

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

AB 779 (Wilson)
Version: July 3, 2023
Hearing Date: July 11, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

Groundwater: adjudication

DIGEST

This bill enacts various changes to procedures governing comprehensive groundwater adjudications and the Sustainable Groundwater Management Act (SGMA) designed to address transparency regarding the adjudication process, ensure that the water use of small farmers and disadvantaged communities have been considered by a court before a judgment is entered, and specify that monitoring and reporting under an approved groundwater sustainability plan (GSP) continues throughout the duration of the adjudication proceeding, unless otherwise ordered by the court.

EXECUTIVE SUMMARY

The adjudication of water rights in the state can be complex and involve many parties and counterclaims. This generally leads to the process being costly and protracted, which can harm water users, especially small and disadvantaged farmers. 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, SGMA was passed to establish local groundwater sustainability agencies (GSAs), who are responsible for implementing SGMA by bringing their over-drafted groundwater basins into sustainable yield. However, SGMA does not alter preexisting groundwater rights, and basins that are undergoing adjudication are exempt from its requirements. According to the author, this frustrates the implementation of GSPs and hinders sustainable management of groundwater because water users may have a right, or think they have a right, to pump more water than can sustainably or equitably be pumped. This bill seeks to remedy these issues by enacting changes to the adjudication of groundwater rights to promote equity, efficiency, and transparency.

The bill is author sponsored and supported by the California Climate & Agriculture Network, the Community Alliance with Family Farmers, and the Cuyama Valley

Community Association. The bill is opposed by a coalition of water agencies, agricultural interests, and the Chamber of Commerce. This bill passed the Senate Natural Resources and Water Committee on a vote of 7 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 the Department of Water Resources (DWR) to develop and be managed under a GSP or coordinated GSPs. (Wat. Code § 10720.7.)
- 3) Provides that nothing in SGMA determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights. (Wat. Code § 10720.5(b).)
- 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 (Wat. Code § 10720.8.)
- 5) 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.)
- 6) Establishes the procedures for a court to use when adjudicating a groundwater basin. (Code of Civ. Proc. § 830 et seq.)
- 7) 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.)
- 8) 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).)
- 9) 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).)
- 10) Authorizes the court, upon a showing that a basin is in a condition of long-term overdraft, to issue a preliminary injunction upon notice and hearing, as provided. (Code of Civ. Proc. § 874).
- 11) 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.)
- 12) 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.)

- 13) 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, the State Water Resources Control Board (SWRCB), or DWR to comply with SGMA and to achieve sustainable groundwater management. (Wat. Code § 10737.8)
- 14) Authorizes SWRCB 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.)
- 15) 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.)
- 16) 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.*)

This bill:

- 1) Requires a court to appoint one party to forward all case management orders, judgments, and interlocutory orders to DWR within 10 business days of issuance. DWR must post the documents on its website in the interest of transparency and accessibility within 20 business days of receipt from a party. These provisions do not apply to any documents that have been sealed by the court.
- 2) Requires the court to allocate payment of the costs incurred by the party appointed to forward all case management orders, judgments, and interlocutory orders to the department among the parties in an amount and a manner that the court deems equitable.

- 3) Requires a court in an adjudication action for a basin required to have a GSP under SGMA to manage the case in accordance with Section 10737.2 of the Water Code.
- 4) Authorizes a court to enter judgment in a comprehensive adjudication, in addition to existing requirements, if the court finds:
 - a) that the water use of small farmers and disadvantaged communities have been considered; and
 - b) 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.
- 5) Clarifies that a court may refer the matter to the SWRCB for investigation and report pursuant to Section 2001 of the Water Code, and specifies that a party may request that the court refer the matter to the SWRCB under this provision.
- 6) Defines certain terms for these purposes.
 - a) "Disadvantaged communities" mean communities identified by the California Environmental Protection Agency as disadvantaged communities pursuant to Section 39711 of the Health and Safety Code.
 - b) "Small farmers" means farmers with between ten thousand dollars (\$10,000) and four hundred thousand dollars (\$400,000) in gross farm sales, as referenced in the Department of Food and Agriculture's California Underserved and Small Producers Program.
- 7) Requires all monitoring and reporting required by a GSP to continue throughout the duration of the adjudication proceedings. Requires a GSA and SWRCB to submit various reports to the court during the adjudication proceeding.
- 8) Requires a party to the adjudication, and any other person extracting water from the basin, to comply with the applicable GSP, except as may be authorized by the court.
- 9) Prohibits a party to the adjudication, or any other person extracting water from the basin, from using new or increased groundwater use to establish a new claim of prescription during an adjudication proceeding, except as authorized by the court
- 10) Requires a GSA, upon receiving notice that an adjudication has commenced in its basin, to arrange for DWR to present an information update at a public meeting to explain the adjudication process and the status of the adjudication to water users within the basin and the public.

COMMENTS

1. Stated need for the bill

The author writes:

AB 779 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. 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 – 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 addressing concerns with the adjudication of groundwater rights and the sustainability of groundwater basins.

a. SGMA

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. SGMA specifically provides that its provisions do not determine or alter surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights. (Wat. Code § 10720.5(b).) 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

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.

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.)

b. Groundwater adjudication proceedings

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. 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. 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.)

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

² Sen. Natural Resources Comm. Analysis of AB 779 (2023-24 Reg. Sess.) as amended Jun. 19. 2023 at p. 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. This bill seeks to enact changes to the existing process for the adjudication of groundwater rights to promote equity, efficiency, and transparency

According to the author, the existing groundwater adjudication process is flawed in numerous ways. Small farmers and under-resourced community members often lack the time and resources to hire lawyers, participate in proceedings, or track down court documents to stay updated on the process. The author further contends that the current process makes it tremendously cumbersome for expert agencies like DWR or SWRCB to provide technical input and ensure compliance with SGMA. The author states that these concerns reveal a lack of equity, efficiency, and transparency that makes the current groundwater adjudication process inaccessible to many small farmers and groundwater users. In addition to delaying the implementation of a GSP, some water users may increase pumping without restriction during the pendency of an adjudication, a phenomenon known as a “rush to the pumphouse,” which can have significant ecological and economic impacts for other water users in the basin. This bill is intended to address these concerns in several ways.

First, in regards to transparency, the bill requires a court to appoint one party to forward all case management orders, judgments, and interlocutory orders to DWR within 10 business days of issuance, and requires DWR to post the documents on its website within 20 business days of receipt from a party. The bill makes it clear that these provisions do not apply to any documents that have been sealed by the court. Additionally, the bill requires a GSA, upon receiving notice that an adjudication has commenced in its basin, to arrange for DWR to present an information update at a public meeting to explain the adjudication process and the status of the adjudication to water users within the basin and to the public. Lastly, the bill requires all monitoring and reporting required by a GSP to continue throughout the duration of the adjudication proceedings, and requires a GSA and SWRCB to submit various reports to the court during the proceeding.

The bill enacts several changes to address equity and efficiency. It requires the court to allocate payment of the costs incurred by the party appointed to forward all case management orders, judgments, and interlocutory orders to the department among the parties in an amount and a manner that the court deems equitable. In addition to existing requirements under Section 850 of the Code of Civil Procedure, the bill authorizes a court to enter judgment in a comprehensive adjudication if the court finds that the water use of small farmers and disadvantaged communities have been considered, and that the judgment will not substantially impair the ability of a GSA, the

³ *Ibid.*

SWRCB, or DWR to comply with SGMA and achieve sustainable groundwater management. The bill clarifies that in an adjudication action for a basin required to have a GSP under SGMA the court must manage the case in accordance with Section 10737.2 of the Water Code. That section specifies a court is 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.

Additionally, the bill also clarifies that a court may refer the matter to the SWRCB for investigation and reporting pursuant to Section 2001 of the Water Code, and provides that a party may request the court refer the matter to the SWRCB under this provision.

In order to ensure a GSP is not negatively affected during the pendency of the adjudication, the bill does three things. It requires a party to the adjudication, and any other person extracting water from the basin, to: (1) comply with the applicable GSP; and (2) prohibits them from using new or increased groundwater use to establish a new claim of prescription during an adjudication proceeding, except as authorized by the court. Prescription occurs when a person puts water that another person has a right over to beneficial use for a period of five years. Existing law requires the use must be open and notorious, adverse and hostile, and continuous and uninterrupted in order for a person to ultimately obtain a right to the water being used. Lastly, all monitoring and reporting required by a GSP must continue throughout the duration of the adjudication proceedings, and GSAs and SWRCB are to submit various reports to the court during the proceeding.

4. Statements in support

The California Climate & Agriculture Network and the Community Alliance with Family Farmers write in support, stating:

Though this bill will not address the inequities in the adjudication process – only having the court appoint class counsel for the rural residents and small farmers would accomplish that--nevertheless bringing the state into the court proceedings and requiring the court to consider the needs of small farms and disadvantaged communities will inject more of SGMA into the adjudication proceedings. Since neither small farms nor disadvantaged communities – nor the environment – have fared well in the history of adjudication, this would be a beneficial reform.

The small farms and rural residents that our organizations represent 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. Reforming the adjudication process to be fairer and more related to the SGMA process might discourage a rash of adjudications.

5. Statements in opposition

The bill is opposed unless amended by a coalition of water agencies, agricultural interests, and the Chamber of Commerce. Their concerns include that reporting rulings to DWR by parties to the adjudication is onerous and that it is inappropriate for DWR to maintain these court records. They note that certain provisions of the bill are duplicative and merely refer to existing provisions of law. The opposition coalition writes:

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, given recent legislation that streamlined groundwater adjudications.

Comprehensive groundwater adjudications are notoriously complex, lengthy, and expensive legal proceedings. We respect the intention to attempt to lower barriers to participation and to increase understanding of the importance of adjudications, but we are concerned that some provisions are duplicative of existing law and inadvertently increase length and expense of groundwater adjudications. We are diligently working with the author's office to attempt to resolve our concerns.

The opposition then state they have the following concerns with the bill:

- forwarding pleadings to DWR for posting is onerous; and
- courts can already obtain recommendations from DWR and the SWRCB

SUPPORT

California Climate & Agriculture Network
Community Alliance with Family Farmers
Cuyama Valley Community Association

OPPOSITION

African American Farmers of California
Agricultural Council of California
American Pistachio Growers
Association of California Egg Farmers
California Apple Commission
California Association of Wheat Growers
California Association of Winegrape Growers
California Blueberry Association
California Blueberry Commission
California Chamber of Commerce
California Fresh Fruit Association
California Grain and Feed Association
California League of Food Producers
California Seed Association
California Walnut Commission
California Warehouse Association
Nisei Farmers League
Olive Growers Council of California
Pacific Egg & Poultry Association
United Ag
Western Growers Association
Western Plant Health Association

RELATED LEGISLATION

Pending Legislation: AB 560 (Bennett, 2023) 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 SWRCB for a nonbinding advisory determination as to whether the proposed settlement agreement will substantially impair the ability of a GSA, the SWRCB, or DWR to achieve sustainable groundwater management, as provided. AB 560 will be heard in this Committee on the same day as this bill.

Prior Legislation:

SB 1372 (Stern, Ch. 682, Stats. 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, 2022) 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, 2016) 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, Ch. 676, Stats. of 2015) *see* Comment 2, above.

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

PRIOR VOTES

Senate Natural Resources and Water Committee (Ayes 7, Noes 3)
Assembly Floor (Ayes 59, Noes 17)
Assembly Appropriations Committee (Ayes 11, Noes 3)
Assembly Judiciary Committee (Ayes 8, Noes 3)
Assembly Water, Parks and Wildlife Committee (Ayes 11, Noes 3)
