

Groundwater Adjudications: Sensible and Cost-Effective Reforms To Ensure a Modern and Fair Process

This proposal would provide a modern, comprehensive adjudication process for all groundwater basins that are regulated under the Sustainable Groundwater Management Act (SGMA), and it would be an option for basins that are not. 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 to ensure that parties have a forum to determine their water rights but do not use it to obstruct or delay SGMA. Because the proposal is located within SGMA, it includes the commitment in SGMA not to alter water rights, but instead provides an expedited process for defining and quantifying existing rights.

Scope of the proposal

To ensure a comprehensive process, the proposal applies to all basin-wide groundwater adjudications in high- and medium-priority SGMA basins (section 10738), may include federal agencies and tribes (sections 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 (section 10738.4), as some past adjudications have done. The court may exclude small pumpers up to five acre-feet-per-year (section 10738.4), which would make the case more manageable without compromising its effectiveness.

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

To provide future certainty for all water right holders, the proposal clarifies that the court is empowered to determine the priority of unexercised water rights, consistent with the principles articulated in *In re Waters of Long Valley Creek System*. (Section 10737)

Basin boundaries

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. (Section 10738.4)

Selection of Judge

The Judicial Council will select a neutral judge for all purposes. Judges may be challenged for cause only; there are no preemptory challenges. (Section 10739)

Notice and service of complaint

Reforms to the notice and service process are intended to be efficient but fair. Notice and service of water right holders may be through various forms of notice, including personal service, publications, websites, and tax assessments. (Sections 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. (Section 10741) All known pumpers must be served according to procedures in the Code of Civil Procedure. (Section 10741.5) Prior to sending notice to landowners, the plaintiff must file a draft notice to the court for approval. (Section 10741.2) The court may require the notice to be translated. (Section 10741.2) If they receive notice, people who claim to hold water rights have a legal duty to step forward and prove their claims. (Section 10741.6)

Intervention

Some parties should have a right to intervene in an adjudication action. The State of California holds all water in trust for the people of California, and the state oversees a statewide regulatory process to ensure sustainable groundwater management. Accordingly, the state may intervene in any adjudication. (Section 105.5) Groundwater sustainability agencies, cities, and counties may intervene in an adjudication that concerns their basin. Landowners in the basin may also intervene. (Section 10741.8)

Discovery

To simplify and expedite discovery, parties are required to disclose their claims, pumping information, and other specified information early in the process, and they are required to update the information when it changes. (Section 10742)

Case management

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. (Section 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. (Sections 10744)

Special master

To help the court sort through complex technical and legal issues, 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. (Section 10745)

Preliminary injunction

One of the primary reasons that adjudications can take decades to resolve is that it is often cheaper for a party to drag out the litigation rather than resolve the case. Meanwhile, the parties continue to overdraft the basin, causing injury to water right holders and long-term damage to the basin. Also, some parties may hope to delay pumping restrictions by disrupting the SGMA process with strategic lawsuits or other tactics.

To discourage delay, minimize ongoing damage, and encourage settlement, if the basin is in overdraft, the court may issue a preliminary injunction to limit pumping during the litigation. In more rare circumstances, if the SGMA process has been delayed or completely broken down, the court would be required to issue a preliminary injunction. (Section 10746)

Witness testimony

To make the process more efficient, expert witness discovery is similar to the federal rules of civil procedure, including written reports. (Section 10747) To expedite trial, the court may require witnesses at trial to submit their testimony in writing. (Section 10747.5)

Stipulated judgments

Historically, adjudications have ended with a negotiated settlement. But settlements are rarely unanimous, and the process of negotiating a settlement for hundreds or thousands of parties can take years and cost millions of dollars in attorney fees.

To provide an expedited process for negotiated settlements, while also allowing dissenters to fully litigate their issues, 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. (Section 10749) Dissenters would not be subject to the stipulated judgment during the

litigation, but, to discourage them from dissenting merely to keep pumping at unsustainable levels, they would remain subject to a preliminary injunction. (Section 10749) After a judgment is entered, the court has continuing jurisdiction to correct problems. (Section 10749.6)

Adjudications will be more efficient in the future if they leverage the SGMA process, in which the parties will be developing the same sort of management plans that historically have been developed in adjudications. To incentivize the parties to focus on the SGMA process, and to provide certainty for SGMA plans, the parties may ask the court to enter a SGMA plan as 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. (Sections 10749 and 10749.6)

In short, the parties have two options for stipulated judgments. They can negotiate their own stipulation so long as it does not interfere with SGMA. Or they can adopt the SGMA plan as their stipulation. In either case, the stipulating parties can obtain the certainty of a negotiated settlement without being held hostage by a small group of dissenters. Dissenters, however, must have a forum to fully resolve their legal claims. Accordingly, they may continue to litigate rather than accept the stipulation. (Section 10749)

Consistency with SGMA

The proposal is located in Chapter 12 of SGMA, but it does not force adjudications to comply with the substantive terms of SGMA. Rather, it entrusts judges with the task of managing the process to avoid conflicts and redundancies. (Sections 10737, 10737.2, 10749, and 10749.6) The court may stay an action, one year at a time, to allow the timely development of a SGMA plan. (Section 10744) As noted, local agencies and the state have a right to intervene in an adjudication process to ensure that broader public interests are protected. (Section 105.5 and 10741.8) The court and the parties have flexibility to adopt a physical solution, by stipulated judgment or otherwise, so long as it would not obstruct SGMA. (Sections 10748 and 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 (see discussion above). (Sections 10749 and 10749.6)

If there are separate lawsuits relating to the SGMA process, the lawsuits may be coordinated or consolidated with a pending adjudication to prevent conflicts. (Section 10739)