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GROUNDWATER MANAGEMENT REFORM IN CALIFORNIA: BROWNSTEIN RECOMMENDATIONS

The late professor Joseph Sax once wrote about California that "they don't do groundwater," referring to the absence of a statewide scheme for the permitting and regulation of groundwater. It is true that there is no centralized state regulatory entity governing groundwater like the California State Water Resources Control Board's (SWRCB) administration of surface water rights. But California is not Texas, as has been suggested by those that would like to paint California as a backwater of water resource management. To the contrary, California abandoned absolute ownership of groundwater more than 100 years ago and it was the first state to develop "safe yield" management as complete limitation on the extraction of groundwater.

For the most part, California's regulation of groundwater has been relegated to ad hoc management by local agencies with mixed results and by the courts. There are a plethora of special districts that have some authority over the production, treatment, storage and transmission of water. These districts have been formed under the general statutory authority set forth in the Water Code or the Government Code. There are also a host of special act districts that have been established directly by the legislature with unique authorities that include powers to "manage" groundwater that are more customized to the described region. However, none of these districts have the power to determine the relative water rights of existing and potential users of groundwater. Nor do they possess a general police power.

For cities and, more frequently, counties that do possess general police powers, many have adopted some form of groundwater regulation contiguous with their defined political boundaries or in areas of special concern. County groundwater ordinances typically focus on the extraction and export of groundwater and can be a surrogate for the area of origin laws that burden several of the larger surface water projects. Such ordinances are constrained in their reach, however, in that cities and counties do not possess the power to resolve competing claims to groundwater or to determine and define groundwater rights. They also suffer from the limitations that other local agencies generally enjoy of sovereign immunity, and even where that immunity has been waived statutorily, the waiver is not applicable to public projects that are for the production, storage and transmission of water (Government Code Section 53091).

Although the legislature has sought to facilitate groundwater management by local agencies and to encourage cooperation by agreement between and among public agencies, and while some have been successful, the efforts have not been satisfactory in many areas of the state when viewed through the lens of whether chronic overdraft has been prevented or arrested. Some of these areas have become subject to adjudication, a comprehensive determination of all rights to a given water supply.

In the final outcome, the adjudication is unique in its ability to deliver a final binding determination apportioning water among competing claimants. By law, it must also deliver a safe-yield management of the groundwater resource, which prevents a chronic unregulated withdrawal of groundwater. The vast majority of groundwater basins in California between the Mexican border and Kern County have now been adjudicated. Adjudications are now in place throughout the six counties of Southern California and in many parts of Santa Barbara County. Adjudication is not without its cost and complexities. Adjudications can be costly and unwieldy. Indeed, where adjudication is sought through adversarial

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litigation rather than a consensual stipulation, it can take a decade or more to implement management plans through the court. On the other hand, where competing stakeholders are able to reach a negotiated consensus leading to a stipulated management plan, approved by the court, the parties may avoid many of the exorbitant litigation costs.

Moreover, through imposition of a "physical solution," a court can formulate a groundwater management plan to benefit from techniques unavailable under the general common law. For example, the court may cap the quantity of overlying groundwater use and may provide for voluntary sales or leases of adjudicated rights among basin water users. Further, unused groundwater rights may be carried over from one year to the next and storage programs can be administered in a safe and coordinated manner with rights to the basin's native yield. Adjudicated basins also benefit from efficient post-judgment oversight (typically through the creation of a basin watermaster) and provide a comparatively easy means to resolve disputes and customize the judgment's governance provisions through the court's perpetual continuing jurisdiction. In sum, the outcome of the adjudicatory process may be advantageous, particularly if the costs and time to achieve a final judgment can be limited.

As California deliberates the reform of groundwater management, here are some of our ideas that we believe are worthy of consideration:

1. Groundwater management should remain local. In this context, "local" means decentralized. Management should be contiguous with some defined geographic reach. Not all of a vast groundwater basin necessarily is brought within a single management entity. However, where practicable, a defined hydrologic unit or sub-unit should be managed together. More importantly, groundwater management is subject to greater opportunities for improvement in efficiencies and optimization that are not necessarily available in the surface water context. Groundwater already exists within the ground. While the groundwater and the basin itself must be managed prudently and responsibly, the mere existence of relatively significant quantities of groundwater already in storage provide opportunities that are not customarily available when dealing with surface water. People closest and most familiar with the resource are better situated to explore these opportunities rather than relying on the State Capitol to dictate. In the end, however, a state backstop is required if after a sufficient passage of time, minimum standards of groundwater management do not emerge through one or more of the available means. While the initiation of an adjudication can always force the issue earlier, if after 10 years a management plan has not been ordered or agreed upon, the SWRCB should be required to initiate a mandatory statutory adjudication of the resource and to assess the cost on a beneficiary pays fee recovery.
2. Improve and Expand Information on Groundwater Production. The absence of data concerning the extraction of groundwater is often lamented as an impediment to understanding the true consequences of water use, potential overdraft and effective management. In the surface water context, the SWRCB requires a routine statement of diversion and use by all users of surface water regardless of whether they hold a permit or license to appropriate. All groundwater users in four counties in Southern California all must file annual forms with the SWRCB if their use exceeds 25 AFY per year (See Water Code Section 4999). The effect of failing to file is deemed a "non-use" of groundwater in any proceeding to adjudicate water rights. Although voluntary, these provisions are not applicable to groundwater users outside the four Southern California counties. Our information

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concerning groundwater use could be easily and dramatically improved by requiring statewide compliance with Water Code Section 4999 et seq.

3. Require Safe Yield Management. "Safe yield" is a common law standard borrowed from groundwater texts that have governed groundwater management in California since at least 1949. In setting total allowed extractions, groundwater basin yields should be set consistent with the basin's "safe yield". As construed by the California Supreme Court this is reflective of: (1) Article X, section 2 of the California Constitution, which requires maximum reasonable and beneficial use of available water supplies; and (2) the common law, including the Supreme Court's discussion of overdraft in *City of Los Angeles v. San Fernando*, which recognizes the benefits of actively managing a basin's available storage space to achieve maximum beneficial use of the basin's water resources provided that the management plan does not cause "undesirable results." The Supreme Court has listed water quality degradation, salt-water intrusion, land subsidence and increased pump lifts as potential "undesirable results." The list is not exhaustive. Nor does it ignore physical environmental impacts. Materially reducing outflow into a surface body of water in a manner that adversely affects fish, wildlife and ecosystems may also qualify as an "undesirable result." As such, the introduction of new popular terms de jour, terms like "sustainable yield," do not aid in achieving the objective of limiting groundwater extractions to a safe level that does not cause harm. On the other hand, attempting to create and insert new or different standards without the benefit of historical definition will merely serve to foster ambiguity that will only forestall prudent management.

4. Define Rights. Because groundwater in California presents a quintessential "public commons," it is generally necessary to set the total quantity of allowed extractions and individual allotments thereof. However, to achieve this result, groundwater rights holders must be afforded due process and allocations must be set consistent with underlying groundwater right priorities; otherwise, we risk violating reasonable investment-backed expectations and resulting lawsuits. While groundwater rights may be adjudicated administratively, an administrative determination is always subject to legal challenge if not authorized and approved by a court or arrived at after providing appropriate due process. Typically, local agencies, cities and counties are not equipped to provide an impartial process for undertaking such an analysis. Once rights are determined, it can serve as a springboard for expedited decisions on local transfers, and conjunctive use. Consensual adjudications, where rights are determined by negotiation and then presented to the court for ratification and approval, provide an opportunity to more efficiently achieve this objective without the politicization of the issues that may skew and encumber local management efforts.

5. Provide Financial Incentives for Consensual Management. California can and should support successful groundwater management efforts that comport with the requirements of 3 and 4 above by reimbursing the costs incurred in evaluating and establishing the safe yield for the groundwater resources under management. The specific amount of the reimbursement can be determined by the total number of acre-feet per year or production that has been subject to management up to a defined cumulative cap, for example, not to exceed $20 per AF managed.

6. Streamline Adjudication Process. Adjudications are the prevailing, albeit unpopular, method to resolve competing claims among water users throughout the western states. There are many management advantages that are secured by the adjudication process. Critics point to the lengthy and expensive legal process pursuant to which each right is quantified and established. Moreover,

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the adjudication process does not necessarily require or guarantee better management. Management decisions most often turn on potential innovations that serve to stretch resources further through collaborative efforts commonly embodying a “physical solution” that can still protect the rights determined through the adjudication process while responsibly making more water available for the benefit of all. Using the notice and service provisions applicable to SWRCB surface water adjudications and the availability of mediators and specialized administrative law judges might expedite and improve the ultimate product of the admittedly substantial effort to obtain it.

This document is intended to provide you with general information regarding groundwater management reform in California. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions

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