Lagerlof Senecal Gosney & Kruse LLP
301 North Lake Avenue
10th Floor
Pasadena, CA 91101-5123
Phone: 626.793.9400
Fax: 626.793.5900
www.lagerlof.com
Established 1908

To: Ray Shindler

From: Thomas S. Bunn III

Date: September 11, 2017

Re: Groundwater allocations in the Borrego Springs basin

Question Presented

The Borrego Valley Groundwater Sustainability Agency must come up with a plan to make the Borrego Springs groundwater basin sustainable. The only practical way to do this is to limit groundwater extractions. Must the extractions be limited in proportion to current use?

Brief Answer

No. The agency may allocate groundwater extractions by any reasonable method. One reasonable method is to allocate the Borrego Water District its current pumping, and reduce agricultural and golf course pumping over time to a sustainable level. However, if there is an adjudication of groundwater rights, it is likely that the allocation would have to be made consistent with the adjudicated rights.

Statement of Facts

The Borrego Springs basin has been overdrafted for many years. The Department of Water Resources has designated the basin as a medium-priority basin subject to critical conditions of overdraft.

The principal groundwater users in the basin are the Borrego Water District, agricultural users, golf courses, domestic wells, and Anza-Borrego State Park.

The Borrego Valley Groundwater Sustainability Agency, comprising the Water District and San Diego County, has been designated as the groundwater sustainability agency (GSA) for the basin. Under the Sustainable Groundwater Management Act (SGMA), the GSA must develop and implement a groundwater sustainability plan by January 31, 2020. The plan must achieve sustainability for the basin within 20 years.

There is no practical source of supplemental water to the basin. As a result, to achieve sustainability, groundwater extractions must be substantially reduced.

Extraction Allocations Under SGMA

If overdraft conditions are identified in a basin, SGMA requires the groundwater sustainability plan to contain projects or management actions to mitigate the overdraft. [1] SGMA provides groundwater sustainability agencies with an array of powers to implement and enforce the groundwater sustainability plan, including the power to establish groundwater extraction allocations.[2] Neither SGMA nor the implementing regulations provide any detail or standards about how allocations are to be made. It appears that GSAs have broad discretion to allocate extractions, as long as the sustainability goals of the plan are met.

That discretion is not unlimited, however. Groundwater management under SGMA must be consistent with Article X, Section 2 of the California Constitution, which provides that water must be used reasonably and beneficially.[3] Groundwater sustainability agencies must consider the interests of all beneficial uses and users of groundwater, including both holders of overlying groundwater rights and public water systems.[4] Most significantly, groundwater sustainability plans may not alter groundwater rights.[5] Specifically, a limitation on extractions by a groundwater sustainability agency is not a final determination of rights to extract groundwater.[6]

An argument can be made that the foregoing provisions mean that groundwater extraction allocations must be according to water rights. That would be consistent with the legislature's statement that its intent is to "respect overlying and other proprietary rights to groundwater."[7] But there is no express directive in the statute to this effect. Contrast that with the express statement in the statute that federally reserved water rights to groundwater "shall be respected in full."[8] Statements of legislative intent are generally not binding in and of themselves, but are used by courts to interpret other provisions of a statute.

Another consideration is that groundwater law is complex, and it is impossible to state with certainty how a court would adjudicate rights in any particular basin. GSAs themselves do not have the power to determine water rights.[9]

In my opinion, the most reasonable interpretation of the statute, and the one a court is most likely to adopt, is that GSAs may allocate extractions by any reasonable method. But if there is an adjudication of

[1] Wat. Code §10727.2(d)(3); Regs. §354.44.
[2] Wat. Code §10726.4(a)(2).
[3] Wat. Code §10720.5(a).
[4] Wat. Code §10723.2.
[5] Wat. Code §10720.5(b).
[6] Wat. Code §10726.4(a)(2).
[7] SGMA uncodified findings (b)(4).
[8] Wat. Code §10720.3(d).
[9] Wat. Code §10726.8(b).

the basin, the allocations must be made consistent with the adjudicated water rights. Otherwise, the GSA's allocation would effectively alter groundwater rights, in contravention of the statute.[10]

If the interested parties in a basin are unable to agree on a method of allocating extractions, it is very possible that an adjudication will be filed to determine water rights. Therefore, in their negotiations, parties will be comparing proposals with the likely results of an adjudication. The following overview is intended to help determine what those results might be.

California Groundwater Rights Law

Groundwater rights in an unadjudicated basin are traditionally classified as *overlying, appropriative*, or *prescriptive*. There is also a *self-help right,* as will be described below. And there are other types of rights I don't discuss here, including imported water return flow rights and federal reserved rights.

Overlying rights are the right of a property owner overlying the basin to pump water for reasonable beneficial use on the overlying land. Overlying rights are not quantified, but are *correlative*—that is, in times of shortage, all have equal priority and all must reduce pumping.

Appropriative rights are rights not used on overlying land, and include rights of water suppliers such as the District. They are lower in priority than overlying rights. If the basin is overdrafted, then appropriative rights must be curtailed first.

If an appropriator nevertheless pumps a quantity of water in an overdrafted basin continuously for over five years, and if certain other conditions—such as notice of the overdraft—are met, the appropriator gets a *prescriptive right* to continue to pump that quantity of water. For purposes of this analysis, I am assuming that the District has a prescriptive right in some amount.

The five-year period is referred to as the *prescriptive period*. There can be multiple prescriptive periods in a single basin, as long as each one is a five-year period of continuous overdraft. However, SGMA provides that prescriptive periods may not include the period between January 1, 2015, and the adoption of a groundwater sustainability plan.[11]

A prescriptive right is higher priority than an overlying right. However, if an overlying landowner has pumped during the prescriptive period, it acquires a *self-help right* to the amount pumped during that period. The self-help right is a quantification of the overlying right, and is equal in priority to a prescriptive right.

It is apparent that in many cases, the total self-help rights plus the prescriptive rights will exceed the safe yield of the basin. The California Supreme Court has stated that when this happens, the prescriptive right is reduced, so that "the ratio of the prescriptive right to the remaining rights of the private defendant [is] as favorable to the former in time of subsequent shortage as it was throughout

[10] Wat. Code §10720.5(b).
[11] Wat. Code §10720.5.

the prescriptive period."[12] It is not completely clear what this means, but I believe it means that the prescriptive right is the same percentage of the safe yield as the prescriptive pumping is of total pumping during the prescriptive period. For example, if the prescriptive pumping was 10% of the total pumping during the prescriptive period, then the prescriptive right would be 10% of the safe yield during that period.

Groundwater Rights in Borrego Springs

I assume that the Water District is the only appropriator that can claim prescriptive rights. Applying these principles in a manner that favors the Water District, we would choose a prescriptive period in which the Water District's continuous pumping was the greatest percentage of the total pumping. As mentioned above, that period must end before January 1, 2015. The Water District would be entitled to a prescriptive right equal to this percentage of the safe yield during that period. This will probably be a different amount than reducing all pumping proportionately from current amounts, because it depends on historical pumping, not current pumping.

Water Code Sections 106, 106.3, and 106.5

Water Code section 106 states that the domestic use of water is a higher use than irrigation. Water Code section 106.3 declares that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes, and state agencies must take that into account in policies, regulations, and grant criteria. Water Code section 106.5 provides for the protection of the right of a municipality to acquire and hold rights to the use of water for existing and future uses. Some have argued that these statutes mean that domestic and municipal uses should get priority in times of shortage. To my knowledge, no case has ever held that these statutes create a new category or priority of groundwater rights. But in the recent Santa Maria groundwater adjudication, the court did use these statutes to support its conclusion that parties with prescriptive rights (who are generally domestic and municipal users) do not lose their rights during times of surplus.[13]

For purposes of groundwater allocations under SGMA, I believe that Water Code sections 106, 106.3, and 106.5 furnish a powerful argument that domestic and municipal uses should not suffer the same reductions as irrigation.

Conclusion

The groundwater sustainability agency has broad discretion about how to allocate groundwater extraction among the competing uses, and is not required to reduce all users equally. There are several arguments for reducing domestic and municipal users less. It is a reasonable position that they should get what they are currently using, perhaps with a modest reduction for water conservation/water

[12] *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 293.
[13] *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 297.

efficiency, and that the remainder of the reduction should fall on irrigation users. Borrego Water District should be taking this position. Ultimately, the results of the negotiation may depend on the parties' perception of the likelihood of an adjudication, and the likely results in any adjudication.