

Date of Hearing: March 28, 2023

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Rebecca Bauer-Kahan, Chair

AB 779 (Wilson) – As Introduced February 13, 2023

SUBJECT: Groundwater: adjudication

SUMMARY: Makes various changes relating to the process for groundwater adjudication proceedings, including adding requirements that a court invite the Department of Water Resources (DWR) or the State Water Resources Control Board (State Water Board) to provide technical assistance in a proceeding and take into account the needs of disadvantaged communities and small farmers when entering a judgement. Specifically, **this bill:**

- 1) Requires the defendant and plaintiff in an adjudication to forward relevant documents to DWR once the court makes a decision. DWR shall post these documents on its internet website in the interest of transparency and accessibility. Provides that this bill does not apply to any documents that have been sealed by the court.
- 2) Requires a court presiding over an adjudication to invite a representative from either the State Water Board or DWR to provide technical assistance or expert testimony on the amount of water in the basin, equitable and sustainable pumping allocations for the basin, and sustainable groundwater and management best practices and recommendations.
- 3) Requires the court, when entering a judgement in a comprehensive adjudication, to take into account the needs of small farmers and disadvantaged communities.
- 4) Defines “disadvantaged community” as communities with an average income less than 80 percent of the state median income and “small farmers” as with between \$10,000 and \$400,000 in gross farm sales for purposes of this bill.
- 5) Requires a groundwater sustainability agency (GSA) with jurisdiction over a basin subject to an adjudication to submit a comprehensive monitoring plan to the court to be followed during the adjudication proceeding and to report monitoring data to the court and DWR during the duration of the adjudication proceeding.
- 6) Prohibits groundwater users involved in an adjudication to increase groundwater pumping beyond the level permitted in the subject basin’s groundwater sustainability plan (GSP), to increase pumping without permission from the court, or to use new or increased pumping to establish a claim of prescription throughout the duration of the proceeding.
- 7) Requires a GSA that has jurisdiction over a basin that has begun an adjudication to hold a public meeting to explain the adjudication process to groundwater users and the public. Permits such a GSA to invite a representative from the State Water Board or DWR to help explain the adjudication process at the public meeting.

EXISTING LAW:

- 1) Enacts the Sustainable Groundwater Management Act (SGMA) that requires local agencies to sustainably manage groundwater in high- or medium-priority basins by 2040. Defines

sustainable management of groundwater as the avoidance of the following six “undesirable results:” (a) chronic lowering of groundwater levels; (b) reduction of groundwater storage; (c) seawater intrusion; (d) degraded water quality; (e) land subsidence; and (f) depletions of interconnected surface water (Water Code § 10720 *et seq.*).

- 2) Requires local agencies in high- and medium-priority basins to form a GSA by June 30, 2017, unless statute designates an “exclusive local agency” for a given area. Provides that a county will be the default GSA for any area in a high- or medium- priority basin not managed by a GSA unless said county notifies DWR that it will not be the GSA for an uncovered portion of a high- or medium-priority basin (Water Code §§ 10723 – 10724).
- 3) Requires critically overdrafted groundwater basins to be managed under a GSP by January 31, 2020 and high- or medium-priority groundwater basins to be managed under a GSP by January 31, 2022 (Water Code § 10720.7).
- 4) Exempts 26 groundwater basins or sub-basins that are subject to existing adjudications from the requirements of SGMA; requires adjudicated areas to report groundwater elevation and other groundwater data to DWR annually (Water Code § 10720.8).
- 5) Outlines process and scope for a comprehensive adjudication of a groundwater basin (Code of Civil Procedure § 830 *et seq.*).
- 6) Permits a party or group of parties proposing a stipulated judgement under the procedures outlined in #3, above, to also submit the proposal to DWR for evaluation and assessment as an alternative to a groundwater sustainability plan (GSP) [Water Code § 10734.4(b)].
- 7) Permits the State Water Board to serve as a referee in a court case involving a water rights dispute upon the request of a state or federal court (Water Code § 2000 *et seq.*).

FISCAL EFFECT: Unknown. This bill is keyed fiscal.

COMMENTS:

- 1) **Purpose of this bill.** According to the author, “[this bill] is an effort to make the groundwater adjudication process more accessible, efficient, and transparent for all water users, especially small farmers, farmers of color, and historically marginalized groundwater users and to ensure the process produces an equitable and science-based allocation of water rights to support sustainable, long-term use by all water users in a basin.”
- 2) **Background.** Groundwater is a critical source of supply that meets more than 40 percent of water demand in an average year and more than 50 percent of demand during drought years. There are three types of groundwater rights: overlying, appropriative, and prescriptive. The most common of these is the overlying right that entitles “an owner of land overlying groundwater to drill a well and pump groundwater for use of that land, within the basin or watershed” (Littleworth and Garner, 2019). No permit is required to obtain overlying rights and these rights are typically not quantified. Due to this, any landowner may pump as much groundwater as they want so long as the water is put to beneficial use and the use is reasonable (Section 2, Article X of California Constitution). As a result of this lack of regulation, many groundwater basins in California are in a state of overdraft (a condition where average annual pumping exceeds average annual groundwater supply in a basin). To

address overdraft and other adverse effects of excessive pumping, SGMA put in place a statewide framework for groundwater management for the first time, but also stipulated that it did not alter surface or groundwater rights (Water Code § 10720.5).

Prescription. In some cases a groundwater right may be obtained through “prescription,” which is somewhat akin to “squatting” only on a water right rather than on real property. Prescription occurs when a person puts water that another has a right for to beneficial use for a period of five years. The use must be “open and notorious”, adverse and hostile, and continuous and uninterrupted in order for a prescripitor to ultimately obtain a right to the water being used.

Adjudications. A groundwater adjudication is when parties ask a court to resolve conflicts over groundwater rights. An adjudication is initiated when one or more groundwater pumpers files a civil action asking the court to intervene to determine groundwater rights and/or limit pumping to a basin’s “safe yield” (the amount of groundwater pumped that is equal to the average replenishment rate of a groundwater basin). According to the Water Education Foundation, “through adjudication, the courts can assign specific water rights to water users and can compel the cooperation of those who might otherwise refuse to limit their pumping of groundwater. Watermasters are typically appointed by the court to ensure that pumping conforms to the limits defined by the adjudication.” 27 basins or sub-basins are adjudicated out of 515 groundwater basins identified by DWR in Bulletin 118. These are predominantly in urban and suburban parts of Southern California.

State law gives every overlying property owner a potential right in an unadjudicated groundwater basin. As such, determining who has groundwater rights that could be affected by an adjudication and the scope of those rights is difficult and can be a lengthy process; adjudications typically take more than a decade to resolve. Identifying and noticing every party that may have a right, completing technical work and sorting through disagreements over this technical work, and determining historic groundwater use which could affect the scope of one's rights are all factors that can contribute to increasing the time and expense of an adjudication. In an attempt to streamline the groundwater adjudication process, the Legislature passed SB 226 (Pavley), Chapter 676, Statutes of 2015, and AB 1390 (Alejo), Chapter 672, Statutes of 201, in the wake of SGMA’s passage.

The Committee is aware of five pending groundwater adjudications:

- Santa Clara Valley – Oxnard (No. 4-001.2) and Pleasant Valley (No. 4-006) groundwater basins, commenced in December 2022.
- Cuyama Valley groundwater basin (No. 3-013), commenced in March 2022.
- Indian Wells groundwater basin (No. 6-54), commenced in November 2021.
- Upper Ventura River (No. 4-3.01), Ojai Valley (No. 4-2), Lower Ventura River (No. 4-3.02), and Upper Ojai Valley (No. 4-1) groundwater basins, commenced in November 2019.
- Las Posas Valley groundwater basin (No. 4-8), commenced in November 2018.

An additional adjudication in the Borrego Valley groundwater subbasin (No. 7-024.1) commenced in July 2020; the court approved a stipulated judgment to settle this adjudication on April 8, 2021 and the case is no longer active.

- 3) **Arguments in support.** The Community Alliance with Family Farmers (CAFF) supports this bill asserting that it will improve the adjudication process to make it more consistent with SGMA and increase access to an adjudication proceeding for small farmers and disadvantaged communities which have not fared well in the adjudication process to date. CAFF points to examples in the Cuyama and Indian Wells basins where large growers initiated an adjudication because they did not agree with the direction the SGMA process was going. Finally, CAFF contends that “the idea of SGMA – that all stakeholders would be represented and their interests considered, and that there would be local community processes to achieve sustainability – will mean nothing if these overdrafted basins end up in court.”
- 4) **Oppose unless amended.** Agricultural Council of California (Ag Council) and a number of agricultural trade associations have taken an “oppose unless amended” position on this bill. Ag Council et al. state “while we respect the author’s intention to make these complex proceedings more accessible to affected landowners who may not fully understand the import of participating in an adjudication, the bill in its current form creates onerous procedures that may not be necessary.” These groups raise a number of concerns with this bill: a) posting specified court documents online is onerous, ambiguous, and would occur after the fact; b) this bill is premature because the streamlined groundwater adjudication process enacted by the Legislature is in early stages of implementation; c) this bill is duplicative because GSAs already have obligations to manage a basin while an adjudication is pending and courts already have a mechanism to as the State Water Board or DWR to provide technical assistance during an adjudication proceeding (Water Code § 2000); and d) the requirement for a GSA for a basin going through an adjudication to hold a public meeting explaining the process is problematic because the GSA is most likely a party to the adjudication and, therefore, may use the opportunity “to put a specific slant on the adjudication process.” Ag Council et al. do not offer specific amendments to address the concerns they raise.
- 5) **Double referral.** This bill is also referred to the Assembly Judiciary Committee.
- 6) **Related legislation.** AB 560 (Bennett), current session, would require a court, before finalizing a groundwater adjudication, to refer the proposed adjudication to the State Water Resources Control Board (State Water Board) for an advisory determination as to whether it will impair the ability of a GSA, the State Water Board, or DWR to achieve sustainable groundwater management. AB 560 is set for hearing before the Assembly Committee on Water, Parks, and Wildlife on March 28, 2023.

SB 1372 (Stern), Chapter 682, Statutes of 2022, provides that the approval of a GSP by DWR shall not be construed as a determination or opinion by DWR that the allocation of pumping rights in a GSP is consistent with groundwater rights law.

AB 2313 (Bloom), 2021-22 Session, would have required the Judicial Council to establish a program to train judges in water law and expanded the utilization of special experts in complex cases involving water law. AB 2313 died in the Senate Appropriations Committee.

AB 938 (Rodriguez), 2015-16 Session, would have permitted a local agency or water master administering an adjudicated groundwater basin to elect that the adjudicated basin be subject to SGMA. AB 928 died in the Senate Committee on Natural Resources and Water.

SB 226 (Pavley), Chapter 676, Statutes of 2015, integrates and streamlines the groundwater adjudication process for groundwater basins that are subject to SGMA.

AB 1390 (Alejo), Chapter 672, Statutes of 2015, added new provisions to the Civil Code of Procedure that establish methods and procedures for comprehensive groundwater adjudications that are consistent with sustainable groundwater management.

REGISTERED SUPPORT / OPPOSITION:

Support

Community Alliance with Family Farmers

Oppose Unless Amended

African American Farmers of California
Agricultural Council of California
California Apple Commission
California Blueberry Association
California Blueberry Commission
California Chamber of Commerce
California Farm Bureau Federation
California Fresh Fruit Association
California League of Food Producers
California Walnut Commission
Nisei Farmers League
Olive Growers Council of California
United Ag
Western Growers Association
Western Plant Health Association

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