

## MODERNIZING THE GROUNDWATER RIGHTS ADJUDICATION PROCESS IN CALIFORNIA

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The groundwater problems in California are as severe as the drought itself. Groundwater levels have declined, on average, more than 15 feet, according to the U.S. Geological Survey. Some wells have had declines of 50 feet or more. Declining groundwater levels impacts water supplies to agricultural land and property owners, as well as regional and city drinking water purveyors. As groundwater levels decline, the property owner with the deeper well tends to draw the most water. Inevitably, there are increasing disputes between water rights holders. Currently, these disputes are still resolved pursuant to an archaic adjudication system, plagued with delays and inequities, and subject to mismanagement and abuse.

The current system incentivizes parties to dissent to settlements and over-pump or further draw down the groundwater while the process lags. Because of these issues, and the pressing need caused by the current drought, Governor Brown issued proposed legislation this summer: the Administration Proposal For Modernizing The Groundwater Adjudication Process, modifying Chapter 12 of the California Water Code (commencing with Water Code §10737). This proposal is in addition to the Sustainable Groundwater Management Act, enacted in 2014 in California, which does not address water rights adjudication.

The proposal has three main objectives: (1) make the adjudication process more cost-effective; (2) ensure that the process is fair; and (3) harmonize the process with SGMA. The proposal applies to all basin-wide groundwater adjudications in high- and medium-priority SGMA basins (§10738), may include federal agencies and tribes (§10722.2 and 10741.2), and may include rights to interconnected surface water when it is necessary for a fair and effective adjudication of the rights to the basin (§10738.4), as some past adjudications have done. The court may exclude small pumpers up to five acre-feet-per-year. (§10738.4).

The court has discretion to use the process in non-SGMA basins when it makes sense to do so (§10738) and to expansions of existing adjudications into areas currently governed by SGMA. (§10720.8). The process does not apply to small disputes, such as well interference actions. (§10738).

The proposal empowers the court to determine the priority of unexercised water rights, consistent with the principles articulated in *In re Waters of Long Valley Creek System*. (§10737).

To limit disputes over basin boundaries, the proposal uses the same boundaries—and the same process for adjusting boundaries—as SGMA. The boundaries are identified by the Department of Water Resources in Bulletin 118 and adjusted by the Department when justified. (§10738.4).

Reforms to the notice and service process are also included in the proposal. Notice and service of water right holders may be through various forms of notice, including personal service, publications, websites, and tax assessments. (§10741, §10741.2, and §10741.5). Notice must be provided to a wide range of interests, including landowners, groundwater sustainability agencies, cities, counties, relevant special districts, tribes, and specified state and federal entities. (§10741). All known pumpers must be served according to procedures in the Code of Civil Procedure. (§10741.5). Prior to sending notice to landowners, the plaintiff must file a draft notice to the

court for approval. (§10741.2). If they receive notice, people who claim to hold water rights have a legal duty to step forward and prove their claims. (§10741.6).

The State of California holds all water in trust for the people of California, and oversees a statewide regulatory process to ensure sustainable groundwater management. Accordingly, the state may intervene in any adjudication. In addition, groundwater sustainability agencies, cities, and counties may intervene in an adjudication that concerns their basin. Landowners in the basin may also intervene. § (10741.8).

To manage the case efficiently and help prompt settlement, the court may divide the case into phases, adopt measures to prevent parties from re-litigating issues from a previous phase, limit discovery to corresponding phases, schedule early resolution of issues such as prescriptive rights, and allow the parties to form classes (groups) of persons with similar overlying rights to the groundwater in the basin. (§10743).

To avoid interference and redundancy with the SGMA process, and to encourage settlement, the court has discretion to stay the litigation while the parties in the SGMA process develop technical information and management options. (§10744).

The court may appoint a special master. The parties would pay the special master's costs, but the court has discretion to waive this requirement for parties that show good cause. § (10745).

If the basin is in overdraft, the court may issue a preliminary injunction to limit pumping during the litigation. In some cases, the court would be *required* to issue a preliminary injunction. (§10746).

Expert witness discovery is similar to the federal rules of civil procedure, including written reports. (§10747). The court may require witnesses at trial to submit their testimony in writing. (§10747.5).

To provide an expedited process for negotiated settlements, the court may enter a stipulated judgment that is supported by 50% of water right holders or 75% of groundwater production if it makes certain findings, including consistency with SGMA and equal treatment of dissenting parties and of small pumpers who are not present in the lawsuit. Dissenting parties may continue to litigate, but the court may impose the plan on them if they fail to demonstrate that it is illegal or treats them unfairly. (§10749). Dissenters would not be subject to the stipulated judgment during the litigation, but would remain subject to a preliminary injunction to prevent over-pumping. (§ 10749). After a judgment is entered, the court has continuing jurisdiction to correct problems. (§10749.6). To incentivize the parties to use the SGMA process, the court may enter a SGMA plan into a stipulated judgment. In that case, SGMA would still apply, but the court would step into the shoes of the water board for enforcement purposes. Thus, DWR would conduct its regular five- year assessments, as SGMA requires, and report the results and any recommended changes to the court, rather than the water board. (§10749 and §10749.6). In this way, parties can negotiate their own stipulation so long as it does not interfere with SGMA, or they can adopt the SGMA plan as their stipulation. (§10749). If the parties choose to use their SGMA plan as a stipulated judgment, they must continue to meet all SGMA requirements, and the court would enforce the terms of SGMA thereafter. (§10749 and §10749.6).

The proposal allows judges to manage the process to avoid conflicts and redundancies between adjudications and the SGMA. (§10737, §10737.2, §10749, and §10749.6).

The Legislature is also considering two bills to reform the adjudication process, [SB 226 \(Pavley\)](#) and [AB 1390 \(Alejo\)](#). Senator Pavley's bill would amend Sections 10721 and 10745.8 of the Water Code and add Chapter 12 (commencing with section 10737) to the Water Code. This bill's approach includes streamlined groundwater adjudications within SGMA, rather than providing a separate adjudication forum. Opponents believe SGMA "should be given time to be implemented and that it is premature to make significant policy changes to the Act at this time." SB 226 was re-referred to the Committee on Appropriations on July 7, 2015.

Assembly Member Alejo's bill would add a chapter to Title 10 of the code of Civil Procedure, relating to groundwater, establishing procedures for comprehensive adjudication actions filed in superior court to determine the rights to extract groundwater from a basin. Many stakeholders prefer AB 1390, which they claim will add "a new chapter to the Code of Civil Procedure making improvements to the judicial proceedings of comprehensive adjudications of groundwater rights in a basin." Supporters say that AB 1390 will reduce the burden of groundwater adjudications on both the courts and claimants without altering the law of groundwater rights and without disruption to the SGMA planning process. The bill authorizes a court to determine if a final judgment is consistent with the sustainability goal of the SGMA. AB 1390 was amended and re-referred to the Judiciary Committee on July 6, 2015.

If the Administration's proposal is enacted, or in the alternative either SB 226 or AB 1390 is enacted, California would have legislation that provides a modern process for settling groundwater rights disputes. Given the current drought in California, this legislation is needed now.