

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2015-2016 Regular Session

AB 1390 (Alejo)
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Fiscal: Yes
Urgency: No
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SUBJECT

Groundwater: Adjudication

DESCRIPTION

This bill would establish special procedures for comprehensive adjudication actions filed in superior court to determine the rights to extract groundwater from a basin. Specifically, this bill would, among other things:

- require certain defendants to be named in an adjudication action;
- require the complaint to be served and published in a specified manner;
- authorize specified entities to intervene in an action;
- provide a draft notice and form answer that substitutes for the summons otherwise required in civil actions;
- limit the ability of the parties to disqualify judges;
- specify the initial groundwater basin boundaries;
- require parties to make specified initial disclosures;
- require parties to disclose specified information about expert witnesses;
- authorize the submission of written testimony in lieu of live testimony;
- authorize the appointment of a special master to report on specified legal and factual issues;
- authorize the stay of an adjudication for up to one year, subject to renewal, to allow the parties to develop a groundwater sustainability plan; and
- authorize the court to determine if a final judgment is consistent with the sustainability goal of the Sustainable Groundwater Management Act.

BACKGROUND

Groundwater adjudications -- civil cases to determine rights to groundwater in a particular area -- are among the lengthiest court proceedings in California. These cases typically involve hundreds if not thousands of parties, often with conflicting claims over the right to extract groundwater. According to one commenter:

There is a joke among lawyers that working on one groundwater adjudication can make your career. The laborious court process settles fights over rights to the state's

increasingly overtapped aquifers and sets out long-term management plans for them. And while they are crucial to resolving water rights disputes, getting there is not easy.

Case in point is an adjudication of the Antelope Valley groundwater basin, which has been sitting in a trial court for 15 years. The case is enormous, involving a multitude of public agencies and landowners large and small who hold groundwater pumping rights. Parties include cities, farmers, the federal government, and a class of 85,000 property owners who hold groundwater rights but who have never pumped water. There are 9,404 docket entries in the case so far and more than 100 lawyers listed on the case . . .

There are several reasons these cases take so long, and attorneys agree some parts of the process could be improved to speed them up. Finding a way to expedite the service process is one. Identifying all the parties and getting them personally served is “a very lengthy and expensive and not very reliable process,” said Thomas S. Bunn, with Lagerlof, Senecal, Gosney & Kruse LLP, who is involved in the Antelope Valley adjudication. He said it took six years to serve the parties in that case.

Discovery is also a real headache because a lot of time is spent trying to figure out the basic information in the case - who is pumping, how much they are pumping, how much water they are claiming a right to and how they use the water . . . Requiring litigants to provide that information up front could cut a big chunk off time and expense . . . (Fiona Smith, *State Looking to Speed Groundwater Lawsuits*, Daily Journal (Oct. 29, 2014).)

This bill would create special procedures in adjudication actions for comprehensively determining rights to extract groundwater in a basin. This bill states that the special procedures established to determine groundwater rights in such adjudications shall not alter groundwater rights or the law concerning those rights. The procedures established for comprehensive adjudications in this bill would operate separately from the development of a groundwater sustainability plan under the Sustainable Groundwater Management Act, but would authorize a court to stay an adjudication to facilitate the development of a plan under that act.

CHANGES TO EXISTING LAW

Existing case law recognizes a right under the common law to adjudicate disputes between overlying landowners concerning water for use on the land in cases where the supply is insufficient for all. Such disputes between landowners with an equal right to water are to be settled by giving to each a fair and just proportion. (*Katz v. Walkinshaw*, 141 Cal. 116, 136 (Cal. 1903).)

Existing law, the Sustainable Groundwater Management Act, requires all groundwater basins designated as basins subject to critical conditions of overdraft to be managed under a groundwater sustainability plan by January 31, 2020, and requires all other groundwater basins designated as high- or medium-priority basins by the Department

of Water Resources to be managed under a groundwater sustainability plan by January 31, 2022, except as specified. (Wat. Code Sec. 10720 et seq.)

Existing law defines “undesirable result” to mean one or more of the following effects caused by groundwater conditions occurring throughout a groundwater basin:

- chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon, as specified;
- significant and unreasonable reduction of groundwater storage;
- significant and unreasonable seawater intrusion;
- significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies;
- significant and unreasonable land subsidence that substantially interferes with surface land uses; or
- depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water. (Wat. Code Sec. 10721(w).)

This bill establishes special procedures to comprehensively determine rights to extract groundwater in a basin, whether based on appropriation, overlying right, or other basis of right. These procedures apply to an Indian tribe and the federal government, to the extent authorized by federal law. These procedures shall not alter groundwater rights or the law concerning groundwater rights.

This bill states that other provisions in the Code of Civil Procedure apply to procedures in a comprehensive adjudication to the extent they do not conflict with the provisions of this bill.

This bill states that a court’s final judgment in a comprehensive adjudication, as to the right to groundwater of each party, may declare the priority, amount, purposes of use, extraction location, and place of use of the water.

This bill specifies that a complaint in a comprehensive adjudication shall name all of the following persons as defendants:

- all general or special districts managing or replenishing groundwater resources in the basin in whole or in part;
- the operator of a public water system that uses groundwater from the basin to supply water service; and
- the operator of a state small water system that uses groundwater from the basin to supply water service.

This bill requires, within 30 days of filing the complaint, the plaintiff to serve the complaint on all named defendants and all cities and counties that provide water service and overlie the basin in whole or in part. Notice of the complaint shall also be published once a week for two successive weeks.

This bill requires a court to allow a county or city identified in the complaint, or a person holding fee simple ownership in a parcel in the basin, to intervene in the adjudication.

This bill requires, after determining that the action should proceed to comprehensively determine rights to extract groundwater within the basin, that the court shall issue an order authorizing service of notice of the complaint to landowners.

This bill provides a draft notice summarizing the causes of action alleged in the complaint and the relief sought, as well as a draft form answer to respond to the complaint, that parties must lodge with the court after it issues an order authorizing service of notice of the complaint to landowners.

This bill provides, following court approval, that the tax collector or tax collectors of the county or counties in which the basin to be adjudicated lies shall include the court-approved notice and form answer with the next annual property tax bill sent to each landowner.

This bill requires the court-approved notice to include a statement advising anyone claiming the right to use groundwater within the basin to file an answer with the court within 30 days after service by mail.

This bill additionally requires service by personal delivery or by mail on any known person that pumps groundwater that would not otherwise be served, as well as on named parties in the complaint.

This bill provides that on the 60th day following completion of the mailing and the fulfillment of other specified service provisions, these service provisions shall be deemed effective service of process of the complaint and notice on all interested parties of the comprehensive adjudication for purposes of establishing in rem jurisdiction and the comprehensive effect of the comprehensive adjudication.

This bill provides that failure to join the United States or an Indian tribe to a comprehensive adjudication shall not deprive the court of jurisdiction over the subject matter of the action.

This bill limits each side to moving only once for the disqualification of a judge hearing the comprehensive adjudication action.

This bill provides that a comprehensive adjudication shall be presumed to be a complex case within the meaning provided in Rule 3.400 of Title 3 of the California Rules of Court.

This bill provides that the initial basin boundaries for a comprehensive adjudication shall be the basin boundaries identified in the Department of Water Resources' report entitled "California's Groundwater: Bulletin 118."

This bill requires, except as otherwise stipulated or ordered by the court, and without awaiting a discovery request, all parties to provide to the other parties, initial disclosures containing, among other things:

- the name and contact information of each party;
- the quantity of any groundwater extraction from the basin by the party during each of the 10 calendar years immediately preceding the filing of the complaint;
- the claimed right and beneficial purpose of any use of groundwater;
- the identification of all surface water rights and contracts that the party claims provides the basis for its water right claims in the comprehensive adjudication; and
- the quantity of any replenishment of water to the basin that augmented the basin's native water supply, resulting from the intentional storage of imported or non-native water in the basin, managed recharge of surface water, or return flows resulting from the use of imported water or non-native water on lands overlying the basin by the party during each of the 10 calendar years immediately preceding the filing of the complaint.

This bill states that a party shall make its initial disclosures based on the information then reasonably available to it, and that a party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

This bill states that in addition to the other required disclosures, a party shall disclose to the other parties the identity of any expert witness it may use at trial to present evidence.

This bill provides that, unless otherwise stipulated or ordered by the court and except as provided, the disclosures pertaining to expert witnesses shall be accompanied by a written report, prepared and signed by the expert witness, if the expert witness is retained or specially employed to provide expert testimony in the case or whose duties as the party's employee regularly involve giving expert testimony.

This bill would specify that the report shall contain all of the following:

- a complete statement of all opinions the expert witness will express and the basis and reasons for them;
- the facts or data considered by the expert witness in forming his or her opinions;
- any exhibits that will be used to summarize or support the opinions of the expert witness;
- the expert witness' qualifications, including a list of all publications authored in the previous 10 years;
- a list of all other cases in which, during the previous five years, the expert witness testified as an expert at trial or by deposition; and
- a statement of the compensation to be paid to the expert witness for testimony in the case.

This bill states that a court in a comprehensive adjudication may require the parties to submit written testimony of relevant witnesses in the forms of affidavits or declarations under penalty of perjury in lieu of presenting live testimony.

This bill authorizes the court to appoint a special master to report on legal and factual issues designated under a specific order, and sets the qualifications for individuals who may be selected as special masters. This bill also specifies certain duties that may be performed by special masters.

This bill authorizes the court to stay a comprehensive adjudication for a period of up to one year, subject to renewal in the court's discretion upon a showing of good cause, in order to facilitate, among other things, the timely development of a groundwater sustainability plan under the Sustainable Groundwater Management Act that may serve as the basis of a stipulated judgment setting forth a physical solution for management of the basin. This bill states that the total time period a comprehensive adjudication may be stayed shall not exceed 5 years.

This bill provides that before the court issues a final judgment in a comprehensive adjudication, a party may file a motion for an order determining that the judgment is consistent with the sustainability goal of the Sustainable Groundwater Management Act. If the court determines that the judgment will achieve the sustainability goal for the basin established by the Sustainable Groundwater Management Act, this bill provides that the judgment shall be considered an alternative to a groundwater sustainability plan and shall be deemed to satisfy the objectives of the Sustainable Groundwater Management Act.

This bill would make legislative findings and declarations related to groundwater adjudications.

COMMENT

1. Stated need for the bill

The author writes:

AB 1390 will streamline the process as to how a court determines water rights within a groundwater basin.

Last year the California legislature passed and the Governor signed into law comprehensive groundwater management legislation. One of the issues left undone in the package of the three groundwater bills was taking steps to improve our groundwater adjudication system. The Governor in his signing message indicated interest in streamlining the adjudication process. Currently this process is longer and less efficient than it could be if certain procedural rules are established.

AB 1390 will:

- Clarify the court procedures applicable to comprehensive groundwater adjudications in order to reduce the time and improve the efficiency of these actions. This does not mean groundwater adjudications will be fast and simple, but that the process will be significantly more efficient.
- Encourage early settlement and avoid unduly disrupting local groundwater planning efforts.
- Three of the most significant improvements are: 1) a preliminary hearing to ensure that a comprehensive adjudication of groundwater rights is appropriate; 2) clear rules on proper service of process to all overlying landowners; and 3) early disclosures of groundwater use.
- Other improvements address designation of adjudication actions as complex, phasing of the litigation, efficient identification of groundwater basin boundaries, assistance to the court of a special master, among other changes.

AB 1390 will make our groundwater rights adjudication system more efficient. The legislation will be focused on procedural matters and not address any substantive principles of water law or local groundwater planning under the Sustainable Groundwater Management Act.

2. Impact on Groundwater Adjudications

This bill would introduce a number of new procedures to common law groundwater adjudications that would likely improve their speed and efficiency. Chief among these new procedures are requirements that direct all parties to disclose through discovery specific limited information about their claims in a groundwater adjudication, as well as information about expert witnesses that will provide testimony on their behalf, without waiting for a discovery order from the court. As noted in the Background above, the discovery process in groundwater adjudications leads to significant delays as parties wait for each other to submit information about their claimed rights to groundwater. The processes implemented by this bill, analogous to Rule 26 of the Federal Rules of Civil Procedure, would require all parties to provide basic information about their claimed interest in the adjudication and about the expert witnesses they plan to have testify on their behalf very early in the proceedings. The provision of this information at the beginning stages of an adjudication will allow the court and the parties to more quickly frame the issues to be addressed, and should reduce delays associated with parties strategically waiting to produce discoverable evidence.

Aside from other procedural changes, such as designating initial basin boundaries, and authorizing the appointment of special masters, this bill would also provide that Section 389 of the Code of Civil Procedure shall not apply to any failure to join an Indian tribe or the United States to a groundwater adjudication. Section 389 provides that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if: (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If such a person cannot be made a party, Section 389 empowers the court to dismiss the action if it determines the non-joined party is indispensable to resolution of the matter. In California, groundwater basins are shared by a multitude of people and entities, including federally recognized Indian tribes and instrumentalities of the United States. Since these entities might have a claim or interest in a groundwater basin, and since California may, in some instances, be unable to compel them to become a party in a groundwater adjudication, this provision of the bill ensures that the non-joinder of those parties would not result in the dismissal of the adjudication.

The California Farm Bureau Federation, sponsor, writes:

The goal of AB 1390 is to address the time sinks that occur in current groundwater adjudications by clarifying the processes that must be followed. Particular challenges exist in groundwater adjudications including determination of venue, identification of basin boundaries, disqualification of judges, notice and service of parties, discovery, and [the] ability of parties to reach settlement. This bill would reform procedural rules to improve the functioning of each of those areas by providing tools to the court and claimants to move more efficiently through the adjudication process, such as trial phasing, deadlines for disclosures of water usage and submission of written testimony and expert disclosures. All of these reforms will significantly reduce costs associated with the courts, claimants, and local groundwater management entities.

3. Impact to Due Process Rights

One of the procedural efficiencies proposed in this bill is to streamline the process of notifying affected parties of a groundwater adjudication. Under this bill, notice of an action calling for the comprehensive adjudication of a groundwater basin would be accomplished by including a copy of the complaint, along with a court approved form answer, with the annual property tax bill mailed to each overlying landowner. Under this bill's streamlined notification procedure, anyone receiving notice via their tax bill that claims a right to use groundwater within the basin would be required to file an answer with the court no later than 30 days after receiving the notice. While efficient, this proposal for streamlining the process of notifying landowners of a pending adjudication may not be sufficient to meet constitutional due process requirements.

According to the United States Supreme Court, “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.” (*Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 [internal citations omitted].) “[W]hen notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” (*Id.* at 315.)

Under existing law, notice of an adjudication is generally provided by personal service of a summons and a copy of the complaint to each party in the action. (Code Civ. Proc. Sec. 415.10.) Personal service has historically been the preferred method of providing parties with notice of suit because it is best calculated to draw attention to the importance of the information being conveyed, and is highly likely to come into the possession of the intended recipient. Where a court determines that a party to be served cannot with reasonable diligence be served by personal service or in another manner specified in the Code of Civil Procedure, existing law empowers the court to order service by other means, including by publication. (Code Civ. Proc. Sec. 415.10.) Service by other methods like publication is useful in giving unknown parties notice of a proceeding which they may have an interest in, but it is not nearly as effective as personal service for providing actual notice. (*See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306.)

The Rural County Representatives of California and the California State Association of Counties, in opposition, have questioned whether notification of an action via inserts enclosed with a property tax bill “comports with due process of law.” They state:

The assessment roll need not - and often does not - include all current fee owners of real property. For example, the tax roll often lags recorded changes of ownership, sometimes by over a year. Further, the tax roll may simply list “unknown owners” if the identity of the owner is not known to the assessor. Mailing notice to the address on the tax roll (especially in the tax bill where people do not commonly look for litigation summons) may not comply with the due process standards employed by California courts . . . Additionally, many landowners do not receive a property tax bill as they pay their property taxes via an impound account. Due process issues may also arise if the tax bill containing the notice is returned unclaimed.

Further, landowners who set aside their annual property tax bill, knowing payment is not required until some weeks or months later, or knowing that it will be automatically paid by their mortgage servicer, may inadvertently miss the 30 day window established by this bill for filing a response to the enclosed complaint.

Given the significant due process problems that could arise by serving notice of a groundwater adjudication through a property owner's annual tax bill, the Committee may wish to explore other alternatives to streamlining the process for serving notice. Potential amendments to this part of the bill would include, instead of providing notice through annual tax bills, authorizing a waiver of personal service through a mechanism analogous to Rule 4 of the Federal Rules of Civil Procedure, or creating a notice procedure that incorporates the process established for statutory stream adjudications in Water Code Section 2527.

Suggested Amendments:

- strike provisions related to service of landowners through annual property tax bills;
- authorize waiver of personal service; and
- authorize service by a combination of methods, including by certified mail, that together are reasonably calculated to provide actual notice of an adjudication.

4. Impact to the Sustainable Groundwater Management Act

In a common law adjudication, groundwater basins are managed according to the concept of "safe yield," and overlying appropriators are limited when total basin groundwater extraction exceeds the basin's safe yield, leading to basin overdraft. The safe yield of a groundwater basin is "the maximum amount of water that could be extracted annually, year after year, without eventually depleting the underground basin. Safe yield is generally calculated as the net of inflows less subsurface and surface outflows." (*City of Santa Maria v. Adam* (2012), 211 Cal.App.4th 266, 279.)

The management goal of achieving a safe yield in a common law groundwater adjudication differs from that in the Sustainable Groundwater Management Act (SGMA), which instead seeks to achieve a "sustainable yield." A sustainable yield is one in which the maximum quantity of water, calculated over a base period representative of long-term conditions in the basin and including any temporary surplus, that can be withdrawn annually from a groundwater supply without causing an undesirable result. (Wat. Code Sec. 10721(v).) In general, an undesirable result under SGMA is one that results in any of the following: the chronic lowering of groundwater levels; significant and unreasonable reduction of groundwater storage; significant and unreasonable seawater intrusion; significant and unreasonable degraded water quality; significant and unreasonable land subsidence that substantially interferes with surface land uses; or depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of surface water. (Wat. Code Sec. 10721(w).)

Since the concept of "safe yield" used in groundwater adjudications could allow parties to extract more groundwater than would be permitted under a groundwater management plan crafted under SGMA, it is possible that improving the speed and efficiency of groundwater adjudications could lead parties not inclined to participate in

the SGMA process to use adjudications as a way to circumvent that process. Clean Water Action, in opposition, states:

We need to ensure that adjudications, even expedited ones, do not delay implementation of SGMA's goal of sustainable management of groundwater. [This] bill needs to allow for State Water Board, local groundwater sustainability agency (GSA), Department of Water Resources, and Department of Fish and Wildlife intervention, particularly when a medium- or high-priority basin, which is required to implement a groundwater sustainability plan (GSP), is adjudicated. This will ensure that there is proper communication and coordination between all parties to the adjudication and those who would be consulted or in charge of a GSP. In addition, it assures that beneficial uses in a basin that are not directly represented in the adjudication process -- for instance beneficial uses in groundwater-dependent streams -- will have the protection of the appropriate regulatory agency. Finally, if a GSP needs to be created, even an interim one by the State Board, all parties will have participated in proper information sharing, expediting implementation of a GSP.

Adjudications should not be used as an avenue to subvert [the] goals and requirements of SGMA. Safeguards need to be created to prevent parties from using an adjudication solely to avoid the creation of a GSP.

Similarly, sections of this bill that authorize a court to determine that a final judgment issued in a comprehensive adjudication is consistent with the sustainability goal of the Sustainable Groundwater Management Act could encourage parties to redirect resources from the SGMA planning process to an adjudication. The Sierra Club of California, in opposition, states:

The effect of this provision to supersede existing planning efforts by GSAs and the public would be a lack of adequate environmental input in the decision making process. The resulting judicial order that would serve as a GSP alternative would be made by a judge or through stipulated judgments by parties, neither guaranteeing that environmental concerns are considered. AB 1390 has no mandatory requirement that a party with technical expertise on water supply and environmental needs be included to assist with the sustainability determination. It is likely that if water supply in a future adjudication is so scarce, that all parties to the case would likely be adverse to curtailment of over pumping of groundwater likely required by SGMA's sustainability goals. This could lead to a situation where, without proper oversight, environmental concerns will not be adequately addressed.

5. Other Stakeholder Concerns

Community Water Center states, "[w]hile we appreciate the author's previous and ongoing work to address drinking water barriers for small communities and support the intent of the bill, the proposed streamlined adjudication process outlined in AB 1390 does not adequately protect the interests of underrepresented and disadvantaged communities." To better represent these communities and enhance their ability to

participate in adjudications under this bill, these stakeholders suggest that the bill be amended to allow for the awarding of attorney's fees and costs to those beneficial users who can prove significant financial hardship, and to require notices related to an adjudication to be translated in any and all languages spoken by 10 percent or more of the population residing in a basin, as well as any other languages as appropriate.

One individual, writing in opposition, states "[a] bill streamlining litigation of groundwater rights must be simple to implement, consistent with current procedural laws, retain the scientific and legal integrity necessary to evaluate a groundwater basin . . . and protect the rights of those who depend on groundwater. AB 1390 is far too complicated, is inconsistent with current procedural laws, eliminates meaningful and unbiased scientific review of a groundwater basin, fails to equally protect the rights of all classes of groundwater users, and is inconsistent with groundwater case law and statutes."

Support: Agricultural Council of California; Almond Hullers and Processors Association; Association of California Egg Farmers; California Association of Wheat Growers; California Bean Shippers Association; California Cattlemen's Association; California Chamber of Commerce; California Citrus Mutual; California Cotton Ginners Association; California Cotton Grower's Association; California Dairies Inc.; California Fresh Fruit Association; California Grain and Feed Association; California Pear Growers Association; California Seed Association; California Tomato Growers Association; Pacific Egg and Poultry Association; Western Agricultural Processors Association; Western Growers Association

Opposition: California League of Conservation Voters; California State Association of Counties; Clean Water Action; Community Water Center; Rural County Representatives of California; Sierra Club of California; one individual

HISTORY

Source: California Farm Bureau Federation

Related Pending Legislation: SB 226 (Pavley, 2015) would establish special procedures for courts use in determining rights to groundwater under the Sustainable Groundwater Management Act (SGMA). This bill would specify procedures for, among other things, making determinations of rights to groundwater under SGMA, for serving notice to unknown parties, for providing initial disclosure of discoverable information, including information pertaining to expert witnesses, and for intervention by the Department of Water Resources and the Department of Fish and Wildlife. This bill is pending in the Assembly Judiciary Committee.

Prior Legislation: None Known

Prior Vote:

Senate Natural Resources and Water Committee (Ayes 8, Noes 0)
Assembly Floor (Ayes 76, Noes 0)
Assembly Appropriations Committee (Ayes 17, Noes 0)
Assembly Judiciary Committee (Ayes 10, Noes 0)
Assembly Water, Parks and Wildlife Committee (Ayes 14, Noes 0)
