

Groundwater Adjudications and Alternatives to Comprehensive Adjudication



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Today's Presenters



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BASIN ADJUDICATIONS A HISTORY LESSON



Introduction

- Much of Southern California groundwater successfully managed by court judgments
 - San Fernando Valley
 - San Gabriel Valley
 - Chino Basin
 - Mojave River Basins
 - Central Basin

Introduction

- Key elements of groundwater basin judgments
 - Water right determination
 - Physical solution – management plan
 - Continuing jurisdiction of Court
 - Court-appointed Watermaster
- Key to success – significant consensus at or near beginning of adjudication

Groundwater Rights – The Basics

- Overlying rights

- Landowner can pump from a basin for reasonable and beneficial uses on his property
- Not limited to specific quantity, not lost by non-use
- Priority over appropriative rights
- Dormant rights – *Wright v. Goleta*, 174 Cal.App.3d 74 (1985) – can't be subordinated to appropriative rights
 - CCP § 830 (b) (7) – court may consider *In re Long Valley Creek Stream System* (1979) 25 Cal. 3d. 339

Groundwater Rights – The Basics

- Rights are correlative – proportionate fair share if insufficient supply
 - Based on current reasonable and beneficial need
 - Many considerations – intensively factual (Tehachapi – *Cummings Water District v. Armstrong* (1975) 49 C.A. 3d 992
- Appropriative rights
 - First in time, first in right
 - Only water surplus to reasonable needs of overlying owners is available for appropriation

Groundwater Rights – The Basics

- Reasonable Use Doctrine – no right to unreasonable use of water
 - Case by case factual analysis – *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132
 - Prior reasonable use can become unreasonable – *Light v. SWRCB* (2014) 227 Cal. App. 4th 732

Groundwater Rights – The Basics

- Prescriptive rights – right by adverse use.
Typically an overdraft situation.
 - Water use for reasonable and beneficial purposes in an open, notorious, adverse, and hostile manner continuously and uninterrupted for 5 years.
 - No prescription versus public entities – Civil Code Section 1007
 - Subject to defense of “self help” by overlyers – *City of Barstow v. Mojave*, 23 Cal.4th 1224 (2000)

Water Right Determinations – The Problem

- Numerous parties – hugely complex, if not impractical
- *Pasadena v. Alhambra* – mutual prescription formula
- *Los Angeles v. San Fernando* – the death of mutual prescription?
- Physical solution doctrine – creates some water rights flexibility
 - However *Mojave Water Agency v. Barstow* – vested rights must be respected
- Stipulated solution – most flexibility

What is a Physical Solution?

- Standard definition – a practical way of allocating water resources when it would be inequitable or in contravention of State policy to allocate strictly according to priority water rights
- But with the passage of Article X, Section 2 and decades of court cases – definition has broadened and evolved – courts have adopted water management plans

Evolution of a Physical Solution: The Equitable Doctrine

- Initially designed to deal with the harsh results of injunctive relief
- Court empowered in equity to “regulate between or among [rights holders] the use of the flow of water....” *Frey v. Lowden*, 70 Cal. 550, 551 (1886)
- Rights should be allocated “to produce least waste and greatest beneficial use....” *Watson v. Lawson*, 166 Cal. 235, 243 (1913)
- Early examples: regulation of manner and time of use, and timing, type, and place of diversion

Advent of Article X, Section 2 (Formerly Section 3 Article XIV)

- 1928 response to “absolute” riparian rights declared in *Herminghaus v. Southern California Edison*, 200 Cal. 81 (1926)
- Requires water resources be put to beneficial use to the fullest extent they are capable
- Requires that waste or unreasonable use be prevented “in the interest of the people and for the public welfare”

Article X, Section 2 Case Law

- “When the supply is limited public interest requires that there be the greatest number of beneficial uses of which the supply can yield.” *Peabody v. City of Vallejo*, 2 Cal.2d 351, 368 (1935)
- Senior rights and the substantial enjoyment thereof must be protected by a physical solution. However, the “mere inconvenience or even the matter of extra expense within limits which are not unreasonable” will not prevent implementation of a physical solution. *Peabody*, at 376-377

Article X, Section 2 Case Law

- It is not only within the power but it is also the duty of the trial court to admit evidence relating to possible physical solutions, and if none is satisfactory to it to suggest on its own motions such physical solution.” *City of Lodi v. East Bay Municipal Utility District*, 7 Cal.2d 316, 341 (1936)
- “It is also apparent that if the Court finds such physical solution appropriate it should by its judgment preserve its continuing jurisdiction to change or modify its orders and decree as occasion may require.” *Peabody v. City of Vallejo*, 2 Cal.2d 351, 380 (1935)

Polling Question 1

Have you participated in a groundwater adjudication?

Examples of Adjudicated Groundwater Basins

■ Main San Gabriel Basin (1972)

- Negotiated Judgment based on Engineer's Report
- Water Rights – Prescriptive pumping rights with minor exceptions
 - PPRs translate into a share of Operating Safe Yield – set each year
- No restriction on pumping
- Pumping in excess of operating safe yield incurs replenishment assessment on yearly basis

Examples of Adjudicated Groundwater Basins

- **Main San Gabriel Basin (1972) (cont'd)**
 - 9 member Watermaster Board sets OSY yearly and purchases Supplemental Water with assessments
 - Storage space controlled by Watermaster
 - Broad continuing jurisdiction provisions
 - Recent Amendments (June 2012)
 - Pre-purchase of Supplemental Water allowed
 - Authorization to borrow money
 - Water Resource Development Assessment

Examples of Adjudicated Groundwater Basins

■ Chino Basin Judgment (1978)

- Negotiated Judgment – Negotiating Committee led by CBMWD
- Water Rights – 3 Pools created in response to *Los Angeles v. San Fernando*
 - Overlyers (Ag and Non-Ag) guaranteed a share of Safe Yield
 - Appropriators receive remainder including unused Safe Yield from Ag Pool
 - Conversion claims

Examples of Adjudicated Groundwater Basins

■ Chino Basin Judgment (1978) (cont'd)

- Governance by Watermaster, Advisory Committee and Pool Committees
- No cutback in groundwater production
- Each pool provides funds to Watermaster to replace over production on yearly basis
- Storage rights controlled by Watermaster
- Optimum Basin Management Plan
- Board continuing jurisdiction provision

Examples of Adjudicated Groundwater Basins

- **Chino Basin Judgment (1978) (cont'd)**
 - OBMP and Peace Agreements
 - Early transfers of unused Ag water to Appropriate Pool
 - Non-Ag transfers
 - Support for DeSalter Program and Recharge Master Plan

Examples of Adjudicated Groundwater Basins

- **Mojave River Basin Judgment (1996)**
 - Stipulated Judgment developed by Negotiating Committees led by Mojave Water Agency
 - Trial versus non-Stipulating Parties
 - 5 subareas – obligations between subareas defined
 - Water rights within each subarea
 - Free Production Allowance based on historic production
 - Ramp down to 80% in first 5 years

Examples of Adjudicated Groundwater Basins

- **Mojave River Basin Judgment (1996) (cont'd)**
 - Further ramp downs based on Watermaster Report and Court Order
 - Overlying rights are transferable
 - No limit on production
 - Replenishment assessment paid on overproduction on a subarea by subarea basis
 - Mojave Water Agency appointed Watermaster

Examples of Adjudicated Groundwater Basins

- **Mojave River Basin Judgment (1996) (cont'd)**
 - Collects assessments
 - Provides for replenishment
 - Groundwater storage under Watermaster control
 - Biological resource mitigation
 - Broad continuing jurisdiction provision

Water Supply Constraints

Challenge Physical Solutions

- Basic premise of these adjudications is that supplemental or imported water will be available to replenish overproduction
 - This premise is under attack—imported water increasingly unreliable
- Basin strategies employed to deal with reliability issue
 - Conservation
 - Enhanced storm water capture
 - Conjunctive use programs
 - Increased use of reclaimed water

Lessons Learned From Adjudicated Basins

- A Management Plan (i.e. an engineering solution) is required at or near the beginning of the adjudication
- A significant consensus is required – adjudicating water rights on a user-by-user basis is not practical
- The Judgment needs built-in flexibility and adaptability – provided by court-appointed Watermaster and continuing jurisdiction

Lessons Learned From Adjudicated Basins

- Physical Solution is a very powerful tool
 - Assessment powers – Proposition 218 constraints may be avoided
 - Can assist in funding required capital improvements
 - Limitations – must respect vested water rights; no bond authority; limited ability to own property/facilities; must work with other agencies to implement programs
- Stipulated solutions work best

Polling Question 2

Is your organization involved in a basin that's in the process of adopting a groundwater sustainability plan to comply with SGMA?

Comprehensive Adjudication

- Rules for traditional adjudications are from case law
- In 2015, Assembly Bill 1390 created “comprehensive adjudication”
- Code of Civil Procedure section 830 et seq.
- New and untested statutory provisions



Purpose

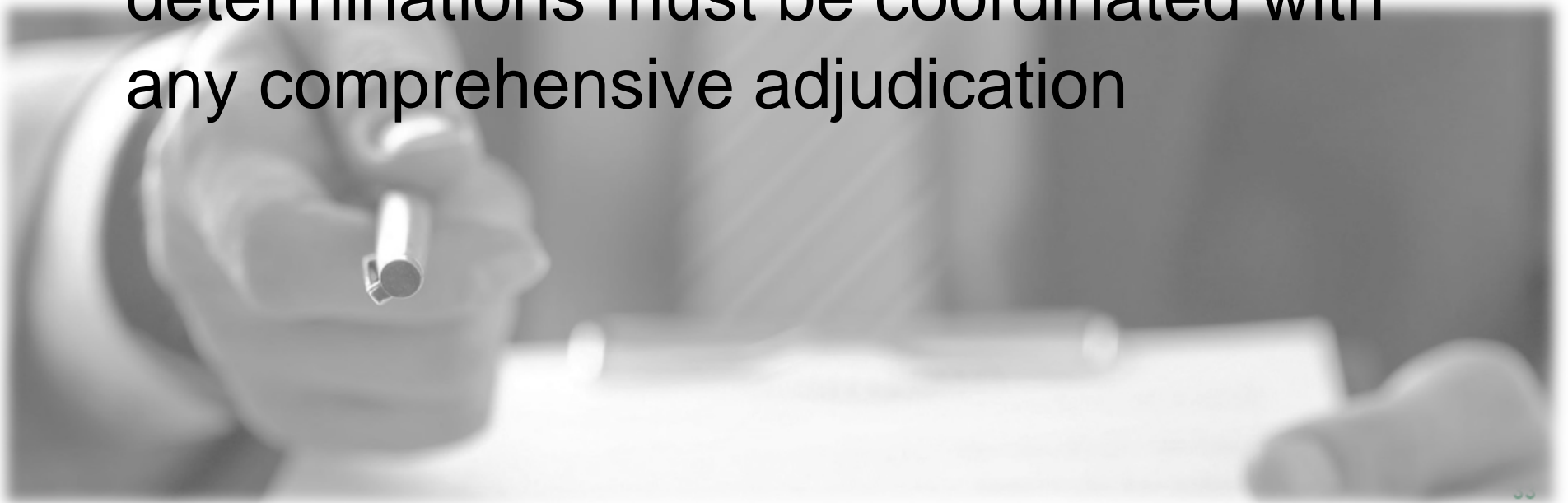
- Protect water rights consistent with Article X, Section 2 of the California Constitution
- Promote efficiency, reduce unnecessary delays, and provide due process
- Encourage compromise and settlement
- Consistency with federal and tribal water rights
- Consistency with SGMA

What Makes Adjudication “Comprehensive”

- “[A]n action filed in superior court to comprehensively determine rights to extract groundwater in a basin.” CCP § 832(c)
- *Not* the following:
 - Well interference actions
 - Claims to a specific source of groundwater recharge
 - Actions that can be resolved among a limited number of parties

Geography

- Basin boundaries of an area subject to comprehensive adjudication are DWR Bulletin 118 boundaries (as modified)
- Judicial review of DWR boundary determinations must be coordinated with any comprehensive adjudication



Due Process

- Old process
- New process:
 - Service of complaint on numerous persons and entities. CCP §§ 835, 836.5
 - Notice and form answer to be approved by the court. CCP § 836
 - Specific intervention provisions. CCP § 837
 - Electronic service. CCP § 839

Intervention

- Specific intervention rights:
 - State
 - GSA for the basin or a portion of the basin
 - City, county, or city and county that overlies any portion of the basin
 - Any person holding fee simple ownership in a parcel in the basin, or that extracts or stores water in the basin

Judicial Assignment

- Statutory disqualification of all judges of the superior court of a county that overlies any portion of the basin
- Chairperson of the Judicial Council assigns a presiding judge outside the county
- Traditional disqualification statutes do not apply
- Cases are presumed complex
- Court may appoint a special master

Case Management

- Among other things, the court may:
 - Divide the case into phases
 - Limit discovery to correspond to the phases
 - Schedule early resolution of claims to prescriptive rights
 - Form a class or classes of overlying groundwater rights holders

Coordination with SGMA

- Action against a GSA in a basin that is being adjudicated is subject to transfer, coordination, and consolidation with the comprehensive adjudication, if the action concerns the adoption, substance, or implementation of a GSP, or compliance with SGMA timelines
- Failure to meet SGMA deadlines shall not result in “probationary” designation if delay is caused by litigation

Initial Disclosures

- Type of water rights claimed
- Quantity of groundwater extracted and the method of measurement for previous 10 years
- Extraction locations
- How and where the groundwater has been used
- Claims based on augmentation of the basin's native water supply for previous 10 years
- Etc.

Experts and Witnesses

- Expert witnesses
 - Expert disclosures are due at least 60 days before the trial date of the relevant phase of the comprehensive adjudication
 - Disclosures include expert reports with mandatory contents
 - Rules differ for experts presented solely for purposes of impeachment or rebuttal
- Court may require witnesses to submit written testimony in lieu of live testimony

Discretionary Stay

- Court may stay comprehensive adjudication up to one year, subject to renewal as follows:
 - To facilitate adoption of a GSP
 - To facilitate technical studies
 - For participation in mediation or a settlement conference
 - To facilitate compromise and settlement

Preliminary Injunction (Permissive)

- Court *may* issue preliminary injunction against pumping during long-term overdraft to include specific terms such as:
 - Moratorium on new or increased pumping
 - Limitations or reductions on diversions and extractions
 - Water allocations
 - Procedures for voluntary transfers

Preliminary Injunction (Mandatory)

- Court *must* issue a preliminary injunction if the SGMA process breaks down as follows:
 - Long term overdraft,
 - Probationary designation, and
 - No interim plan has been imposed by the state

Preliminary Injunction

- “The terms of a preliminary injunction shall not determine the rights in a final judgment of the comprehensive adjudication.”
- Court may appoint a watermaster to oversee implementation of preliminary injunction
- No bond requirement

Physical Solution

- Court has *authority and duty* to impose a physical solution in a comprehensive adjudication where necessary, and consistent with Article 2 of Section X of the California Constitution
- Before doing so, the court must consider any existing GSP or groundwater sustainability program

Settlement

- Court may enter a stipulated judgment that has majority support and meets specified requirements including:
 1. Consistency with Article X, Section 2 of the Constitution
 2. Consistency with water rights priorities
 3. Objecting parties are treated equitably

Settlement

- Majority support is 50% of parties who extract or store groundwater and parties responsible for 75% of groundwater production
- Objecting parties must demonstrate that the proposed stipulated judgment fails to satisfy one or more of the 3 criteria, or the court may impose the stipulated judgment on objectors

Water Rights

- Both SGMA and comprehensive adjudication affirm that these statutes do not alter water rights law
- In a comprehensive adjudication, the Court may determine the priority of unexercised water rights, consistent with principles articulated in *In re Waters of Long Valley Creek System* (1979) 25 Cal.3d 339
- Previously *Long Valley* principles did not extend to groundwater

Polling Question 3

Has a comprehensive adjudication or other SGMA-related litigation been filed for any basin that you are involved in?

Alternatives to Litigation

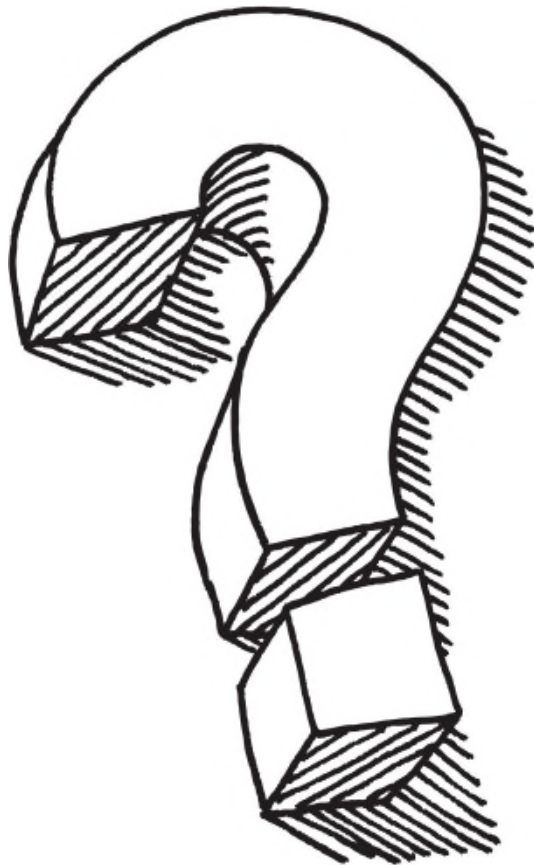
- Facilitation
- Alternative dispute resolution such as mediation
- Other

Alternatives to Comprehensive Adjudication

- Writs
- Declaratory relief
- Injunctive relief
- Well interference
- Torts
- Nuisance
- Takings and inverse condemnation

Alternatives to Comprehensive Adjudication

- Proposition 26
- Proposition 218?
- *City of San Buenaventura v. United Water Conservation District* (Dec. 4, 2017) Cal. Supreme Court Case No. S226036



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