

FEATURE ARTICLE

THE CALIFORNIA LEGISLATURE SHOULD ESTABLISH WATER COURTS

By James L. Markman

It is the purpose of this article to advocate the legislative creation of special courts in California (water courts) presided over by water judges, the proposed criteria for which are discussed below. The core purpose for the creation of water courts is to more efficiently administer California groundwater adjudications through the employment of judges already experienced in dealing with the arcane body of California water law. Adjudications in turn generate groundwater production administration and resource protection. Unfortunately, for the most part, groundwater production in excess of sustainable supplies has been a condoned circumstance in California for decades. Following is the latest iteration of the California Department of Water Resources concerning the continuous mining of California groundwater:

A comprehensive assessment of overdraft in the State's groundwater basins has not been conducted since Bulletin 118-80, but it is estimated that overdraft is between 1 million and 2 million acre-feet annually: Historical overdraft in many basins is evident in hydrographs that show a steady decline in groundwater levels for a number of years; [o]ther basins may be subject to overdraft in the future if current water management practices are continued; [o]verdraft can result in increased water production costs, land subsidence, water quality impairment, and environmental degradation; [f]ew basins have detailed water budgets by which to estimate overdraft; [w]hile the most extensively developed basins tend to have information, many basins have insufficient data for effective management or the data have not been evaluated; [t]he extent and impacts of overdraft must be fully evaluated to determine whether groundwater

will provide a sustainable water supply; [m]odern computer hardware and software enable rapid manipulation of data to determine basin conditions such as groundwater storage changes or groundwater extraction, but a lack of essential data limits the ability to make such calculations; and [a]equate statewide land use data for making groundwater extraction estimates are not available in electronic format.

The California State Water Resources Control Board's administrative jurisdiction to bring order to water production is limited to the surface and subsurface flows of stream systems. W.C. § 1200. Controlling decision making relative to groundwater production rights and the distribution of costs needed to protect groundwater resources must emanate from the court system. Accordingly, if one accepts the premise that water law is complex and foreign territory for the vast majority of judges and justices in the California court system, it is clear that a group of expert judges should be allocated the disposition of groundwater production disputes.

Water courts have been established in other states, notably Montana (see Mont. Code Ann. § 3-7-101 [1885]) and Colorado.

Colorado's System

Colorado's extensive water court system and its functions have been described as follows:

The district courts of the counties within a water division collectively acting through the water judge have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge may

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act with respect to water matters in that division. Water matters are only those matters specified by law to be heard by the water judge of the district courts, including determinations of water rights and conditional water rights, determinations that conditional water rights have become water rights by reason of the completion of the appropriations, determinations with respect to changes of water rights and approvals of plans of augmentation, applications for findings of reasonable diligence, approvals of proposed or existing exchanges of water, determinations of rights to nontributary groundwater outside of designated groundwater basins, and approval to use water outside the state pursuant to West's C.R.S.A. § 37-81-101.... The Colorado Supreme Court has held that the water judge's exclusive jurisdiction extends to review of the rules and regulations of the state engineer, and it has stated that nontributary water and abandonment of a water right are included within the term 'water matters.' In addition to exclusive jurisdiction over water matters, the water judge, as a district court judge, has jurisdiction over other matters implied in article VI, section 9(1) of the Colorado Constitution and West's C.R.S.A., § 37-92-203(1), and has the power to decide issues affecting water matters. As the meaning of 'water matters' is litigated, more items will undoubtedly be included within it. The water judges have no jurisdiction, however, over matters involving designated ground water. These are committed exclusively to the administrative agencies and courts prescribed by the Colorado Ground Water Management Act.

Stricklin, Cathy, *West's Colorado Practice Series, Methods Of Practice, A Group Of Colorado Practice Experts*, Part VI. Real Estate Transactions, Chapter 76. Water Law, Wayne B. Schroeder, §§ 76.3, 76.4 (1998).

Arizona's System

Arizona's initial disposition of a groundwater production rights dispute is made by its department of water resources. Jurisdiction for judicial review of such a decision is vested in superior court judges with water experience specifically designated to do so by the Arizona Supreme Court. See Arizona Rev. Stat.

Ann. § 45-401 (1980). The reason why Arizona's Legislature created a structure for the application of administrative and judicial expertise to the disposition of groundwater disputes is explained as follows:

The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.... It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.

Ariz. Rev. Stat. Ann. § 45-401 (1980).

California's Situation

The rationale for the creation of specialized water courts to adjudicate groundwater rights and disputes certainly applies in California, a state lacking administrative machinery to resolve or aid in resolving such disputes. California also is a state which depletes its groundwater resources on a continuous basis. The legislative description of Arizona's groundwater issues stated above mirrors the situation in California. Efficient and legally accurate court dispositions of California groundwater disputes are needed now.

As stated above, the court system offers the only available mandatory process for administering groundwater disputes. In multiple party circumstances often involving hundreds of producers and claims to production rights, a party seeking adjudication is able to compel all producers to participate in the process

and thereby may achieve long term resource protection through the establishment of a court supervised management plan (often referred to as a physical solution). The court retains continuing jurisdiction in such a case and thus is required to make decision after decision impacting the basin and water producers. However, court adjudications are often initially more time consuming and expensive than should be the case, at least in part due to the fact that judges dealing with these matters often lack any prior exposure to the water rights legal literature replete with cases exceeding fifty pages in length. In addition, parties are able to move the cases from county to county and from judge to judge utilizing available legal devices, thereby generating delays and costs.

The pending Santa Maria Basin case (*Santa Maria Valley Water Conservation District v. City of Santa Maria, et al.* and related cross-actions, lead case No. CV 770214, Santa Clara County Superior Court) presents an unfortunate demonstration of how a groundwater adjudication may be delayed and moved from venue to venue and from judge to judge as reflected in the following chronology: July, 1997—case filed in San Luis Obispo County; July, 1997-November, 1997—case pending before first Superior Court Judge; November, 1997—case transferred to Santa Clara County pursuant to California Code of Civil Procedure Section 394 motion; November, 1997-February, 1999—case heard in Santa Clara County Law & Motion Departments; August, 1998-March, 1999—cross complaints seeking water rights declarations and the imposition of a physical solution are filed by major public water purveyors; June, 1999—case assigned for all purposes to second Superior Court Judge; June, 1999—Second Superior Court Judge is peremptorily challenged and the case is assigned for all purposes to third Superior Court Judge; June, 1999-July, 1999—over 15 Quiet Title Actions are filed in San Luis Obispo and Santa Barbara County by overlying agricultural water producers seeking a declaration of paramount rights to produce water from the Santa Maria Basin and to control storage space therein; April, 2001—Third Superior Court Judge is peremptorily challenged when a new opportunity to do so is created by an order consolidating the above-referenced quiet title actions with the main action in Santa Clara County; April, 2001—The case is assigned to fourth Superior Court Judge for all purposes; February, 2002—Fourth Superior Court Judge is elevated to

the Court of Appeals and the case is assigned to fifth Superior Court Judge for all purposes.

It is instructive to compare the efficient structure for dealing with water rights issues established in Colorado described above with the manner in which the Santa Maria Basin case has been moved and delayed by parties making use of available California Civil Procedure machinery. It seems clear that if California Water Courts were established, decisions would be generated more quickly. If those courts are manned by persons familiar with applicable legal principles and precedents, those decisions would likely be more legally sound and would be less likely to generate appeals. That rationale already is employed in Superior Courts which establish California Environmental Quality Act panels, writs and receivers departments and other specialized courtrooms in which experts in certain subject matter preside.

Another demonstration of the need for judicial water law expertise occurred relatively recently in the Chino Basin adjudication, a multiparty case involving the administration of approximately 140,000 acre-feet of annual groundwater production from a groundwater basin in San Bernardino County. (San Bernardino County Superior Court Case No. RCV 51010). In that case, Judgment was entered in 1978. The Board of Directors of a local public entity, Chino Basin Municipal Water District (now known as Inland Empire Utilities Agency) was then appointed Watermaster, the court's administrator of the Judgment, and played that role for approximately twenty (20) years. Then, in the late 1990s, a motion was filed to remove that board from its Watermaster position and replace it with a board composed of persons elected by vote of the parties producing water. In dealing with that motion, the Judge recognized his need for assistance in dealing with the barrage of complex arguments hurled at him by the seasoned water lawyers who represented water producers. With the consent of the warring factions of water producers, he appointed both outside counsel and an independent engineer to advise him, the costs of which were assessed to the water producers. That practice has continued to the present time. Parties to that action not only pay for their own attorneys and engineers and for a complex system of committees and an elected Watermaster board, but also in essence employ an attorney and engineer to provide independent advice to the court. The appointment of a judge with experience in water

rights issues who, among other duties, presides over all groundwater matters in a described district would obviate the need for such additional independent lawyers and engineers to aid courts.

The Santa Maria Example

Following are a few examples of the issues before the court in the Santa Maria Basin Adjudication, issues emanating from murky language embedded in lengthy cases and “spun” in numerous directions by able water counsel:

Deprioritizing Unexercised Overlying Rights

Unexercised overlying rights of parties in an overdrafted basin as to which a judgment has quantified prescriptive rights and self-help rights would be deprioritized as compared to these quantified rights. But, in what other circumstances and as to what other type of water production would unexercised overlying rights be deprioritized?

In *Wright v. Goleta Water District* (1985), 174 Cal. App.3d 74, the court grudgingly conceded the fact that overlying production could be increased in the future while maintaining a priority position over appropriative rights and would proportionately reduce that portion of the safe yield available to other overlying producers. Conversely, in *In re Waters of Long Valley Creek Stream System* (1979), 25 Cal.3d 339, the California Supreme Court indicated that at least in the context of a State Water Resources Control Board stream adjudication, priority rights could be deprioritized and quantified to create a sense of certainty which would allow all persons relying on the same water resource to plan their activities in accordance with the amount of water available to them. This need for certainty in water resource planning and the fact that continuing to recognize a priority in unexercised overlying rights would impede management of groundwater resources was recognized in footnote 13 in *City of Barstow v. City of Adelanto, et al.* (2000), 23 Cal.4th 1224, at page 1249 as follows:

The *Wright* court refused to apply *Long Valley, supra*, 25 Cal.3d at page 350, to limit the scope of an overlying owner’s future unexercised groundwater right to a present appropriative use, because the comprehensive legislative scheme applicable to the adjudication of surface water rights and riparian rights is not applicable to

groundwater. (*Wright, supra*, 174 Cal.App.3d at pp. 87-89.) Although we do not address the question here, *Wright* does suggest that, in theory at least, a trial court could apply the *Long Valley* riparian right principles to reduce a landowner’s future overlying water right use below a current but unreasonable or wasteful usage, as long as the trial court provided the owners with the same notice or due process protections afforded the riparian owners under the Water Code. (See Wat. Code, § 1200 *et seq.*; *Wright, supra*, 174 Cal.App.3d at pp. 87-89.) If Californians expect to harmonize water shortages with a fair allocation of future use, courts should have some discretion to limit the future groundwater use of an overlying owner who has exercised the water right and to reduce to a reasonable level the amount the overlying user takes from an overdrafted basin.

In the Santa Maria Basin Adjudication, there is one party whose existence should cause concern among all other water producers. That party is an oil company with large land holdings overlying the basin from which very little water has been produced to date. Much of the property is susceptible of agricultural development so that there is a potential for increased overlying production. The issue presented is whether an adjudication which is based upon a factual finding that there is equilibrium in the Basin, and a quantification of production rights in priority order should also deprioritize or, at least, quantify unexercised overlying rights. In the Santa Maria adjudication, overlying agricultural production could be given the first priority in a quantified amount and appropriative production of existing surplus could be given second priority in quantified amounts. If the footnote in *Barstow* quoted above is implemented, the judgment would protect those quantified production rights against future increased overlying production, thereby deprioritizing that unexercised production. Were that to occur, parties who rely upon groundwater in the area would know how much of their water needs could be met by basin production and they could plan accordingly. If, on the other hand, the appropriative rights could be reduced to zero by presently unexercised overlying production and each agricultural interest could have its correlative right reduced by presently unexercised overlying production, no certainty in the availability of groundwater

would be afforded to any producer. One must question whether the priority of unexercised overlying rights is compatible with basin management through adjudication, the only practical method of management available.

Who Owns Storage Rights?

The issue of who owns storage space in the basin also is pending in the Santa Maria Basin adjudication. Certain overlying producers have asserted a right to the storage space beneath their property. They argue that that right is equivalent to the right of a property owner whose property is converted to surface reservoir use. That is, if a public entity is going to take the subject property and put it to public use, there is a value in that property and the public entity must pay to the owner of that property that value. Those allegations were the subject of demurrers.

To support the demurrers, the public entities first argued that entities being forced to pay for storage space would violate Article 10, § 2 of the California Constitution requiring that water be beneficially used to the fullest extent possible. Costs would be added to and could collapse conjunctive use programs.

As to “storage” of return flows from imported water, the public entities argued that the Supreme Court in *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, recognized the right of Los Angeles to capture return flows of imported water so long as those return flows represent a net benefit to the groundwater basin.

Most interestingly, the public entities argued that storage space in a groundwater basin could not physically be subjected to the possession, dominion or control of the owner of the surface of the ground. In that regard, the public entities cite *State of California v. Superior Court of Riverside County* (2000) 93 Cal. Rptr.2d 276 at 286, as follows:

[I]t has long been held by the courts of this state that ‘...running water, so long as it continues to flow in its natural course, is not, and cannot be made the subject of private ownership.’ (*Kidd v. Laird* (1860) 15 Cal. 161, 179-180.) Indeed, groundwater, under the absolute dominion rule, was held comparable to wild animals—*ferae naturae*—and was considered subject to ‘ownership’ by the landowner only so long as it was under his land. As a bird, or deer, ‘belonged’ to a landowner only so long as it was on his land,

so was ‘ownership’ of groundwater limited; when it flowed away, so flowed to any ‘ownership.’ (*Westmoreland Cambria Nat. Gas Co. v. DeWitt* (1889) 130 Pa. 235, 18 A. 724.) Our Supreme Court has made the similar analogy of water to ‘the air, which cannot be said to be possessed or owned by any person unless it is confined within impervious walls.’ (*Palmer v. Railroad Commission* (1914) 167 Cal. 163, 168, 138 P. 997.) The same instinctively appealing logic applies to ‘ownership’ by the State when the essentially evanescent and/or transitory character of water in its natural state is considered.

Notwithstanding the above-stated arguments, demurrers were overruled leaving for trial the disposition of the control and ownership of storage space and the potential right to be compensated therefor. At trial, the landowners will be required to present their theory as to how to measure the proportionate share in the storage space each of them owns and how much that proportionate share may be worth. Will they claim a share based on proportionate surface area? Will the presence or amount of water bearing alluvium underlying each parcel be required to be measured? No theory on proportionate value has yet been expressed.

The issues discussed above expose only a few examples of groundwater law complexities. It seems unfair to expect the prompt and accurate disposition of such issues by judges with normal case loads and no prior water rights experience.

Proposed Water Court Details

Following the text of this article is a draft of a legislative bill which would create California Water Courts and Water Judges, judges with the existing expertise to efficiently adjudicate issues such as those presented above and now under scrutiny in the Santa Maria Basin case. The draft is a first attempt at a core structure to implement the concepts discussed in this article. The draft includes the following features:

- 1.) Judicial Water Divisions are established which are identical to the divisions established for Regional Water Quality Control Boards in California Water Code § 13200. The divisions thus would have boundaries representing watershed demarcations.
- 2.) There is to be one Water Judge appointed for each water division. That judge must be qualified to

be and is to be a superior court judge. Those qualifications are stated in Article 6, § 15 of the California Constitution as follows:

A person is ineligible to be a judge of a court of record unless for ten years immediately preceding selection, the person has been a member of the State bar or served as a judge of a court of record in this State.

In addition, the Bill would require a Water Judge to have at least ten years of experience dealing with groundwater rights either as a practicing attorney, a judge, or a law professor. The California Legislative Analyst's office reviewed a prior version of the proposed bill and concluded that it would require an amendment to Article 6, § 15 of the California Constitution to add qualifications for a Water Judge. If so, it is submitted that such an amendment should be included in the legislative package.

3.) The bill contemplates that a Water Judge will have exclusive jurisdiction over cases in which rights to produce groundwater are at issue. In order to make that allocation of jurisdiction meaningful, the bill precludes a Water Judge from being subject to a preemptory challenge pursuant to California Code of Civil Procedure Section 170.6 and exempts a groundwater adjudication from the provisions of California Code of Civil Procedure § 374 which allows the transfer of any case in which public entities are adverse parties to a neutral county. (See *City of Alameda v. Superior Court*, 42 Cal.App.3d 312 (1974).

4.) The bill allows the challenge of a Water Judge for cause in a matter over which the Water Judge possesses exclusive subject matter jurisdiction and venue, but requires the case to be transferred to another Water Judge.

5.) The bill provides for the direct appeal of the entry of Judgment by a Water Judge in a groundwater adjudication to the California Supreme Court. In reviewing a prior version of the bill, the Legislative Analyst raised the issue of whether exempting Water Judges from preemptory challenges and providing for direct appeal to the California Supreme Court creates an "equal protection" issue. It is felt that the legisla-

tive goal of facilitating efficient and legally sound dispositions of groundwater disputes creates a classification of circumstances which provide a basis for legal differentiation.

Conclusion and Implications

It seems clear that the creation of water courts (water judges) would cause groundwater resource preservation, generate efficiencies in litigating rights to produce groundwater and more quickly bring certainty of costs and availability of supply to California water producers. The bill deliberately was drafted to be cost-neutral with no new judicial position being created. It also was formulated so as to avoid nipping at the jurisdiction of the State Water Resources Control Board. It has been suggested that a better approach would be to provide exclusive water court jurisdiction for a wide variety of water rights disputes. Conversely, suggestions have been made to simply require water panels, similar to California Environmental Quality Act panels, to be established in large counties to generate the judicial expertise needed to deal with water issues. However, the first suggestion (broader jurisdiction) could generate opposition from the State Water Resources Control Board while the second (court panels) still would allow litigants to challenge expert water judges without cause and move groundwater cases from county to county.

Attorneys dealing with groundwater litigation are invited to provide suggested modifications or other input on the concepts and proposals contained in this article and are urged to support legislation creating Water Judges which may be introduced. California needs the benefit of a judiciary equipped to efficiently adjudicate complex groundwater issues, thereby generating certainty of supplies and costs to producers while protecting California's groundwater basins.

Editor's note: Space did not permit inclusion of the legislative proposal in this issue. If you would like a copy of the proposal, please contact Argent Communications at <gala@argentco.com> and it will be emailed to you.

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