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TOPICAL ARTICLES

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such as the Arizona Water Bank have helped augment limited groundwater resources and are being copied elsewhere. The GMA, however, focuses largely on groundwater use within AMAs. As the population of rural areas and towns outside of AMAs continues to increase, new legislation may be needed to address increasing groundwater use and competition between uses. (RPH).

CALIFORNIA: GROUNDWATER MANAGEMENT, CONJUNCTIVE USE AND WATER BANKING

With water supplies throughout California struggling to keep up with increasing demand, groundwater remains an important source of supply. Unlike the complicated permitting system for California surface waters, groundwater has historically been unregulated throughout California. Recently, the increasing importance of groundwater as a source of water supply is leading to various forms of regulation, including county ordinance, basin adjudications and efforts by the California State Water Resources Control Board (State Board) to exercise jurisdiction over certain groundwater by defining it as a "subterranean stream." To be sure, there is a lot going on in California groundwater law.

Background on California Groundwater Law

The California Constitution requires that all water be put to reasonable and beneficial use, including groundwater. (Cal. Const., art. X, § 2.) Subject to this requirement, there are two types of groundwater rights: overlying rights and appropriative rights. A landowner overlying a groundwater basin, *i.e.*, an overlyer, has an absolute right to take water from the groundwater basin beneath the owner's lands. (*Katz v. Walkinshaw,* 141 Cal. 116 (1903).) This right is equal and correlative with respect to other overlyers within the same groundwater basin. Overlying rights are superior to appropriative rights. (*City of Pasadena v. City of Alhambra* 33 Cal.2d 908, 926 (1949).)

Groundwater users that do not own overlying land or that use groundwater on lands that do not overly the groundwater basin are appropriators. The rights of appropriators are limited to surplus water in the basin. Where the basin is overdrafted, no appropriative rights can be acquired, except by prescription. When the basin is not in overdraft, one may perfect an appropriative right by actual development of groundwater wells and conveyance systems, extraction of groundwater, and utilization of that water for reasonable and beneficial purposes. (*Katz v. Walkinshaw*, *supra*, 141 Cal. 116.) Within the class of appropriators in a given groundwater basin, the priority of rights is first in time, first in right.

Local Groundwater Regulation

Historically, there has been no regulation of groundwater in California. Where groundwater conflicts arose, rights were delineated through litigation. California still does not regulate groundwater through the kind of permitting system used for surface water rights, but recently local jurisdictions have exercised some regulation of groundwater through two mechanisms: ordinances and AB 3030 groundwater management plans.

The trend in California is increasingly for counties to adopt groundwater ordinances. Local regulation of groundwater was sanctioned by the California Court of Appeal in the 1994 case of *Tehama County v. Baldwin*, 31 Cal.App.4th 166 (1994) (*Baldwin)*. In *Baldwin,* the plaintiff challenged Tehama County's fledgling groundwater ordinance on the grounds that state law preempted local regulation of groundwater. Citing several statutes and the California Constitution, the *Baldwin* plaintiffs argued that California state law already regulated groundwater and, therefore, local regulation was preempted. The Court of Appeal disagreed with the plaintiffs, and upheld Tehama County's ordinance. The number of counties adopting groundwater ordinances increased significantly after the *Baldwin* decision. There are now approximately 30 counties with groundwater ordinances.

A review of the ordinances reveals some common themes and some distinct differences. The ordinances all have a common theme of recognizing the importance of, and reliance upon, each county's groundwater resources. They all seek to protect their county's groundwater basin from overdraft and generally all

prohibit groundwater pumping when the basin is in a state of overdraft. Each ordinance is specifically tailored, however, to the county's groundwater issues and attitudes.

Water Transfers

The big issues that are distinctly addressed in most groundwater ordinances are groundwater transfers outside of the county and use of groundwater outside the parcel from which it was extracted. These issues are dealt with in diverse methods, depending on the attitudes of the county's residents and the condition of the underlying groundwater basin. In many of the county ordinances transfers of groundwater outside the county are uniformly prohibited. These ordinances typically allow for appropriation of groundwater and use on another parcel, but may require the appropriator to obtain a special permit. Some counties require that the party proposing to transfer water outside the county boundaries obtain a permit. The permittee is required to demonstrate that the extraction and transfer will not have a detrimental impact on the groundwater basin. Other ordinances explicitly condone transfers of groundwater outside the county without any permitting requirements.

Groundwater Management Plans

In addition to regulation through groundwater ordinances, local agencies can also regulate groundwater through groundwater management plans. Fourteen years ago, the California Legislature enacted groundwater management provisions of the Water Code (§ 10750 *et seq.*), commonly referred to as AB 3030. AB 3030 permits a local agency that provides water service to all or a portion of its service area, whose service area includes a groundwater basin or portion thereof, to adopt and implement a groundwater management plan for that basin. A groundwater management plan may not be adopted pursuant to AB 3030 if the groundwater basin is otherwise subject to management under some other authority (such as a watermaster appointed by the court in a groundwater adjudication).

An AB 3030 plan may include components relating to regulation of migration of contaminated groundwater, mitigation of conditions of overdraft, replenishment of groundwater extracted by water producers, facilitating conjunctive use, and construction and operation of groundwater contamination cleanup, recharge, storage, conservation, recycling and extraction projects. AB 3030 plans have the potential to have far-reaching impacts on groundwater regulation on a local level.

Finally, there is a trend toward groundwater basin adjudications. There are currently three pending or recently resolved groundwater adjudications and approximately twenty adjudicated basins. Adjudications result in a court-appointed watermaster that regulates the groundwater basin. In smaller basins, the watermaster can be one person, but often it is a board representing the various groundwater pumpers.

Water masters

Court-appointed watermasters have broad powers of regulation. In conformance with the judgment in the case, watermasters can exercise powers to restrict pumping, order relocation of wells, and charge replenishment fees to pumpers for purposes of developing in lieu water supplies and improving conditions in the basin.

The Seaside Basin Example

An example of a recently adjudicated groundwater basin is the Seaside Basin, located near the Monterey Peninsula. Water from the Seaside Basin, in conjunction with surface water from the Carmel River, serves as the sole drinking water supply for the cities of Seaside, Sand City, Del Rey Oaks, Monterey, Carmel, Pacific Grove and areas of Monterey County. In 2003, the local water purveyor, California American Water, filed the adjudication after commissioning a study demonstrating that annual pumping from the coastal Seaside Basin was in excess of the safe yield and posed a risk of seawater intrusion. California American worked cooperatively with the other water user defendants in the action and received a tentative ruling in January 2006. The tentative ruling set forth each party's water rights, established a multiparty watermaster board, and rejected arguments by a local water management district that it, alone, should govern the watermaster. The court's ruling established strict timelines for the watermaster board to prepare and implement a monitoring and management plan for the Seaside Basin. The parties are finalizing the judgment and preparing to convene the watermaster board.

State Groundwater Regulation

Going back over one hundred years, California courts and the legislature have made a distinction between "percolating" groundwater and water in "subterranean streams following through known and definite channels." (*See*, Cal. Wat. Code, § 1200.) "Percolating" groundwater is governed under California's common law of groundwater. In contrast, water flowing in "subterranean streams" is governed by surface water law and, as well, the permitting jurisdiction of the State Board.

What constitutes "percolating" groundwater is a topical issue and one that is currently being litigated in California's appellate courts. (*See, North Gualala Water Co. v. State Water Resources Control Board*, Case No. A109438, First District). Recently, the State Board began applying a test for percolating groundwater that results in classifying most groundwater in alluvial valleys as "subterranean streams." This test is known as the "Garrapata Test," and is the focus of the litigation in the *North Gualala Water* litigation cited above. By classifying more groundwater as flowing in "subterranean streams," some have argued the State Board is attempting to bring significant quantities of groundwater within its permitting jurisdiction—a practice that allows the State Board to include conditions on the permits that are often costly and result in reductions in allowed groundwater pumping from historic levels. The State Board takes the position that the Garrapata Test simply restates existing law and is applied only on a case-by-case basis, not to entire alluvial valleys. The Court of Appeal should hear oral argument on the matter and rule sometime in the summer of 2006.

Conjunctive Use and Water Transfers

There is an increasing trend of Northern California water rights holders—mainly agricultural water districts —engaging in short-term water transfers to Southern California interests. The transfers are often accomplished by the transferring water district agreeing to forgo a quantity of its surface water entitlements, instead, relying on groundwater to meet its agricultural supply needs. Many of these conjunctive use transfers involve complicated banking arrangements and are also subject to California's strict environmental laws. Despite these obstacles, short-term water transfers have benefited Southern California urban water users as well as the Northern California districts transferring water. With increasing farming costs, the proceeds from short-term water transfers have been significant sources of income for Northern California districts.

Conclusion

There is increasing groundwater regulation in California, mostly occurring at the local level. With statewide water supplies stretched thin, this trend of increasing regulation of groundwater is not surprising. Tensions exist between long-time groundwater pumpers and the agencies seeking to impose new regulations.

The continuing adjudication of groundwater basins is seen as a mixed blessing. Where groundwater basins are overdrafted, the first step in rectifying the problem is determining who holds water rights and in what quantities. This process necessarily entails an adjudication. Only after the groundwater rights/priorities have been established is it possible to assign responsibility for monitoring, managing and replenishing the basin. Adjudications are almost always costly, however, and the money spent on attorneys and consultants can impact local coffers.

The practice of short-term water transfers based on substitution of groundwater pumping will continue. In the future, streamlining the transfer process will result in fewer transaction costs and a more flexible statewide water supply. Importantly, any environmental impacts from the transfers must be considered and properly mitigated. (NAJ)