundwater interconnected with it anywhere in ELF’s petition.

Rather, ELF does allege injury to Public Trust resources dependent upon the water, most notably the fish populations in the Scott River. (App. at 202-203, ¶¶ 21-24.) Fish are wild animals. Civil Code §658. They are not real property

¹² ELF’s petition does not argue that interconnected groundwater is itself a public trust resource subject to public trust rights of access. Rather, ELF’s Petition asserts that such waters can be managed to protect public trust resources in the Scott River.

¹³ This problem is apparent in the County’s discussion of reading C.C.P. §§ 392 & 393 in pari materia. County’s Petition at 24. The County misinterprets the doctrine because it usually is only held to apply when two statutes share express language, or when one statute expressly states a proposition and another does not. In this case both statutes referred to by the County are silent and the doctrine does not apply. *See People v. Licas* (2007) 41 Cal.4th 362, 367; *Marriage of Kacik* (2009) 179 Cal.App.4th 410, 421.

¹⁴ ELF does not argue that the interconnected groundwater itself is a public trust resource, only that it should be managed in a way to protect the Scott River as habitat for fish populations. (App. at 205-205, ¶ 30 [“Petitioners request a judicial determination of the State Water Board’s authority to protect groundwater which is hydrological connected to navigable, public trust waterways. . .”]).

(they are not land, nor affixed or appurtenant to land). Fish in their natural state can not be owned until reduced to possession, at which time they would be personal, not real, property. *People v. Brady* (1991) 234 Cal.App.3d 954, 958. Any injury alleged to fish populations is not an action for injury to real property under C.C.P. § 392.

B. Water In its Natural State Does Not Constitute Real Property and Therefore Cannot Provide the Basis for a Motion to Transfer Venue Under California CCP §392(a)(1)

The County's argument that “water is real property” fundamentally mischaracterizes the nature of water, real property, and ownership under California law. The County invites this Court to be the first to hold that all groundwater (and, apparently, all surface water) is real property, overturning the foundations of California’s legal system of water rights and discarding more than 150 years of established precedent while also contradicting Civil Code §654’s definition of property. The Court should decline the invitation.

1. Water Cannot be Owned and Is Therefore Not Property

The defining requirement of property is that one has the exclusive possession or right to use of the property. *People v. Kwok*, 63 Cal.App.4th 49, 63. As set forth under the California Civil Code, “property” is defined as “the thing of which there may be ownership.” Civ. Code §654.

///

///

///

Water in its natural state, whether flowing in rivers or in underground aquifers, is not property because it is not subject to ownership.¹⁵ California Courts have consistently and unequivocally held that water in a stream, or in its natural state cannot be “owned.” *Kidd v. Laird* (1860) 15 Cal. 161, 179-180; *Palmer v. Railroad Com. of Cal.* (1914) 167 Cal. 163, 168; *State of California*, 78 Cal.App.4th at 1024; *Jurupa Ditch Co. v. San Bernardino County* (1967) 256 Cal.App.2d 35, 41 (“Water flowing in a stream belongs to no one.”). Water is a natural resource to which the people of the state have a right to access and a right to use (under some circumstances) but “there is no private right of ownership of ground or flowing water.” *State of California*, 78 Cal.App.4th 1019, 1023. The right in water has been identified by numerous courts as a usufructuary right, and not one of proprietary possession. *People v. Shirokow* (1980) 26 Cal.3d 301, 307 (“Both riparian and appropriative rights are usufructuary only and confer no right of private ownership in the watercourse.”);¹⁶ *Nat’l Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 (quoting *Eddy v. Simpson* (1853) 3 Cal. 249, 252) (“It

¹⁵ Witkin teaches that, in defining what “property” is, “[c]ertain things are not the subject of actual or lawful ownership and are ordinarily not considered property. Thus, there is no ownership of . . . water in a stream or other body of water.” 13 *Summary of California Law*, XVIII, *Personal Property*, § 1 (internal citations omitted).

¹⁶ Although a right of private ownership of water does not exist, the right to use water may create a property interest. For instance, “the right to water to be used for irrigation” has been held to be a right in real property. *Schimmel v. Martin* (1923) 190 Cal. 429, 432 (citing *Fawkes v. Reynolds* (1922) 190 Cal. 204, 211); *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 723, 725-726.

is laid down by our law writers, that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use.”); *People v. Murrison* (2002) 101 Cal.App.4th 349, 359 (citing *United States v. State Water Resources Control Bd. (Racanelli)* (1986) 182 Cal.App.3d 82) (“unlike real property rights, usufructuary water rights are limited and uncertain.”). Thus, the concept that water cannot be owned remains a bedrock principle of water law.

Besides ownership, other key attributes of real property are (a) that it can be alienated (*Apartment Ass’n of Los Angeles v. City of Los Angeles* (2001) 24 Cal.4th 830, 840-841.); (b) there is a right to exclude others from the corpus of the real property (*People v. Tapia* (2005) 129 Cal.App.4th 1153, 1166); and, (c) it is part of or permanently affixed to a parcel of land from which it cannot be moved or separated.¹⁷ Neither surface nor groundwater in its natural state has these characteristics. Because water in its natural state cannot be owned, it can neither be alienated nor does one possess the right to exclude others from its corpus. Similarly, waters in their natural state are not permanently affixed to land, “even the waters of an apparently tranquil and stable lake may in fact flow in and out, or percolate from the lake boundaries and wend their way through the soil below

¹⁷ If something is separated and moved, of course, such as part of a structure that is removed, or earth that is dug up and hauled away, or a tree felled, it ceases to be real property and becomes, simply, property or chattel. *Kindig v. Palos Verdes Homes Ass’n.* (1939) 33 Cal.Ap.2d 349, 354. Water can also become personal property (without having been real property) if severed and contained. *State of California*, 78 Cal.App.4th at 1027, n.11.

other tracts of property. The same is true, even a fortiori, of groundwater percolating through soils.” *State of California*, 78 Cal.App.4th at 1032.

Following this guidance, neither the Scott River nor the groundwater interconnected with the River can be owned. While landowners may have a right to use water from the Scott River or to use water from an underground aquifer, that right does not turn the water itself into real property. The County’s attempt to change the nature of water into something that can be owned by simply calling it a “water body” or “corpus” should be denied.

2. The County’s Reliance on Dicta Regarding Water Ownership in Pre-1929 Cases Is Unavailing

The County’s principle support for its argument that water is real property is based on *dicta* from a California Supreme Court case over a century old that pre-dates constitutional, statutory, and judicial developments in California water law. (See County’s Petition at 20 (citing *Stanislaus Water Co. v. Bachman* (1908) 152 Cal. 716, 725)). In *Bachman* the Court held that “the right of Bachman [as a successor in interest] under the agreement, to have the water flow from the plaintiff’s canal through the lateral ditch, to the land, for its irrigation, is a servitude upon the ditch and upon the canal, is an appurtenance to the land, and is real property. *Id.* at 727. Thus, *Bachman* stands for the principle that the right to use water flowing in artificial channels is a real property right. *Id.* at 726-727.

///

///

The *Bachman* Court’s statement that water is real property is dicta and not binding on this Court.¹⁸ In considering the matter before it, the Court in *Bachman* conflated the separate issues of whether a water right is real property and whether water itself is real property.¹⁹ As certain other courts have done, the *Bachman* Court recognized and decided the case based on a right to use of water, but stated gratuitously that there is a property right in the water itself.

Indeed, other Courts have recognized the unfortunate frequency that the terms “property” and “real property” are mistakenly used. The court in *State of California* lamented, “it is perhaps unfortunate that the word ‘property’ is sometimes used in cases and statutes with no careful consideration of the nuances of its meaning.” *State of California*, 78 Cal.App.4th at 1027. Despite the inconsistency of the use of the word “property” in the world of water law that vexed the court in *State of California*, there has never been inconsistency on the subject of ownership of water. Since the infancy of California water law, it has been held that:

¹⁸ “That water in its natural situation upon the surface of the earth, whether as a flowing stream, as a lake or a pond, or as percolations in the soil, is real property, will not be disputed.” *Bachman* at 724. Although dicta, this statement can be read consistently with current case law to mean that when water is situated on (or under) land, the real property right in that water is the landowner’s right of use of that water. This reading is consistent with the Court’s holding.

¹⁹ The County’s Petition shows similar confusion. (County’s Petition at 20-22.) However, the brief in support of the Petition makes it abundantly and repeatedly clear that it is the water itself –in the Scott River and in the groundwater – that the County wishes to label as real property for purposes of invoking CCP 392(a). *Ibid.*

Running water, so long as it continues to flow in its natural course, is not, and cannot be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself.

Kidd v. Laird, supra, 15 Cal. at 179-180. Similarly, after carefully canvassing a wide range of authorities, and laying out arguments for and against the proposition that water was property that could be owned, the court in *State of California* found that “at least prior to the 1928 adoption of the predecessor to section 2 of the article X of California Constitution, one could speak of ‘ownership’ of water itself (*Lux v. Haggin* (1886) 69 Cal. 255 at p. 392)*But in its natural state, water is certainly not subject to ownership by an individual.*” 78 Cal.App.4th 1019, 1025 (emphasis added). The court further held that even the State does not “own” the water of the state in its natural condition within the meaning of California Civil Code sections 654, 655, 658, and 670.²⁰ *Id.* at 1027-1033. The Court’s

²⁰ The County’s argument as presented is not without some cleverness. It directs almost its entire attention at trying to establish that the “real property” at issue here is that of the State – whether it is the Scott River itself, or the groundwater connected to it. This is undoubtedly because even Siskiyou County recognizes and accepts that no private person can claim an ownership in water so as to make it real property. Only at the end of its argument does the County argue that, since in its view this water is the real property of a public entity, and the venue statute makes no distinction between public and private real property, therefore we can simply back into calling any private interests in water “real property”, too. (County’s Petition at 23-24).

This argument is seriously flawed. The argument rests upon a premise that is untrue: that the State owns real property called the Scott River and its underground water. The Court in *State of California* definitively and completely removes that premise. The water of the state is *not* the “owned property” of the State of California. (*State of California*, 78 Cal. App. 4th at 1027.) The premise

conclusions admit of no ownership of water, nor therefore any notion that natural waters can constitute real property.²¹

The County’s arguments fall into a similar state of confusion. It correctly asserts that there is a difference between a non-possessory usufructuary right to use water, and contrasts that with possessory interests in property. (Country’s Petition at 21 -22.) But without breaking stride, in the very same paragraph, it baldly asserts that such limitations apply only to the water right, not to the water, and asserts “that the corpus of water is ‘real property.’” *Ibid* at 22. The County’s confused arguments notwithstanding, there is no ownership of the “corpus of water.” “It is impossible to accept [the proposition] that the State has an ownership interest in the ‘corpus’ of State waters.. .[I]t is contrary to the explicit statements in *Kidd v. Laird*. . .to the effect that the State does not have a property right in the ‘corpus’ of the waters.” *State of California*, 78 Cal.App.4th at 1032. The same is true of private parties. *Id.* at 1025 [“in its natural state, water is certainly not subject to ownership by an individual.”].

///

///

being false, the entire argument falls.

²¹ The Court did recognize that water severed from the land and placed into a container –such as a bottle of water – is chattel property that can be purchased and owned. (*State of California*, 78 Cal.App.4th at 1025) It would be no different for compressed air; the air cannot be owned, but one can capture a small amount in a container and sell it. That, however, is not what was at issue there, nor here.

3. The County Improperly Relies on Irrigation Cases for the Proposition that Water in Its Natural State Is Property

The County seeks to avoid the conclusion that water in its natural state cannot be owned, by negating the important distinction between water that is in its natural condition – as groundwater surely is – and water that has been captured and put to use. The County invites this Court to blur the distinction and turn one thing – natural water – into another – irrigation water. (County Petition at 20 (citing to *Schimmel v. Martin* (1923) 190 Cal. 429, 432; *Relovich v. Stuart* (1931) 211 Cal. 422, 428; *Copeland v. Fairview Land & Water Co.* (1913) 165 Cal. 148, 154; and *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n* (1939) 34 Cal.App.2d 159, 174).) The cases cited by the County highlight the distinction between water in artificial channels and water in its natural state for purposes of property classification. None of these cases speak to water in its natural state, and each can be distinguished by its focus on water which has been removed from its natural state and set aside for agricultural purposes. That is not the issue here.

Further, *Schimmel v. Martin*, a case of a contract dispute between an irrigator and a water company, only states that the “right to water to be used for irrigation is a right in real property.” *Schimmel v. Martin, supra*, 190 Cal. at 432. *Relovich v. Stuart* states only that water for irrigation is not personal property and that there may be a property right to take water for irrigation. *Relovich, supra*, 211 Cal. at 428. Other cases cited in the County’s petition state only that water in

reservoirs or in ditches to be used for irrigation is real property.²²

This line of cases is inapposite in this case. ELF's Petition does not address water that has been severed and placed in use for irrigation. Rather, at issue in ELF's petition is the Scott River and its interconnected groundwater in their natural states, which is distinct from water that has been removed and reserved for agricultural application or irrigation purposes. This distinction is significant. Declaring ownership of a natural waterbody, and all the water flowing in it, would give landowners rights of exclusion that they do not possess. Such a right is much different than a finding that, as a landowner, one owns the right to use and transport water in an irrigation system for use on a landowner's land.

4. California Civil Code §658.3 Provides A Real Property Interest in the Use of A Watercourse Appurtenant to Land

The County bases a large segment of its petition for transfer on the argument that Civil Code section 658(3) makes water "appurtenant" to land real property. County's Petition at 19; California Civil Code §§658(3), 662. Civil Code section 658 defines real property as land; that which is affixed to land; that which is incidental or appurtenant to land; that which is immovable by law (with certain exceptions). Civil Code section 662 states that something is deemed

²² *Copeland v. Fairview Land & Water Co.* (1913) 165 Cal. 148, 154 ("The water of the Hemet Company, stored in its reservoir, is therefore real property."); *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n* (1939) 34 Cal.App.2d 159, 174 ("It is well settled that water for irrigation, while in ditches and reservoirs, is generally considered as real property...").

appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse. . . .”

The County misconstrues the meaning of the statute in this case. The appurtenance of the watercourse is the same as the appurtenance of a way. It is based on the *right to use* the way²³ or watercourse, and it is the appurtenant right to use that is deemed real property. As discussed above, a landowner does not own the water in a watercourse which flows across her land, but has a real property interest in the continued right to use such water on her land. This usufructuary right, which takes the form of a riparian right or a right of an overlying landowner to use groundwater, is the real property interest that is deemed to be appurtenant to land under §662 and therefore real property under §658, not the water itself. *State of California*, 78 Cal.App.4th 1019 at 1027 (state does not “own” water within meaning of Civil Code statutes, including §658, but has a real property interest in right to use such water, including riparian rights.) That section 658 does not confer ownership to the water body itself is in conformance with the State’s system of water rights and modern case law holding that there is no ownership interest in water. To read sections 658 and 662 as creating an ownership interest in a water body would conflict with the large body

²³ The owner of a right of way holds title only to the right to use that right of way. He has no ownership of the land underlying it. (*Beyer v. Tahoe Sands Resort* (2005) 129 Cal.App.4th 1458, 1472 [“In contrast to fee simple property ownership, which provides the owner the right to the surface and to everything permanently situated beneath or above it, an appurtenant easement is a burden on land that creates a right-of-way or the right to use the land only.] (citations omitted))

of case law referenced above and would create great uncertainty in water law, allowing the “owner” of water flowing across one’s property to assert possessory interests to the exclusion of all others. By virtue of owning the water body itself, a riparian or overlying land owner would legally be allowed to channel, store, and sell all water flowing across or under his property, just as a landowner could sell as many trees or as much soil and gravel as exists on his land. Such an outcome is in direct contradiction to the current water use rights afforded landowners, which are governed by the concepts of beneficial and reasonable use and are subject to prohibitions against using water on other lands or outside of the watershed.

In sum, the theory put forth by the County that water is real property contravenes not only firmly established precedent on water law but also all of property law. Since water is not capable of being owned, then by the definition under the Civil Code it cannot be considered property, real, or personal.

C. Affirming the Trial Court’s Denial of the County’s Motion Will Have No Effect on Venue For Future Stream Adjudications

The County vainly argues that, if this Court affirms denial of its venue motion, all future general stream adjudications may be brought in any county where any water users reside and there would be no procedural mechanism for transfer. (County’s Petition at 2, 22)²⁴ That assertion is flatly incorrect and ignores pertinent provisions of the Water Code.

²⁴ This, despite the fact that ELF is not seeking a stream adjudication or anything akin to it. (App. at 205, ¶ 31.)

First, as the County notes, C.C.P. § 392(a)(1) provides for the transfer of an action for the recovery of real property, or of an estate or interest therein, or for the determination in any form, of that right or interest, and for injuries to real property. Where any of these elements are met, such a case would go to the Superior Court in the county where the real property is located. As set forth above, that is not the case with ELF's petition.²⁵

The Water Code also provides a clear mechanism for ensuring that stream adjudications occur only in the County where the water at issue is located. California Water Code §2500 *et seq.* expressly provides that stream adjudications can be heard only by a superior court in the county where the water resource is located. "As soon as practicable after adoption of the order of determination or issuance of an order on reconsideration by the State Water Resources Control Board, whichever is later, a certified copy of the order, together with the original evidence and transcript of testimony filed with or taken before the board and certified by it, *shall be filed with the clerk of the superior court of the county in which the stream system, or some part thereof, is situated.*" (Water Code §2750; emphasis added) Therefore, affirming the Sacramento Superior Court's decision to retain jurisdiction in this case will not change any application of the law regarding general stream adjudication venue selection. The County's alarm

²⁵ If, at the conclusion of this case, the Water Board (and County) are found to have authority to manage interconnected groundwater to protect the Public Trust, and that requires some adjustment of specific individual's existing water rights, such action will have to be performed in conjunction with the Siskiyou Superior Court, and if necessary the Decree re-opened.

regarding this issue is unfounded.

IV. The Trial Court Properly Denied the County's Demurrer for Lack of Subject Matter Jurisdiction

The Superior Court correctly denied the County's demurrer for lack of subject matter jurisdiction, reasoning that this action would not affect the previous adjudication for the Scott River and does not involve the same subject matter as the Decree. (App. at 379-382.) The Court held that jurisdiction was proper in Sacramento.²⁶

ELF's petition requests declaratory relief regarding public agencies' authority and responsibilities in managing interconnected groundwater resources in a manner consistent with the Public Trust Doctrine. (App. at 204-205 ¶ 30, 207 ¶ 39.) Injunctive relief is expressly limited to un-adjudicated groundwater. (App. at 205-207 ¶¶ 33-35, 39.) ELF's petition does not request that any decreed rights be taken, changed, or affected in any way. If, or how, such agencies choose to administer the Public Trust is not at issue in this case.

The County's petition patently mischaracterizes this action as affecting existing rights and conflicting with the 1980 adjudication and Decree. (County's Petition at 29.) It does not. The County alleges that ELF's petition involves the

²⁶ Sacramento Superior Court has jurisdiction to decide ELF's petition. Venue is proper under C.C.P. §395 as the State Water Resources Control Board, a state agency, is headquartered in Sacramento. Additionally, venue is proper against a state agency in a county where the Attorney General has an office—there is such an office in Sacramento. C.C.P. §401.

same subject matter of the Decree. *Ibid.* It does not. The County's petition also mischaracterizes this action as requiring application of different and more stringent regulatory standards than that in the Decree. (County's Petition at 30.) It does not.

The County's Petition is replete with allegations that this action will disturb what the 1980 adjudication and Decree established in managing water in the Scott River watershed. The Sacramento Superior Court noted, however, that the County's dramatic portrayal is not an accurate reflection of the lawsuit or the relief requested.

This is not a lawsuit which seeks this Court to adjudicate any right that is specifically identified in the context of the adjudication decree. ¶I'm not deciding, and no one is asking me to decide whether or not Mr. Smith will be compelled to reduce the amount of diversion. That issue is not before me. There is no context that I can envisage in this lawsuit where that or any similar issue would come before me. . . ¶. . . There is an adjudication decree that forecloses new diversions with a delineated specific area. This lawsuit doesn't affect that. ¶ The adjudication. . . memorializes existing diversions and water rights. This lawsuit does not address that.

(App. at 378-380 [transcript at 27, line 22 – page 28, lines 15.]

ELF's Petition will have none of the effects described by the County and removing jurisdiction from the Superior Court of Sacramento on this incorrect characterization of the lawsuit and its effects would be improper.

A. The Superior Court of Siskiyou County Did Not Retain Continuing Jurisdiction over the Subject Matter of ELF's Petition

A court may retain exclusive jurisdiction over the parties and the subject matter of a lawsuit for efficient administration of its ruling. However, it does not

follow that a court must hear every claim that is tangentially related to the original suit, such as the claim at issue here. Not only would that be an inappropriately broad interpretation of exclusive jurisdiction, but it would require courts to hear unrelated cases to the detriment of judicial efficiency.

1. ELF’s Petition and the Decree Do Not Involve the Same Subject Matter

In the 1980 Decree, the Siskiyou County Superior Court retained jurisdiction over “the parties to these proceedings, and of the subject matter hereof, and upon any application . . . to review its decree and to change or modify the same. . . .” (App. at 42.) After careful review of the text of the Decree and its attachment, the Sacramento Superior Court correctly ruled that the Decree’s retained jurisdiction did not reach ELF’s Petition because the subject matter of the Petition is different from that of the Decree. (App. at 378-380.) The Court properly found that the only groundwater resources at issue in ELF’s petition were existing and/or potential interconnected groundwater that was specifically not covered by the terms of the Decree, and thus outside the Decree’s subject matter.

Ibid.

a. The Subject Matter of ELF’s Petition is Whether the State and County Have Authority to Manage Interconnected Groundwater Resources Under the Public Trust Doctrine

The Court correctly recognized that ELF’s Public Trust claims do not involve an adjudication of water rights. (App. at 380.) The subject matter of ELF’s Petition is, rather, public agency authority and responsibility under the

Public Trust Doctrine as applied to groundwater interconnected to surface Public Trust waters. The subject matter of the Decree is the adjudication of various private (and public) parties' specific water rights in the Scott River sub-basin. These are two distinct and separate legal issues. The former deals with the power of the government to manage a resource for the benefit of the people. The latter deals with determining the rights of individuals to use a specific resource, which the Scott River adjudication did. The Sacramento Superior Court correctly found that resolution of ELF's case would not in any way affect the rights decreed in 1980 by the Scott River adjudication and so did not fall within the subject matter of the Decree.

b. The Trial Court Properly Found that the Scope of the Decree Does Not Reach All Sources of Interconnected Groundwater

The County argues that ELF's Petition raises the same subject matter as the Decree because they both involve interconnected groundwater. County's Petition at 29. Although both actions deal with groundwater, they do not address the same groundwater resources. After a careful review of the Decree, the Sacramento Superior Court disagreed with the County's argument. (App. at 388.) The Court found that the Decree, on its face, did *not* cover all current and potential sources of interconnected groundwater. (App. at 379-380; App. at 22.) Rather, the Decree adjudicated rights to specifically delineated resources.²⁷ (App. at 379-380.) Such

²⁷ Judicial notice was requested by the County of the Decree and the attached maps. No party objected. (App. at 323.)

resources were precisely described in the Decree and indicated by boundaries on a map that was attached to the Decree itself. (App. at 23.)²⁸ By its plain language, the Decree only adjudicated water rights within a boundary as indicated on the State Board’s map. (App. at 22.)²⁹ The Court agreed with the Water Board—which actually drew the map used by the Siskiyou Superior Court—that the Decree and the incorporated map did *not* cover “all interconnected groundwater” and that there are some interconnected groundwater resources in the Scott River basin that are not indicated on the map, and therefore, not within the scope of the Decree. (App. at 379.)

In its Petition, ELF clearly limits the injunctive relief requested against the County to *new* well drilling permits for those previously *un-adjudicated* groundwater resources. (App. at 205-207 ¶¶ 33-35, 39.) By its plain language, the relief ELF seeks is only directed towards groundwater and activity not addressed

²⁸ The Decree defines its reach as: “all rights to groundwater that is interconnected with the Scott River *as delineated on the State Water Resources Control map*” and “that area adjacent to the Scott River *as delineated on the SWRCB map*. . .” (App. 21, 22 (emphasis added)). The County consistently drops the qualifying language referring to the map’s boundaries and claims it adjudicated “*all* interconnected groundwater.” Petition at 2, 22.

²⁹ The County in its petition and brief repeatedly and erroneously claims the adjudication included all “interconnected groundwater,” (*see* Country’s Petition at 2, 22 (emphasis added)) and consistently ignores the boundary limitation provided by the Decree, as denoted in the State Water Board’s map. The State Water Board, represented by the Attorney General, addressed the County’s erroneous interpretation of the Decree and the trial court adopted the State Water Board’s interpretation that the Decree’s map clearly illustrates that there are sources of interconnected groundwater which fall outside the scope of the Decree.

in the Decree. (App. at 207-208 ¶ 1.) The Sacramento Superior Court correctly found that ELF's requested injunctive relief would only apply to groundwater resources not already regulated by the Decree and therefore would not conflict or affect existing rights under the Decree. (App. at 382.)

c. ELF's Petition Does Not Involve Instream Flow Requirements for the Scott River

The County also argues that since the Decree establishes instream flow requirements for the Scott River fishery resource, that it covers the same subject matter as ELF's petition. (County's Petition at 29-30.) The County wrongly alleges that, "ELF is obviously attempting to establish different and more stringent regulatory standards than those adopted under the Decree." (County's Petition at 30.) Contrary to the County's unsupported allegations, ELF is not seeking to change or modify the instream flow requirements set forth in the decree. ELF does not even allege that the injury to the fishery resource that it describes in its complaint is caused by any action taken pursuant to the Decree. ELF's petition takes no position on whether the instream flow requirements set forth in the Decree are adequate because no relief is requested relating to instream flow requirements. What ELF is alleging is that a failure to manage extractions that are outside the reach of the Decree are contributing to conditions which are harmful to fish populations in the Scott River. (App. at 206-207 ¶ 36.)³⁰ ELF is not

³⁰ It is irrelevant to ELF's petition whether the instream requirements set forth in the Decree are in reality being met since that is a completely different issue than

challenging the terms of the Decree in this lawsuit. Simply because ELF's Petition alleges injury to fish does not mean that it involves the same subject matter as the decree.

d. The Trial Court Properly Found that the ELF Petition Would Not Affect Existing Water Rights

The Sacramento Superior Court correctly ruled that no water rights adjudicated under the Decree would be affected by either the declaratory or injunctive relief requested in ELF's petition. (App. at 379-380.)³¹ ELF's petition serves only to establish authority in responsible agencies to manage interconnected groundwater in a manner consistent with the Public Trust Doctrine, but does not direct them to take any action that would affect current groundwater extraction operations covered by the Decree. If authority is established in the State and County to apply public trust protections to any interconnected groundwater, and if the State and County choose to administer their duties under the Public Trust Doctrine, any such actions would take place in some different and future forum, whether in a completely different lawsuit, an administrative proceeding before the State Water Board, or (perhaps and) in front of the Siskiyou Superior Court pursuant to its authority to re-open the Decree to adjudicate or adjust specific water rights. As all parties and the court below acknowledged, no one can know if

the one at hand.

³¹ This finding was also the primary basis for denying a motion by the California Farm Bureau Federation to intervene in the action, since none of its member's water rights would be affected by ELF's petition.

or how the State or County will choose to act pursuant to their authority under the Public Trust Doctrine. Hence, attempting to bootstrap into this action potentialities that might happen at some future date, and which might affect specific individuals' rights under the Decree, is improper. Such future possible action is, in the words of the court, "speculative, attenuated, unknown what in particular which is the County's fear here, the State Water Resources Control Board would do. ¶ I would point out, it's somewhat speculative that they would do anything." (App. at 380.) Speculation about possible future actions is not a proper basis for asserting that jurisdiction of the current action must lie in Siskiyou County. While future action was speculative, the Superior Court clearly found that the relief actually requested by ELF would not impact rights adjudicated under the Decree.

e. ELF's Action Will Not Establish Different Regulatory Standards That Would Conflict with the Decree

The County argues that this action will create new regulatory standards for the management of interconnected groundwater in the Scott River Basin, different from those in the adjudication. (County's Petition at 30.) This action will not create new regulatory standards at all. Thus, the trial court properly held that no conflict would result from it issuing a ruling on ELF's petition. (App. at 382.)

A declaratory judgment from the Court affirming authority in the State and County to manage interconnected groundwater pursuant to the Public Trust Doctrine will not change "regulatory standards" of water administration regarding

specific water rights holders under the Decree. Any regulatory standards will be set, if at all, in new and future proceedings before the water board and must be addressed through appropriate procedures provided by the Decree.³² (App. at 42-43 ¶64.) The Sacramento Superior Court has not been asked to and will not issue any regulatory standards whatsoever regarding application of the Public Trust to adjudicated water rights. The Sacramento Superior Court correctly observed that any such actions, if they happen, will occur in some other and different forum. (App. at 380-381.)

Similarly, ELF's injunctive relief also does not require the County to adopt different regulatory standards that conflict with the rights established under the Decree. The County argues that the Decree authorizes new groundwater uses if they comply with the Decree's conditions, and that the relief requested by ELF would interfere with these permitted uses. (County Petition at 30.) ELF's Petition only refers to new well-drilling permits (not uses) for interconnected groundwater sources and further, only for the interconnected groundwater sources that are outside the scope of the Decree. By its plain language, the permits that ELF's Petition addresses would not be within the scope of the Decree and therefore would not be authorized by the Decree. (App. at 206-207 ¶ 36.) If new wells are authorized pursuant to the Decree, ELF's requested relief does not reach them.

³² If the State Water Board or County choose to make changes that could affect water rights under the Decree, such regulations may properly be challenged in Siskiyou County.

Therefore, ELF's petition does not attempt to establish anything different or new for those groundwater sources covered by the Decree.³³

Additionally, ELF is not requesting any determination as to the adequacy of the Decree or whether the Decree did in fact take the Public Trust into account or whether the County is acting pursuant to its Public Trust duties in administering the terms of the Decree. The Decree's terms and the adequacy of the Decree's conditions are simply not at issue in this lawsuit.

B. Sacramento Superior Court has Proper Jurisdiction to Interpret the Legal Scope and the Subject Matter of a Decree from Another County

Sacramento Superior Court has jurisdiction to hear cases such as this one. Despite its form, the County's original demurrer is actually not based on a lack of "subject matter jurisdiction." The County is only arguing that the Sacramento Superior Court had jurisdiction but should have abated.³⁴

³³ In a similar argument, the County also argues that ELF's petition would require the County to establish the boundary of interconnected groundwater. ELF does not request, in its prayer for relief, that an interconnected zone be established and ELF does not request that the Court take a position on whether this is necessary. ELF's Petition does not challenge the boundary set forth in the Decree at all, and for the purposes of the Petition, accepts whatever the Decree sets forth as adequate and not at issue in this lawsuit. It is the County, through their attempts to have the Courts re-visit this boundary, that muddies the jurisdictional waters. ELF is not challenging the Decree through this lawsuit and its Petition makes it clear that ELF is not requesting relief of that nature from the Court. Should the County request the State Water Board to revisit the established boundaries, it can do so pursuant to the procedures established in the Decree.

³⁴ The Superior Court noted this error by the County, and also noted it is a doctrine rarely used. (App. at 381-382.)

The subject matter at issue in ELF’s petition is whether certain governmental authorities have power to manage interconnected groundwater under the Public Trust. This type of legal issue is not required to be heard in a specific court or type of court.³⁵ The Sacramento Superior Court does not lack subject matter jurisdiction since there is nothing about the subject matter of this case that would negate the jurisdiction of any superior court from hearing it.

The County cannot argue that the Sacramento Superior Court does not, and would never have, jurisdiction over the subject matter, which is the application of the Public Trust Doctrine to groundwater resources. Rather, the County is arguing that Sacramento cannot enter a ruling because such authority may potentially, in the future, be applied to water resources governed by the Decree in Siskiyou County.

The County then makes one final “Hail Mary” pass to move jurisdiction to Siskiyou. It argues that because *its demurrer* (not ELF’s Petition) places the scope of the Decree at issue, interpretation of the Decree is needed to decide the scope of its jurisdiction—and that only Siskiyou County can do that. Therefore, the County argues, the case should be transferred to Siskiyou County to determine whether jurisdiction is proper there.

The argument that only Siskiyou County Superior Court has jurisdiction to

³⁵ For example, this is not a matter of bringing a bankruptcy proceeding in state court when the federal bankruptcy court has exclusive jurisdiction over the matter, or an employee attempting to sue his employer in tort for negligence where the Workers’ Compensation Appeals Board has exclusive jurisdiction.

determine the limits of its jurisdiction is a flawed one. First, the Superior Court of Sacramento is fully competent to determine fundamental issues of law—such as jurisdiction and whether the subject matter of the Decree is implicated. Mere invocation of jurisdictional reservation in an earlier Decree does not mean that all decisions about whether future cases fall within the scope of such jurisdiction have to be transferred to Siskiyou. Additionally, the Decree does not retain jurisdiction over interpretation issues relating to the Decree, only over parties, changes and modifications to and the subject matter of the Decree. (App. at 42.)

It makes no practical sense to send the case to Siskiyou to find out whether it has jurisdiction. As a matter of judicial efficiency and common sense, it would not be a good use of court resources to transfer a case away from a court with jurisdiction over it, to a second court, in order to determine whether the case should stay in the second court or be transferred back to the first court because jurisdiction was proper. The Court already ruled that jurisdiction was proper in Sacramento, to transfer it on the basis that Siskiyou County Superior Court might not agree is not a proper basis for transfer.

The Sacramento Superior Court was faced with a fundamental jurisdictional question derived from law that emanated elsewhere. The court was and is fully equipped to address the concern and need not transfer the action elsewhere to do its work for it.

///

///

C. The Rule of Concurrent Jurisdiction Does Not Preclude Sacramento Superior Court from hearing ELF's Action

ELF's petition for a writ of mandate and complaint for injunctive relief can be appropriately heard in the Superior Court of Sacramento. C.C.P. §§ 401 & 1085; *See App.* at 199 ¶ 12.

The Sacramento Superior Court is not precluded from hearing ELF's petition under the doctrine of exclusive concurrent jurisdiction.³⁶ Exclusive concurrent jurisdiction is a rule of comity that applies when one court retains jurisdiction over the parties and subject matter of a particular transaction or proceeding. *Childs v. Eltinge* (1973) 29 Cal.App.3d 843, 849. The purpose of the doctrine is to avoid courts making contradictory decisions or awards relating to the same controversy. *Id.* at fn 7. The Sacramento Superior Court found that because the applicability of the Public Trust Doctrine to the groundwater was not within the original Decree, and any resulting ruling of the Sacramento Court would only affect new wells for un-adjudicated water rights, there was no risk of conflicting court decisions, and judicial comity did not require the Sacramento Superior court to abate. (*App.* at 382-383.)

As discussed above, the subject matter of the public trust's applicability to the groundwater is not the same subject matter as in the Decree (an adjudication of

³⁶ To the extent that the County argues that issues of judicial comity (and not fundamental issues of "subject matter jurisdiction") prevent Sacramento Superior Court from hearing the case, this Court should affirm the decision of the Sacramento Superior Court that judicial comity under the doctrine of exclusive concurrent jurisdiction does not mandate such a transfer.

water rights). Stream adjudications, such as the Scott River Decree, are proceedings to determine the rights of water users along a specific water body. Water Code § 2501. ELF is not seeking to reopen the Scott River Decree. (App. at 205 ¶ 31.) Nor is ELF seeking a determination of water rights. *Ibid.* ELF is merely seeking a declaration from the Court that the State Water Board has the authority to apply the Public Trust Doctrine to the interconnected groundwater of the Scott River. (App. at 204-205 ¶ 30.) Since ELF is seeking a declaration from the Court, which is wholly separate from the order made in the Scott River Decree, the subject matter cannot be said to be the same in both cases. The Sacramento Superior Court recognized this and made it clear that exclusive concurrent jurisdiction did not apply because in order for it to apply, the underlying decree would have to be reopened and re-litigated in some way, an outcome which is not sought and would not be a direct result of this case. (App. at 382.)

The Sacramento Superior Court acknowledged that the doctrine of exclusive concurrent jurisdiction often applies when one case is “open” or “pending”, and another court must step aside and abate in order to allow full resolution by the first court. (App. at 381-382.) The County relies on *Browne v. Superior Court* (1940) 16 Cal.2d 593 for the proposition that a pending lawsuit in the original court is not required to invoke exclusive concurrent jurisdiction.³⁷

³⁷ The County interprets *Browne* unreasonably broadly. In *Browne* the court with original jurisdiction only maintained exclusive concurrent jurisdiction with regard to the issue which was considered un-exhausted – the discharge of the guardian. The original court did not maintain exclusive concurrent jurisdiction

(County's Petition at 27.) ELF does not disagree with this statement.

ELF is not arguing, and the Sacramento Superior Court did not find, that the doctrine of concurrent jurisdiction is not implicated only because the adjudication procedure in Siskiyou is complete. The doctrine of concurrent jurisdiction is not applicable here because, as explained above in ELF's papers, and as found by the Sacramento Superior Court, the subject matter of the two actions is different. (App. at 378-380.) Moreover, the Siskiyou Superior Court never took jurisdiction over the issue of whether the State Water Board or the County have the authority to protect interconnected groundwater under the Public Trust Doctrine. It is impossible that they have not exhausted jurisdiction over the matter when jurisdiction never existed.

The Siskiyou County Superior Court has maintained jurisdiction over the specific adjudicated water rights in the Scott basin, but does not claim jurisdiction in regard to the applicability of other principles of law to the groundwater in that basin. Specifically, the Decree does not assert nor maintain continuing

over all future issues relating to Ms. Browne, no matter how distinct from the issue of whether her guardian should be discharged. Under the County's interpretation of *Browne*, any time any action arises involving anything related to the Scott River's groundwater, the Siskiyou Superior Court will have exclusive jurisdiction based on the Decree, even, for example, a claim involving groundwater pollution. This is an untenable reading of *Browne* and a misapplication of the doctrine of concurrent exclusive jurisdiction. Under *Browne* and the express language of the Decree itself, the Siskiyou Superior Court only maintains jurisdiction over changes or modifications to water rights adjudicated in the Decree, and the subject matter thereof.

jurisdiction over the issue of whether the State Water Board or the County have authority to apply the Public Trust Doctrine to interconnected groundwater across the state or to interconnected groundwater of the Scott River. By virtue of the fact that the Siskiyou County Superior Court never took control over the issue of the State Water Board or the County's authority to apply the Public Trust Doctrine to interconnected waters, they cannot be said to have exclusive concurrent jurisdiction over that issue.

The Siskiyou County Superior Court also never claimed jurisdiction over sources of interconnected groundwater outside the delineated portions of the map. (App. at 174, 379.) As discussed above, the Sacramento Superior Court, after an exhaustive analysis and discussion with the County and the State Water Board at the hearing, found that there were potential or existing sources of interconnected groundwater which were not included in the Decree and therefore outside its scope. (App. at 379.) ELF's Petition specifically addresses new well-drilling operations to only those sources of interconnected groundwater outside the scope of the Decree and does not request relief relating to any sources which may be covered by the Decree. The trial court properly found that the Siskiyou County Superior Court did not take control over every potential source of the Scott River's interconnected groundwater, only those delineated on the map. (App. at 379-380.) Since the groundwater sources at issue in the Decree are not the same as the ones specified in ELF's Petition, the rule of concurrent exclusive jurisdiction would not apply to preclude Sacramento Superior Court from hearing ELF's Petition.

V. CONCLUSION

In order to move this case to its home county on venue grounds, the County invites this Court to overrule 150 years of law regarding the nature of water, real property and ownership of water. To invoke jurisdiction, the County asks the Court to misread and misinterpret both the Siskiyou Superior Court's 1980 Decree, and the petition filed below. For all the foregoing reasons, this Court should decline the invitation.

The Petition should be denied, the stay should be lifted and the action dismissed with prejudice.

Dated: 18 March 2011

Respectfully Submitted,

James Wheaton
Attorney for Real Parties in Interest
Environmental Law Foundation, Pacific Coast
Federation of Fishermen's Associations, and
Institute for Fisheries Resources

VERIFICATION

I, James Wheaton, declare as follows:

I am an attorney with the Environmental Law Foundation, in Oakland, California. I am of the counsel of record in the instant case.

I have read the foregoing Return to Alternative Writ by Answer and Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate and know the contents thereof. The facts set forth herein, not otherwise supported by citations to exhibits, are true and correct to of my own knowledge.

Executed on March 18, 2011, at Oakland, California.

James Wheaton
Attorney for Real Parties in Interest
Environmental Law Foundation, Pacific Coast
Federation of Fishermen's Associations, and
Institute for Fisheries Resources

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of the California Rule of Court 8.204(c)(1). This brief is printed in 13 point Times New Roman font and, exclusive of the portions exempted by Rule 8.204(c)(3), contains 12,089 words.

Dated: March 18, 2011

James Wheaton
Attorney for Real Parties in Interest
Environmental Law Foundation,
Pacific Coast Federation of
Fishermen's Associations, and Institute
for Fisheries Resources

PROOF OF SERVICE

I, Monica Aguilar, hereby declare:

I am over the age of 18 years and am not a party to this action. I am employed in the county of Alameda. My business address is Environmental Law Foundation, 1736 Franklin Street, Ninth Floor, Oakland, CA 94612.

On March 18, 2011, I caused to be served the attached:

REAL PARTIES IN INTEREST ENVIRONMENTAL LAW FOUNDATION, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES RETURN TO ALTERNATIVE WRIT BY ANSWER AND MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

 X **BY FEDERAL EXPRESS.** I caused the above identified document(s) to be deposited for collection at the Public Interest Law Offices or a certified Federal Express delivery following the regular practice for collection and processing of correspondence for mailing with Federal Express. I caused the document(s) to be delivered overnight delivery and scheduled them to arrive before 10:00 a.m. the following (business day) morning.

 X **BY US MAIL / USPS** I caused the above identified document(s) addressed to the party(ies) listed in Service List below to be deposited for collection at the Public Interest Law Offices or a certified United States Postal Service box following the regular practice for collection and processing of correspondence for mailing with the United States Postal Service, in the ordinary course of business.

SEE ATTACHED SERVICE LIST

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 in Oakland, California on March 18, 2011.

I further declare that on this same day, an Original and 5 copies of this document has been sent for filing via overnight delivery using Federal Express to:

Court of Appeal, Third Appellate District
Attn: Carrie Whitney, Deputy Clerk
621 Capitol Mall, 10th Floor
Sacramento, CA 95814-4719

Monica Aguilar
DECLARANT

SERVICE LIST:

<p>Roderick E. Walston Best Best & Krieger LLP 2001 North Main Street, Suite 390 Walnut Creek, CA 94596 Tel: (925) 977-3300 Fax: (925) 977-1870 <i>Attorneys for Petitioners, County of Siskiyou</i></p>	<p>By US MAIL</p>
<p>Thomas P. Guarino Natalie E. Reed County Counsel 205 Lane Street P.O. Box 659 Yreka, CA 96097 Tel: (530) 842-8100 Fax: (530) 842-7032 <i>Attorneys for Petitioners, County of Siskiyou</i></p>	<p>By US MAIL</p>
<p>The Superior Court of Sacramento County Gordon D Schaber Courthouse Hon. Lloyd Connelly, Dept. 33 720 9th Street Sacramento, CA 95814 <i>Attorney for Respondent, Trial Court</i></p>	<p>By US MAIL</p>
<p>Allison Goldsmith Daniel Fuchs Mark Poole Office of the Attorney General 1300 "I" Street P.O. Box 944255 Sacramento, CA 94244 Tel: (916) 324-0002 Fax: (916) 327-2319 <i>Attorneys for Real Party in Interest, State Water Resources Control Board</i></p>	<p>By US MAIL</p>

<p>Glen H. Spain, Pacific Coast Federation of Fishermen's Associations Institute for Fisheries Resources Northwest Regional Office PO Box 11170 Eugene, OR 97440-3370 Tel: (541) 689-2000 Fax: (541) 689-2500</p> <p><i>Attorney for Real Parties in Interest, Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources</i></p>	<p>By US MAIL</p>
<p>Richard Michael Frank University of California, Davis School of Law Davis, CA 95616 Tel: (916) 217-1292 Fax: (510) 643-2672</p> <p><i>Attorney for Real Parties in Interest, Environmental Law Foundation</i></p>	<p>By US MAIL</p>