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State looking to speed groundwater lawsuits

By Fiona Smith

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 overlapped 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.



Associated Press

A Central Valley recharge basin catches San Joaquin River water in Arvin, Calif. Such basins are used to replenish aquifers depleted during the drought. Limited groundwater has led to fights in the court system over water rights.

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.

With that backdrop, Gov. Jerry Brown is trying to streamline the process as part of a larger push by state officials to rein in rampant groundwater use. Earlier this year Brown signed a historic bill that for the first time requires local officials to create plans to sustainably manage aquifers. As local officials make plans that could involve pumping restrictions or new pumping fees, more adjudications may hit the courts.

Brown stated his desire to streamline adjudications in his signing statement accompanying the Sustainable Groundwater Management Act, and the Senate Committee on Natural Resources and Water is holding a hearing on the issue on Nov. 20.

The new law provides one path to sustainable water management; adjudications are another, said Gordon B. Burns, a lawyer and undersecretary of the California Environmental Protection Agency.

"The problem with adjudications is they're not cost effective, it takes a long time and it's expensive. So if we can make it more cost effective without compromising the fairness of the process, that would make it a more attractive option," Burns said.

Adjudications are the best solution to groundwater disputes because they address both water rights and long-term aquifer management, but "adjudication has been a four-letter word in the groundwater community ... because of the utter pain of going through the process," said Russell M. McGlothlin, a shareholder with Brownstein Hyatt Farber Schreck LLP.

In the Santa Maria groundwater basin, in Santa Barbara and San Luis Obispo counties, an adjudication took 15 years to work through the trial and appellate courts, and it is still not completely resolved. That case involved thousands of parties and has cost tens of millions of dollars, said Henry S. Weinstock, a partner at Nossaman LLP who worked on the case.

Adjudications are triggered when someone files a lawsuit claiming their groundwater rights are being infringed or demanding the court determine their groundwater rights. The unadjudicated aquifers most in trouble are in the Central Valley, where heavy pumping in the current drought has rapidly lowered groundwater levels and caused land to sink up to 21 inches between 2008 and 2010 alone, according the U.S. Geological Survey.

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, said McGlothlin. Requiring litigants to provide that information up front could cut a big chunk off time and expense, he said.

The courts could reduce discovery disputes by creating standardized forms for groundwater adjudication discovery requests, as they have done in other types of civil cases such as personal injury, Weinstock said.

Some judges may feel uncomfortable actively overseeing settlement discussions in a case on which they could later rule at trial, but explicitly allowing judges to do so could

help speed resolution as "the parties are more likely to behave reasonably in settlement discussions," Weinstock said.

The cases are currently heard by complex civil litigation judges, but Weinstock said creating specialized water judges who understand water rights and hydrology could help to not only oversee adjudications, but to deal with disputes that can arise after the adjudication.

Of California's more than 500 groundwater basins, 23 have been adjudicated since the 1960s, when urban areas centered in Southern California faced seawater intrusion from over-pumping and began to reach agreements on managing their aquifers.

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