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New Mexico v. General Electric: A Cautionary Tale

New Jersey may have embarked on a long road to an uncertain and possibly futile end

New Jersey's much-trumpeted program to pursue damages for injury to natural resources, primarily groundwater, has garnered significant national attention. A series of court decisions from an unlikely place, *State of New Mexico v. General Electric Company*, Civ. 99-1118 (D.N.M. 2004), should serve as an early warning that New Jersey may have embarked on a long road to an uncertain and possibly futile end. After years of extensive litigation, on May 12, 2004, the New Mexico court granted summary judgment to the defendants and exposed as unproven, speculative, and inconsistent with fundamental principles of law all of the state's claims.

In pursuing its NRD claims, New Jersey is following in the footsteps of New Mexico, even to the point of relying on specially retained private plaintiffs' lawyers. In October 1999, New Mexico, as trustee over the groundwater resources of the state, sued General Electric and other defendants for natural resource damages (NRD) resulting from contamination of the Middle Rio Grande Basin aquifer. Based on New

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Mexico statutory and common law claims, the state sought a significant monetary award for "the value of the volume of contaminated groundwater thus rendered unavailable for appropriation and damages for loss of use of" the contaminated portion of the aquifer.

New Mexico claimed that the proper measure of damages was "the market value, with future losses adjusted to present value, of the volume of water affected by the contamination, together with the replacement cost of the storage capacity of the aquifer." New Jersey similarly uses a settlement formula that calculates lost value on the basis of water utilities' retail charges for water applied to the volume of contaminated groundwater over time without, however, discounting to present value.

The groundwater at issue in *New Mexico v. General Electric* was contaminated with volatile organic compounds and petroleum hydrocarbons. Two of Albuquerque's municipal water supply wells were shut down in 1981. The closed wells were replaced by a new city water supply well that diverted water from a clean part of the same aquifer. The site was subsequently placed on the National Priorities List under CERCLA. A USEPA-mandated remedy required the defendants to pump, treat and recharge the groundwater. By 2003, nearly 2.3 billion gallons

of groundwater had been treated and returned to the aquifer "allowing the groundwater to be returned back to its beneficial use." Billions more gallons of contaminated groundwater remain to be remediated.

After years of litigation, the trial judge concluded that the state cannot prove its claimed damages because the state did not show an actual loss of groundwater services and could not show that remaining contaminated groundwater has lost all of its beneficial uses. On April 5, 2004, in a 145-page *tour de force* opinion that preceded summary judgment to the defendants, the court explored some of the fundamental issues surrounding a trustee's ability to recover NRD for groundwater contamination.

The court rejected the state's efforts to shortcut its proofs or rely on inapplicable or logically flawed legal theories. The court simply would not accept the state's paradigm that contamination equals injury and injury equals damages.

Three fundamental questions drove the court's analysis:

(1) What is the nature of the state's interest in the contaminated groundwater?

(2) How has that interest been injured?

(3) What is the appropriate measure

of damages to compensate the injury?

The State's Role as Trustee

Under New Mexico's trusteeship, unappropriated groundwater belongs to the public subject to appropriation for beneficial use. Statutes provide for groundwater appropriation through permits administered by the state. The court characterized the state as "the watermaster, the gatekeeper, the overseer of the process of appropriation for beneficial use."

In assessing the theory of damages, the court first distinguished the state's claimed injury in its role as trustee from that of a holder of water rights or as a beneficial user of the water or as an owner of the land over the aquifer. For the court, any remedy must be tailored to redress specific injury to the state's role as trustee—the role of making water available for appropriation for beneficial use by others—and not injuries that could be claimed only by an appropriator (landowner) whose beneficial uses were impaired. The court distinguished, too, the state's interest in the groundwater from the sand, gravel, rock, etc. that makes up the subsurface. While both together constitute an aquifer, only the groundwater is a natural resource held in trust; the subsurface belongs to the owner of the property.

Loss of Groundwater Services

The injury inquiry requires an examination of the uses to which the groundwater could be put but for the contamination at issue. The court examined the "highest and best use" of the groundwater and concluded that since potable water was derived in fact from the aquifer, the injury was the volume of water that exceeded applicable drinking water standards. In doing so, the court rejected the state's argument that more stringent discharge or remediation standards should apply.

The state could not recover simply because the groundwater was no longer "pristine." The availability of groundwater for drinking water purposes depends upon whether the drinking water standards are met, not whether

the water "remains in its primordial state." In determining the quantum of the injury, the court considered the safe yield and other aquifer characteristics that limited the scope of any damage to the aquifer's drinking water yielding capabilities in fact.

After a highly factual analysis, the court determined that New Mexico could not point to an actual loss of groundwater services. Although a particular portion of the aquifer was contaminated, the state did not actually lose any groundwater use because the city diverted aquifer water for city use from areas outside of the contamination. As the court explained, "[a] change in the point of diversion, by itself, is not a loss of use." The state could not show that any applications for groundwater extraction had been denied because of the contamination at issue. The court regarded any claim of loss of use of the groundwater as "simply premature" or "speculative."

Alleged Loss of *in situ* Groundwater

The state also insisted that it had lost the *in situ* value of the groundwater as "stock" or "drought reserve." The defendants countered with the argument that even if contaminated water had to be tapped at some future date, wellhead treatment could render the groundwater safe, and ongoing remediation was effecting restoration to potable standards over time.

The court found that a loss of *in situ* groundwater is the same thing as loss of drinking water services because loss of groundwater as a drought reserve is no different than loss of future use: "The 'diminution of value' of *in situ* groundwater claimed by the [state] is not a discrete injury, different in kind from the claimed loss of 'extractive services.' To the contrary, it reflects *the same loss of drinking water services involving the same water* projected into the future, but without any limitation by the concept of the aquifer's 'safe yield.'" Slip Op. at pp. 52-53 (emphasis in original).

In sum, the state could not show loss of future use when the groundwater was being remediated successfully and wellhead treatment could be used to draw upon the contaminated portion of

the aquifer in a time of need.

Market Value vs. Cost of Restoration

The state sought damages in excess of \$1.2 billion based upon the "market value" replacement cost of existing water rights and the estimated construction cost of a "replacement" surface reservoir. The court concluded that the state's "market value" replacement estimate grossly overstated the NRD because the loss of beneficial use was neither permanent nor total.

The Restatement (Second) of Torts §929 allows damages to real property based upon the difference in value of the land before and after the harm. Courts can fashion an award based on replacement costs or restoration costs, but replacement or restoration costs should not be used when it results in economic waste, that is, when the replacement or restoration costs exceed the value of the property. The court concluded that the state's proposed "market value" replacement cost measure of damages necessarily assumes a complete and permanent loss of that resource. The "market value" measure of NRD is not appropriate when the groundwater injury is not permanent and can be remediated.

The determination of whether an injury is permanent is fact-driven, context-dependent, and inescapably empirical, based upon the nature and circumstances of the particular injury itself. The fact that the defendants were remediating the contamination negated the state's market value theory of recovery, i.e. that there was a permanent loss of the resource. Even as to that portion of the plume which remained outside of the capture radius of the extraction wells, the court refused to assume that no remediation would be employed to treat such groundwater in the future. Nor could the loss be said to be "total."

Even contaminated groundwater, the court found, had beneficial uses, e.g. for agricultural, industrial, fire protection or other uses. The court stated that if some or all of the groundwater may be put to beneficial use, then the state may not recover for value that in fact has not been or need not be lost. The

court concluded that the cost of restoration, i.e. remediation, is the most compelling measure of damages, not the state's proposed "market value" replacement costs. However, the cost of restoration was being borne by the defendants, not the state.

Lessons for New Jersey

For NRD purposes, New Jersey treats substantially all groundwater as if required to meet the water quality criteria for drinking water regardless of

whether other factors (e.g. inadequate yield capability or inadequate depth) preclude that use. It seeks substantial compensation for contaminated groundwater without regard to its suitability or current or likely future use for any specific purposes. It relies on short-cut, formula-based market value calculations in lieu of factual proof.

The New Mexico court's disdain for speculative measures of damages in the absence of proof of any actual impairment of the trustee's function to manage the resource for the benefit of

the public seriously undercuts New Jersey's approach. Moreover, the court's decision is fully in accord with *Puerto Rico v. SS Zoe Colocotroni*, 628 F. 2d 652 (1st Cir.) cert. denied, 450 U.S. 912 (1981), to the effect that natural resource damages "should be awarded only to make the trust whole, not to provide a windfall to the public treasury." Unless New Jersey rethinks its approach to groundwater NRD, the alternative is protracted and uncertain litigation in which it is likely to fare no better than New Mexico. ■