

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 560 (Bennett)
Version: June 26, 2023
Hearing Date: July 11, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

Sustainable Groundwater Management Act: groundwater adjudication

DIGEST

This bill requires the parties to an adjudication action regarding groundwater management, before filing a proposed settlement agreement with the court, to submit the proposed settlement agreement to the State Water Resources Control Board (SWRCB) for a nonbinding advisory determination as to whether the proposed settlement agreement will substantially impair the ability of a groundwater sustainability agency (GSA), the SWRCB, or the Department of Water Resources (DWR) to achieve sustainable groundwater management, as provided. The bill requires the determination to be provided no later than 120 days after the submission, and for it to contain specified findings, including how the proposed settlement agreement would affect small and disadvantaged groundwater users under the existing groundwater sustainability plan (GSP). The bill requires the parties to submit the advisory determination to the court when filing the proposed settlement, and specifies that a court is not bound to enter judgment in a manner consistent with the nonbinding advisory determination of the board.

EXECUTIVE SUMMARY

The adjudication of water rights in the state can be complex and involve many parties and counterclaims. Groundwater is a critical source of water supply in this state that meets more than 40 percent of water demand in an average year and more than 60 percent of demand during drought years. In 2014, the Sustainable Groundwater Management Act (SGMA) was passed to establish local GSAs, who are responsible for implementing SGMA by bringing their over-drafted groundwater basins into sustainable yield. However, SGMA does not apply to certain adjudicated basins. According to the author, this has created a situation where it is more appealing to some to seek adjudication over a basin's ground water rights than complying with SGMA. In light of this, the bill seeks to require parties to an adjudication action regarding

groundwater management, before filing a proposed settlement agreement with the court, to submit the proposed agreement to SWRCB for a nonbinding advisory determination as to whether it will substantially impair the ability of a GSA, SWRCB, or DWR to achieve sustainable groundwater management.

The bill is author sponsored and supported by California Environmental Voters, several other small water users, and Indian Wells Valley Groundwater Authority. The bill is opposed by a coalition of water agencies, agricultural interests, and the Chamber of Commerce. The Judicial Council removed their opposition to the bill and are now neutral as a result of recent amendments. This bill passed the Senate Natural Resources and Water Committee on a vote of 6 to 3.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes SGMA with the goal of providing for the sustainable management of groundwater basins, enhancing local management of groundwater consistent with rights to use or store groundwater, providing local groundwater agencies with the authority and the technical and financial assistance necessary to sustainably manage groundwater, and establishing minimum standards for sustainable groundwater management.
 - a) Defines sustainable management of groundwater as the avoidance of the following six “undesirable results:” (i) chronic lowering of groundwater levels; (ii) reduction of groundwater storage; (iii) seawater intrusion; (iv) degraded water quality; (v) land subsidence; and (vi) depletions of interconnected surface water (Wat. Code § 10720 et seq.)
- 2) Requires, pursuant to SGMA, all groundwater basins designated as high- or medium-priority basins by DWR to develop and be managed under a GSP or coordinated GSPs. (Wat. Code § 10720.7.)
- 3) 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 (Wat. Code § 10720.8.)
- 4) Authorizes the creation of local GSAs and requires GSAs to consider the interests of all beneficial uses and users of groundwater, as well as those responsible for implementing groundwater sustainability plans. (Wat. Code § 10723.2.)
- 5) Establishes the procedures for a court to use when adjudicating a groundwater basin. (Code of Civ. Proc. § 830 et seq.)
- 6) Authorizes any of the following parties to intervene in a groundwater adjudication:

- a) a groundwater sustainability agency for the basin or a portion of the basin;
 - b) a city, county, or city and county that overlies the basin or a portion of the basin;
 - c) the state; and
 - d) any person upon an ex parte application that demonstrates that the person holds fee simple ownership in a parcel in the basin, or extracts or stores water in the basin. (Code of Civ. Proc. § 837 & 837.5.)
- 7) Provides that a court may enter a judgment in a comprehensive groundwater adjudication if the court finds that the judgment meets all of the following criteria:
- a) it is consistent with Section 2 of Article X of the California Constitution;
 - b) it is consistent with the water right priorities of all non-stipulating parties and any persons who have claims that are exempted in the basin; and
 - c) it treats all objecting parties and any persons who have claims that are exempted as compared to the stipulating parties. (Code of Civ. Proc. § 850(a).)
- 8) Provides that if a party or group of parties submits a proposed stipulated judgment that is supported by more than 50 percent of all parties who are groundwater extractors in the basin or use the basin for groundwater storage and is supported by groundwater extractors responsible for at least 75 percent of the groundwater extracted in the basin during the five calendar years before the filing of the complaint, the court may adopt the proposed stipulated judgment, as applied to the stipulating parties, if the proposed stipulated judgment meets the criteria described in 6). (Code of Civ. Proc. § 850(b).)
- 9) Authorizes a party proposing a stipulated judgment to submit the proposed stipulated judgement to DWR for evaluation and assessment that it satisfies the objectives of SGMA for the basin. If DWR determines that a judgement satisfies the objectives of SGMA, DWR submits to the court the assessments and recommended corrective actions and the court, if necessary, determines whether to amend the judgment to adopt the DWR's recommended corrective actions. (Wat. Code § 10737.4.)
- 10) Requires a court presiding over an adjudication to manage the proceedings in a manner that does not interfere with the completion and implementation of a GSP and that is consistent with sustainable groundwater management under SGMA. (Wat. Code § 10737.2.)
- 11) Provides a court is not to approve entry of judgment in an adjudication action for a basin required to have a groundwater sustainability plan unless the court finds that the judgment will not substantially impair the ability of a GSA, SWRCB, or DWR to

comply with SGMA and to achieve sustainable groundwater management. (Wat. C. § 10737.8)

- 12) Authorizes 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. (Wat. Code § 2000 et seq.)
- 13) Declares that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare, and that the right to water or to the use or flow of water in or from any natural stream or water course in this state is to be limited to such water as is reasonably required for the beneficial use to be served, and such right does not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. (Cal. Const. art. X, § 2.)
- 14) Provides that no water is to be available for appropriation by storage in, or by direct diversion from, any of the components of the California Wild and Scenic Rivers System, as such system exists on January 1, 1981, where such appropriation is for export of water into another major hydrologic basin of the State, as defined by the Department of Water, unless such export is expressly authorized prior to such appropriation by an initiative statute approved by the electors, or the Legislature, by statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring. (*Ibid.*)
- 15) Prohibits a judge of a court of record from receiving the salary for the judicial office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision. (Cal. Const. art VI, § 19.)

This bill:

- 1) Requires the parties to an adjudication action, before filing a proposed settlement agreement with the court, to submit the proposed settlement agreement to the State Water Resources Control Board (SWRCB) for a nonbinding advisory determination as to whether the proposed settlement agreement will substantially impair the ability of a groundwater sustainability agency, the SWRCB, or the DWR to achieve sustainable groundwater management.
- 2) Requires SWRCB to consult with DWR before making its nonbinding advisory determination and to provide its nonbinding advisory determination to the parties

of the adjudication action no later than 120 days after the submission of the proposed settlement agreement.

- 3) Requires SWRCB's nonbinding advisory determination to include findings on both of the following:
 - a) the consistency of the proposed settlement agreement with the technical findings and conclusions from the existing groundwater sustainability plan adopted by a groundwater sustainability agency and approved by the department; and
 - b) how the proposed settlement agreement would affect small and disadvantaged groundwater users under the existing GSP adopted by a GSA and approved by DWR.
- 4) Requires parties to include SWRCB's nonbinding advisory determination of the proposed settlement agreement when filing the proposed settlement agreement with the court. The proposed settlement agreement filed with the court is required to be the same as was submitted to SWRCB for a nonbinding advisory determination.
- 5) Specifies that the court is not bound to enter judgment in a manner consistent with the nonbinding advisory determination of the board.

COMMENTS

1. Stated need for the bill

The author writes:

A lot of work has been done by local governments and state agencies in putting together groundwater sustainability plans. Through the basin adjudication process, it is possible for a single local judge to undercut all that work with a single determination. My bill asks that judges who are making decisions in complicated groundwater matters simply have their determinations reviewed by the departments for consistency with current SGMA law. This will ensure that SGMA is upheld and that everyone's hard work is preserved.

2. Adjudication of water rights and SGMA

The adjudication of water rights in the state can be complex and involve many parties. According to the State Water Resources Control Board, a "water right is a legal entitlement authorizing water to be diverted from a specified source and put to beneficial, nonwasteful use. Water rights are property rights, but their holders do not own the water itself."¹ Existing state law recognizes three types of water rights –

¹ State Wat. Resources Control Bd., *The Water Right Process* (updated Aug. 20, 2020), available at https://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.html.

riparian rights, appropriative rights, and groundwater rights. With the impacts of climate change affecting the scarcity and availability of water, via droughts and other conditions, litigation around water rights will likely increase in the near future. This bill is focused on the groundwater rights.

In 2014, the Legislature passed SGMA, which put in place a statewide framework for groundwater management for the first time, but specified that it did not alter surface or groundwater rights. The purpose of SGMA was to address overdraft and other adverse effects of excessive pumping of groundwater. After the enactment of SGMA, the Legislature passed SB 226 (Pavley, Ch. 676, Stats. 2015) and AB 1390 (Alejo, Ch. 672, Stats. 2015) with the intent of streamlining the adjudication process for groundwater rights. Under SB 226, a court must adjudicate rights to groundwater in a basin that is required to have a GSP under SGMA in a manner that minimizes interference with the timely completion and implementation of a GSP, avoids redundancy and unnecessary costs in the development of technical information and a physical solution, and is consistent with the attainment of sustainable groundwater management within the timeframes established by SGMA. (Wat. Code § 10737.2.) AB 1390 authorized a GSA for the basin, a city, county, or city and county that overlies the basin, and certain persons to intervene in a groundwater adjudication. (Code of Civ. Proc. § 837 & 837.5.)

Under state law, every overlying property owner has a potential right in an unadjudicated groundwater basin, which makes adjudication of those rights difficult and often a very lengthy process. Sometimes taking more than a decade for water rights holders and basin managers to come to an agreement. The author notes that during the adjudication process, judges only need to consider “safe yield” for the basin, rather than future basin sustainability. A “safe yield” determination merely necessitates that the amount of water coming into the basin equals the amount of water going out. But, since the judgement is made during a single point in time, adjudicated basins have no way of considering future changes in basin sustainability without relitigating the adjudication agreement. The author states that there have been instances of judges making determinations that go against the sustainable water allocations determined by the GSA. These allocations were approved by DWR during the GSP review process outlined under SGMA. The author argues that judgement determinations that rule in favor of higher use allocations prevent the basin from reaching future sustainable yields, and also runs the risk of rendering SGMA ineffective by setting precedent in court.

Existing state law provides a court may enter a judgement in a comprehensive groundwater basin adjudication if the judgement is consistent with the reasonable use doctrine, is consistent with the rights of parties exempted from the adjudication, and treats all objecting and exempted parties equitably. (Code of Civ. Proc. § 850(a).) Any party to the adjudication may propose a stipulated judgment to the court, and the court may adopt the stipulated judgement if the parties proposing the settlement represent 75 percent of the groundwater pumped in the basin or if 50 percent of the pumpers in the

basin agree to the stipulated judgment (*Id.* at (b).) The party proposing the stipulated judgment may submit the proposed stipulated judgment to DWR for an evaluation and assessment that it satisfies the objects of SGMA for the basin, and DWR can recommend corrective actions. (Wat. Code § 10737.4.) The court may determine it is necessary to amend the judgment to adopt DWR's recommended corrective actions. (*Ibid.*). This process, however, is only triggered if a party chooses to submit the proposed settlement. Under this bill, the submittal of a proposed settlement would be required. Additionally, a court is not to approve entry of judgment in an adjudication action for a basin required to have a groundwater sustainability plan unless the court finds that the judgment will not substantially impair the ability of a GSA, SWRCB, or DWR to comply with SGMA and to achieve sustainable groundwater management. (Wat. C. § 10737.8)

The bill proposes to address this issue by requiring the parties to an adjudication action, before filing a proposed settlement agreement with the court, to submit the proposed settlement agreement to SWRCB for a nonbinding advisory determination as to whether the proposed settlement agreement will substantially impair the ability of a GSA, SWRCB, or DWR to achieve sustainable groundwater management. Before making its nonbinding advisory determination, SWRCB must consult with DWR. In order to ensure that the adjudication is not unduly burdened with additional time constraints, the bill requires SWRCB to provide its determination no later than 120 days after the submission of the proposed settlement agreement. The advisory determination should include findings on both: (a) the consistency of the proposed settlement agreement with the technical findings and conclusions from the existing groundwater sustainability plan adopted by a GSA and approved by DWR; and (b) how the proposed settlement agreement would affect small and disadvantaged groundwater users under the existing approved and adopted GSP. The parties would then provide the nonbinding advisory determination to the court when filing the proposed settlement agreement with the court. In order to ensure that the bill does not violate constitutional provisions related to separation of powers, the bill specifies that the court is not bound to enter judgment in a manner consistent with the nonbinding advisory determination of the board.

According to the Senate Natural Resources Committee, there are currently 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 2018.²

In July 2020, an additional adjudication in the Borrego Valley groundwater subbasin (No. 7-024.1) commenced; however, the court approved a stipulated judgment to settle this adjudication on April 8, 2021 and the case is no longer active.³

3. Opposition concerns

The bill is opposed by a coalition of water agencies, agricultural interests, and the Chamber of Commerce. They fear that the bill will lead to further delays in groundwater adjudications, which are already lengthy proceedings. They note that existing law already requires a court presiding over an adjudication to manage the proceedings in a manner that does not interfere with the completion and implementation of a GSP and that is consistent with sustainable groundwater management under SGMA. (Wat. Code § 10737.2.) Additionally, they point to the fact that a GSA is many times a lead defendant in an adjudication and has the right to intervene. (Code of Civ. Proc. § 837.) Existing law also allows a court to request recommendations from the SWRCB on individuals who would be suitable special masters for a groundwater adjudication. (Code of Civ. Proc. § 845.) The opposition points to the findings that must be included in an advisory determination as also adding more delay into the process stating:

AB 560 adds several other items for State Water Board to opine upon. Not only do these additions have the potential to further increase the delay imposed by mandating State Water Board participation, but they also turn the roles of the State Water Board, GSAs, and the courts on their heads. For instance, the bill would require the State Water Board to opine on the consistency of the proposed settlement with a groundwater sustainability plan (GSP). This question is completely irrelevant, particularly because in the plain language of SGMA, neither a GSA nor a GSP can modify rights to water. (Water Code, §§ 10726.4(a)(2), 10726.8(b), 10738.) Rather, only a judgment in a comprehensive groundwater adjudication may modify groundwater rights within a basin. Thus, the question of whether and to what degree a proposed judgment may be consistent with a GSP has no bearing on the ultimate determination by a court as to the water rights within a basin. Furthermore, it presumes that a GSP is legally unassailable, which is certainly not the case for any agency plan or policy.

AB 560 also require the State Water Board to advise on potential impacts of the proposed settlement on “small and disadvantaged groundwater users.” First, these terms are not defined anywhere in the bill, making it difficult to understand the

² Sen. Natural Resources Comm. Analysis of AB 560 (2023-24 Reg. Sess.) as amended Jun. 14, 2023 at p. 2.

³ *Ibid.*

scope of the provision. We will note that some basins are located entirely within DACs. More importantly, it presumes that the State Water Board has specialized knowledge as to whatever small and disadvantaged groundwater users might mean within a particular basin. This is likely outside of the scope of the State Water Board's expertise generally, and particularly as to individual basins.

The Judicial Council of California was in opposition, but recent amendments have addressed their concerns and they are now neutral.

4. Statements in support

The Community Alliance with Family Farmers writes in support stating:

Though this bill will not address the inequities in the adjudication process, nevertheless its attempt to bring the state in for review is a step in the right direction. We would prefer for the state to be brought in earlier in the process when it might be able to influence the court's treatment of small water users and the environment, since neither of these has fared well in the history of adjudication.

The small farms and rural residents that CAFF represents are at such a disadvantage in the adjudication proceedings that it is unfortunate that this legal proceeding is an option to circumvent the SGMA process. As we have seen in Cuyama, where the largest agricultural pumpers – Grimmway and Bolthouse, both now owned by hedge funds – decided they could get a better deal from the court than from the GSA process and forced everyone into court, the costs of legal representation are too high for the small pumpers. Similarly, a large pistachio grower from Kern County filed for adjudication in Indian Wells when he decided the SGMA process wasn't going his way.

Unless the Legislature intervenes and limits the ability of the largest groundwater pumpers to circumvent the GSAs by going to court, we will see this scenario play out over and over. 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 all these overdrafted basins end up in court. CAFF urges an "aye" vote on this and any other bill that seeks to reform the adjudication process and better align it with the SGMA process.

5. Statements in opposition

The opposition coalition writes:

Comprehensive groundwater adjudications are notoriously complex, lengthy, and expensive legal proceedings. We are concerned that the bill as currently drafted mandates a consultation that will lead to further delays in groundwater adjudications. These adjudications are already lengthy, fact-intensive, and expensive legal proceedings, and creating a new mandatory step that does not include a deadline for the State Water Board to respond will add further delay and expense.

Under existing law, the court must make a finding that the judgment will not impair a groundwater sustainability agency's (GSA) or the state's ability to achieve sustainable groundwater management. (Water Code, § 10737.8.) This means that the court is already charged with ensuring that the Sustainable Groundwater Management Act (SGMA) is complied with. Additionally, the GSA is often the lead defendant in a groundwater adjudication, or if they are not initially named, a GSA has a right to intervene in an adjudication affecting its basin. (Code Civ. Proc., § 837.) This means that the perspective of GSAs, and their ability to meet their duties under SGMA, will be directly represented and considered in an adjudication proceeding. [...]

Instead of encouraging use of the referral processes in existing law, but keeping them voluntary, AB 560 serves to further delay lengthy adjudication proceedings by adding a mandatory consultation requirement and then potentially puts the brakes on the adjudication for 4 months while the State Water Board considers the matter. In the meantime, the court and litigants are left in limbo, waiting for some future time when the State Water Board will file a response. This means that the case would stay open and pending, while just steps from the finish line. This is also a significant time commitment that will divert State Water Board resources from existing tasks and responsibilities.

SUPPORT

California Environmental Voters
CivicWell
Community Alliance with Family Farmers
Cuyama Valley Community Association
Indian Wells Valley Groundwater Authority

OPPOSITION

African American Farmers of California
Agricultural Council of California
Almond Alliance of California
American Pistachio Growers
Association of California Egg Farmers

Association of California Water Agencies
California Apple Commission
California Association of Winegrape Growers
California Blueberry Association
California Blueberry Commission
California Chamber of Commerce
California Fresh Fruit Association
California League of Food Producers
California Grain and Feed Association
California Seed Association
California State Association of Counties
California Walnut Commission
California Warehouse Association
Kings River Conservation District
Kings River Water Association
Nisei Farmers League
United Water Conservation District
Valley Ag Water Coalition
Western Growers Association
Western Plant Health Association

RELATED LEGISLATION

Pending Legislation: AB 779 (Wilson, 2023) makes various changes relating to the process for groundwater adjudication proceedings, including adding requirements that a court take into account the needs of disadvantaged communities and small farmers when entering a judgment and that groundwater pumpers continue in a groundwater basin subject to an adjudication continue to comply with any applicable GSP. AB 779 will be heard in this Committee on the same day as this bill.

Prior Legislation:

SB 226 (Pavley, Ch. 676, Stats. 2015) *see* Comment 2, above.

AB 1390 (Alejo, Ch. 672, Stats. 2015) *see* Comment 2, above.

PRIOR VOTES

Senate Natural Resources and Water Committee (Ayes 6, Noes 3)

Assembly Floor (Ayes 48, Noes 19)

Assembly Appropriations Committee (Ayes 11, Noes 4)

Assembly Judiciary Committee (Ayes 7, Noes 2)

Assembly Water, Parks and Wildlife Committee (Ayes 9, Noes 4)
