DRAFT RESPONSES TO QUESTIONS ASKED OF

WRAC BY MEMBERS

THESE DRAFT RESPONSES WERE PREPARED BY DAVID CHIPPING, CHAIR OF THE WATER LAW AD-HOC SUBCOMMITTEE, WITH SUPPORT FROM FELLOW AD-HOC SUBCOMMITTEE MEMBERS LINDA CHIPPING, ANDY PEASE, AND DEBBIE PETERSON.

THE AD-HOC COMMITTEE USES THE ORDER OF THE QUESTION SHEET PREVIOUSLY DISTRIBUTED AT THE DECEMBER 6 MEETING. WE HAVE ADDED SOME ADDITIONAL QUESTIONS FOR WHICH EXPERT RESPONSE WILL BE NEEDED

DIRECT QUOTES FROM SOURCES ARE IN ITALICS

YELLOW HIGHLIGHT IS TENTATIVE ANSWER, SUBJECT TO EDIT, CORRECTION ETC.

RED HIGHLIGHT INDICATES NEED FOR FURTHER OUTREACH, MOSTLY FROM LEGAL SOURCES

THE AD-HOC COMMITTEE MEETS ON DECEMBER 14, SO COMMENTS SHOULD BE MADE TO RAY BY DECEMBER 13.

(1) DEFINITION OF LEGAL TERMS

•Explain "correlative" rights: how does it differ from equal and how are they implemented

http://www.waterscape.org/pubs/factsheet_waterrights/FS_CaliforniaWaterRights.htm

https://definitions.uslegal.com/c/correlative-rights-doctrine/

The correlative rights doctrine is a legal doctrine limiting the rights of landowners to a common source of groundwater (such as an aquifer) to a reasonable share, typically based on the amount of land owned by each on the surface above. Under California law, the owners of overlying land own the subsurface water as tenants in common, and each is allowed a reasonable amount for his/her own use.

Correlative Rights Doctrine Law and Legal Definition Correlative Rights Doctrine is a legal principle that states that adjoining landowners must limit their use of a common water source to a reasonable amount. This is based on the amount of land owned by each on the surface above. Under California doctrine of correlative rights, if the ground water supply is inadequate to meet the needs of all users, each user can be judicially required to proportionally reduce use until the overdraft is ended. The policy significance of correlative rights is that each well owner is treated as having an equal right to ground water regardless of when first use was initiated. The correlative rights doctrine is part of the ground water jurisprudence of many states in U.S. This principle is also used in relation to Oil & gas. Here it refers to rule whereby a lessee's or landowner's right to capture oil and gas from the property is restricted by the duty to exercise that right without waste or negligence. This is a corollary to the rule of capture.

•Define "safe yield" and how does safe yield differ from SGMA's "undesirable results"

http://gwsustainability.sdsu.edu/

Excessive groundwater pumping can lead to groundwater depletion, and this may have serious social and economic consequences. Attempts to limit groundwater

pumping have been commonly based on the concept of ***safe yield, defined as the attainment and maintenance of a long term balance between the annual amount of ground water withdrawn by pumping and the annual amount of recharge.*** *This definition is too narrow because it does not take into account the rights of groundwater-fed surface water (springs and baseflow) and groundwater-dependent ecosystems (wetlands and riparian vegetation) (Sophocleous, 1997). Recently, the emphasis has shifted to sustainable yield (Alley and Leake, 2004; Maimone, 2004; Seward et al., 2006).* ***Sustainable yield reserves a fraction of safe yield for the benefit of the surface waters. There is currently a lack of consensus as to what percentage of safe yield should constitute sustainable yield****. The issue is complicated by the fact that knowledge of several related earth sciences is required for a correct assessment of sustainable yield. Additionally, there are social, economic, and legal implications which have a definite bearing on the analysis.*

http://www.water.ca.gov/groundwater/sgm/definitions.cfm

From the CDWR site on SGMA, Definitions:

(u) "Sustainable groundwater management" *means the management and use of groundwater in a manner that can be maintained during the planning and implementation horizon without causing undesirable results. (w)* ***"Undesirable result" means one or more of the following effects caused by groundwater conditions occurring throughout the basin:*** *(1) Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon. Overdraft during a period of drought is not sufficient to establish a chronic lowering of groundwater levels if extractions and recharge are managed as necessary to ensure that reductions in groundwater levels or storage during a period of drought are offset by increases in groundwater levels or storage during other periods. (2) Significant and unreasonable reduction of groundwater storage. (3) Significant and unreasonable seawater intrusion. (4) Significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies. (5) Significant and unreasonable land subsidence that substantially interferes with surface land uses. (6) Depletions of interconnected surface water that has significant and unreasonable adverse impacts on beneficial uses of the surface water.*

•How is "reasonable and beneficial use of water" interpreted

Source: SB 1168, Pavley.

Groundwater management. (1) The California Constitution requires the reasonable and beneficial use of water. Existing law establishes various state water policies, including the policy that the people of the state have a paramount interest in the use of all the water of the state and that the state is required to determine what water of the state, surface and underground, can be converted to public use or be controlled for public protection. This bill would state the policy of the state that groundwater resources be managed sustainably for long-term reliability and multiple economic,

social, and environmental benefits for current and future beneficial uses. This bill would state that sustainable groundwater management is best achieved locally through the development, implementation, and updating of plans and programs based on the best available science.

•Explain the difference between underflow and groundwater

http://www.watereducation.org/aquapedia-background/groundwater-law

Groundwater and the Courts: One of the first groundwater controversies that had to be resolved was how far water had to seep under a streambed before it stopped being surface water and started being groundwater. Early in the 20th century, the courts divided groundwater into two broad categories—sub-surface streams flowing in known and definite channels and percolating groundwater. Underflow, an outdated term that is still in the California code, is water moving through the sands and gravel under or next to a stream channel and is a sub-category of subterranean streams. Underflow is considered to be part of the stream and subject to the same riparian and appropriative rights that guide the use of the stream itself. Percolating groundwater is often defined as water moving through the soil by gravity along the path of least resistance. In California, the term covers all groundwater that is not flowing in a known and defined channel.

• How is overdaft of a basin-as-a-whole defined and through what mechanism is it determined?

http://www.water.ca.gov/groundwater/sgm/cod.cfm

(1) Determination of Critically Overdrafted Basin under SGMA

DWR identified a statewide base period of 1989 to 2009 for evaluation, which included wet and dry periods and has the same mean precipitation as the long-term mean. DWR also consulted with the State Climatologist to determine the base period. Groundwater elevation data available at DWR from the base period was very limited for many basins. DWR then conducted a review of available data, reports and other information to identify basins with obvious evidence of adverse impacts. DWR also utilized available groundwater elevation data and additional information from local agencies.

Groundwater conditions may have significantly worsened in some groundwater basins in the time since the last update of the list of critically overdrafted basins. A condition of overdraft during the current (2011 through 2015) drought period is not considered as an indication of overdraft, as the legislation requires the current drought period to be excluded from evaluation.

As defined in the SGMA, “A basin is subject to critical overdraft when continuation of present water management practices would probably result in significant adverse overdraft-related environmental, social, or economic impacts.”

(2) Determination of the current state of a Basin

SGMA § 10727.2. Required Plan Elements

Compliance with SGMA requires that an agency must have a Groundwater Sustainability Plan. This plan would define a water level sampling process and thresholds by which basin discharge and recharge can be observed.

§ 10727.2. A groundwater sustainability plan shall include all of the following:

(a) A description of the physical setting and characteristics of the aquifer system underlying the basin that includes the following: (1) Historical data, to the extent available. (2) Groundwater levels, groundwater quality, subsidence, and groundwater - surface water interaction. (3) A general discussion of historical and projected water demands and supplies. (4) A map that details the area of the basin and the boundaries of the groundwater sustainability agencies that overlie the basin that have or are developing groundwater sustainability plans. (5) A map identifying existing and potential recharge areas for the basin. The map or maps shall identify the existing recharge areas that substantially contribute to the replenishment of the groundwater basin. The map or maps shall be provided to the appropriate local planning agencies after adoption of the groundwater sustainability plan.

(b) (1) Measurable objectives, as well as interim milestones in increments of five years, to achieve the sustainability goal in the basin within 20 years of the implementation of the plan. (2) A description of how the plan helps meet each objective and how each objective is intended to achieve the sustainability goal for the basin for long - term beneficial uses of groundwater.

•How does prescription work?

Note: the following ‘Primer’ starts with surface water, where prescriptive rights are usually applied. It then discusses application to groundwater.

A PRIMER ON CALIFORNIA WATER RIGHTS Prepared by Gary W. Sawyers, Esq. Prescriptive Rights.

This final category of surface water rights is obtained by open, notorious, continuous and adverse use for the prescriptive period (in California, five years). Since the use must be adverse, a use which harms one water user may not harm another (for example an upstream water user). The prescriptive right is therefore less of a "water right" than it is the right to prevent another from objecting to one's own water use. One cannot prescript upstream. Since the adverse use must be continuous for the prescriptive period, one year of surplus water can cut off the prescriptive period and

will require the would-be prescriptor to begin the prescriptive period again. Furthermore, in one case, the courts have held that since prescription does not run against the State, the SWRCB is not bound to recognize a prescriptive right and that the State may (i) require a prescriptor to apply for an appropriative permit and to comply with all conditions imposed thereon by the SWRCB, and (ii) enjoin the prescriptive use of water by a prescriptor who ref uses to do so. As a result, a prescriptive right is also difficult to establish, unless it has been adjudicated; a SWRCB adjudication or court proceeding is necessary to confirm the existence and scope of a prescriptive right.

Prescriptive Rights. There is some question in California as to whether prescriptive rights to groundwater can be asserted. At least one case suggests that the doctrine of prescription (or at least the doctrine of "mutual prescription" pursuant to which all users of a basin prescript as against each other) no longer has a place in California. However, the better view seems to be that prescription can occur relative to groundwater, just as it can with respect to surface water. Prescriptive rights do not begin to accrue until a condition of overdraft begins. Therefore , it is first necessary to determine when a condition of surplus ends and overdraft begins. The definition of overdraft was articulated by the California Supreme Court in 1975. The re, the court held that overdraft begins when extractions exceed the safe yield of a basin plus any temporary surplus. Safe yield is defined as the maximum quantity of water which can be withdrawn annually from a groundwater supply under a given set of conditions without causing a gradual lowering of the groundwater levels resulting, in turn, in the eventual depletion of the supply. " Temporary surplus" is the amount of water which can be pumped from a basin to provide storage space for surface water which would be wasted during wet years if it could not be stored in the basin. Once a groundwater basin reaches a condition of overdraft, no new appropriative uses may be lawfully made. If overlying users (who, as discussed below, have priority over appropriative users) begin to consume a greater share of the safe yield, the existing appropriators must cease pumping in reverse order of their priority as against other appropriators. Typically, however, appropriators continue extraction activities unless and until demand is made and/or suit is brought. If an appropriator continues pumping from an overdrafted basin for the prescriptive period (which, as in other contexts, is five years) after the other users from the basin have notice of the overdraft condition (through decline of groundwater levels or otherwise), then that appropriator may obtain a prescriptive right good as against any other private (i.e., overlying) user. If the groundwater basin comes out of an overdraft condition, i.e., there is a surplus, during the five year period, the "continuous adverse use" requirement is not satisfied. In that situation , the five year period begins anew once overdraft conditions return. Prescription generally may not occur as against public entities and public utilities. As against other prescriptive users, the first in time probably is first in right. It has been held, however, that if multiple prescriptors continue their prescriptive uses for an extended period of time, the concept of "mutual prescription" may apply. Under the mutual prescription doctrine, all such prescriptive users would bear proportionate reductions caused by water shortages, rather than on the basis of temporal priority. However, as noted above, questions exist about the continued viability of the mutual

prescription doctrine. As with prescriptive surface water rights, an adjudication or court proceeding is necessary to confirm the existence and scope of prescriptive rights. Some Southern California counties are subject to the additional requirement that notice of extraction in excess of 25 acre-feet per year be filed. If the required notice is not filed in any one year, the prescriptive period starts over.

•Surplus water, what is the definition of surplus water?

A PRIMER ON CALIFORNIA WATER RIGHTS Prepared by Gary W. Sawyers, Esq. Prescriptive Rights.

"surplus" means available water (that is, water the use of which will not create an overdraft condition) not needed to provide for the needs of all overlying users."

Sawyers embeds this definition within the discussion of Appropriative Rights.

"Appropriative Rights. Any party who does not own land overlying the basin, who owns overlying land but uses the water on non-overlying land, or who sells the water to the public gene rally is an "appropriator" and not an overlying user. The courts generally acknowledge the right of an appropriator to take the available surplus from a groundwater basin and apply it to beneficial use inside or outside the basin. For this purpose, "surplus" means available water (that is, water the use of which will not create an overdraft condition) not needed to provide for the needs of all overlying users. There is no restriction as to where the water may be used, and no requirement that the appropriator be a landowner. The water ma y generally be used for private or public uses without restriction, subject to the requirement that t he use of the water must be reasonable and beneficial. Among appropriators, the priority of each appropriator's right is determined by the relative timing of the commencement of use, i.e., first in time is first in right. "

• If a piece of land has been dry-farmed for 100 years and irrigated for 5 years, which is the "historic" use?

• Define historical use and water banking. Example, if a property is a vineyard, or other agricultural use, and is abandoned, does the water that would have been used to irrigate now classified as surplus based on historical use?

These two questions address historic use. The following site has a Q/A page regarding SGMA where the answer is 'several decades"

https://groundwateractblog.wordpress.com/2015/12/21/sgma-anniversary-meetings-technical-qa-from-one-year-in/ Groundwater Sustainability Requirements under SGMA Q:

Q: SGMA legislation talks about developing a baseline for historic use. What does historic mean? Response: *The GSAs will need to have a thorough understanding of*

water use, and the history of water use, in the basin. ***To some degree, historic will refer to the last several decades.***

The second question addresses surplus generated by land use change. This is partly addressed in:

2015 Amendments to Sustainable Groundwater Management Act 1-15-2016

This defines the powers of a GSA:

" A groundwater sustainability agency may do the following: (a) Acquire by grant, purchase, lease, gift, devise, contract, construction, or otherwise, and hold, use, enjoy, sell, let, and dispose of, real and personal property of every kind, including lands, water rights, structures, buildings, rights-of-way, easements, and privileges, and construct, maintain, alter, and Sustainable Groundwater Management Act, and related provisions (as chaptered) Page 26 As Effective January 1, 2016 [rev. 1/15/2016] operate any and all works or improvements, within or outside the agency, necessary or proper to carry out any of the purposes of this part. (b) Appropriate and acquire surface water or groundwater and surface water or groundwater rights, import surface water or groundwater into the agency, and conserve and store within or outside the agency that water for any purpose necessary or proper to carry out the provisions of this part, including, but not limited to, the spreading, storing, retaining, or percolating into the soil of the waters for subsequent use or in a manner consistent with the provisions of Section 10727.2. ***As part of this authority, the agency shall not alter another person's or agency's existing groundwater conjunctive use or storage program except upon a finding that the conjunctive use or storage program interferes with implementation of the agency's groundwater sustainability plan.*** *d) Perform any acts necessary or proper to enable the agency to purchase, transfer, deliver, or exchange water or water rights of any type with any person that may be necessary or proper to carry out any of the purposes of this part, including, but not limited to, providing surface water in exchange for a groundwater extractor's agreement to reduce or cease groundwater extractions. The agency shall not deliver retail water supplies within the service area of a public water system without either the consent of that system or authority under the agency's existing authorities.*

Comment on the above: As this issue will tangle with attempts to declare a prescriptive right or debate the length of time defined under "existing", we could use legal clarification here

(2) WATER OWNERSHIP

•If I conserve water, how does that impact my water right

•How do water districts change private water rights

These two questions are answered, by defining GSA powers, in part in

2015 Amendments to Sustainable Groundwater Management Act 1-15-2016

2) To control groundwater extractions by regulating, limiting, or suspending extractions from individual groundwater wells or extractions from groundwater wells in the aggregate, construction of new groundwater wells, enlargement of existing groundwater wells, or reactivation of abandoned groundwater wells, or otherwise establishing groundwater extraction allocations. Those actions shall be consistent with the applicable elements of the city or county general plan, unless there is insufficient sustainable yield in the basin to serve a land use designated in the city or county general plan. A limitation on extractions by a groundwater sustainability agency shall not be construed to be a final determination of rights to extract groundwater from the basin or any portion of the basin.

•If flood waters are recharged by the County or a water district facility, who "owns" that recharged water

While surface water can be 'owned' under current law, groundwater is a commons to which a right to withdraw may be given. Thus it would appear that once the water percolates, it becomes part of the commons. However agencies have powers to buy, sell, store provided that the SGMA sustainability criteria are met. While basin overdraft continues, extraction is governed by the restrictions imposed by the SGA. However if an agency brings 'new water' into the basin, that agency would retain the right to extract an equal amount from the basin, using the basin essentially as storage.

Background and Recent History of Water Transfers in California: Prepared for the Delta Stewardship Council by the Department of Water Resources and the State Water Resources Control Board July, 2015

There is no administrative process for permitting extraction of groundwater in California except in the few basins that have been adjudicated. The majority of the adjudicated groundwater basins are located in southern California. Groundwater use in California is analogous to riparian rights. Overlying users have the ability to install a well and use the naturally occurring groundwater for beneficial use on their overlying land. The overlying users share equally in the resource. ***Users overlying a basin may import water to a basin and retain a right to the imported water, less any losses and, other users within the basin cannot claim a right to imported water***

• Can surplus water be legally sold or transferred?

With the understanding that the term surplus applies here to water savings, and cannot be applied to the groundwater basin as a whole where SGMA restrictions still apply, the 2015 Amendments to SGMA cites "Additional Authorities of Groundwater Water Sustainability Agency, which grant power to:

To authorize temporary and permanent transfers of groundwater extraction allocations within the agency's boundaries, if the total quantity of groundwater extracted in any water year is consistent with the provisions of the groundwater sustainability plan. The transfer is subject to applicable city and county ordinances. (4) To establish accounting rules to allow unused groundwater extraction allocations issued by the agency to be carried over from one year to another and voluntarily transferred, if the total quantity of groundwater extracted in any five-year period is consistent with the provisions of the groundwater sustainability plan.

.•When does groundwater use change from being "overlying" to appropriative when the same person owns different parcels of land

We assume the question addresses local water transfers from a parcel within a basin to a parcel bordering the basin. The quote below addresses establishing water use in a mix of farmed and fallowed land, and thus would not address transfers from inside to outside of the basin where an ag operation crosses the basin boundary.

2016_Water_Transfer_White_Paper: www.water.ca.gov/watertransfers/faqs.cfm

1) 2.1.2 Individual Farm Operations and Small Water Districts "Small water district" is defined as a legal entity that serves one or few landowners. For individual farm operations or small water districts, last year's cropping patterns may be an inappropriate measure of likely future conditions absent the cropland idling/crop shifting transfer because of crop rotation patterns. Small water districts and individual operations need to provide the previous five years of crop history for their entire district or operation to identify significant crop rotation cycles. Where crop rotation cycles are evident for the whole of the farm operation or small water district, either (1) a repeating crop pattern or (2) the five-year average should be used. In these cases, the potential participant has to identify specific fields to be enrolled in the transfer and provide the five-year crop history for these fields, at a minimum. Use of a repeating pattern to characterize routine land idling and crop rotation practices requires the proponent to provide an exact repeating pattern of cropland idling practices for the fields to be involved in the transfer. The lands considered routinely idled would correspond to those in the subsequent year of the pattern. The Project Agencies must agree to use of a repeating pattern. From this crop history, the proponent needs to calculate the five-year average of crop evapotranspiration of applied water (ETAW) values, as indicated below, for each field. The five-year average ETAW values for each field would be used as the base for determining changes due to the proposed cropland idling/crop shifting transfer in the year of the transfer. Individual farms or small water districts must provide a statement that the land idled for water transfer is not "shifted" to other operations under their control. 2.1.3 Eligibility of Double-Cropped Fields If the seller has historically practiced double cropping of a winter crop such as wheat and a second crop grown during the transfer period, the seller may cultivate that winter crop and idle the field for transfer in that transfer year. The transfer proponent will need to provide evidence to the Project Agencies of the double cropping history verifiable by Farm Service Agency (FSA)

acreage consistent with section 2.1 above, including a five-year crop history. The history needs to indicate which crop(s) were historically the second crop (thus assigning the appropriate ETAW) in order to determine the water available for transfer. Refer to Table 2-1 for crops suitable for idling or shifting.

(3) INTERACTION WITH OTHER LAWS

•How does the Endangered Species Act interact with water rights. What happens if an illegal storage facility (maybe a stockpond) harbors endangered species

The ESA has a lot of power concerning protecting listed animals such as red-legged frog, not so much for protected plants. Take is not allowed for animals on private land, but is allowed for plants. However a take permit might be issued where pond removal is critical as a safety issue, and the take can be mitigated. Decisions and permits are on a case-by-case basis. It is likely that this would also a flag a CEQA study if the pond needed to be modified or removed, where CEQA would address the impacts to species. LEGAL VALIDATION NEEDED

•How are we going to figure out in-stream requirements and who has to give up water to fill that need

In stream requirements would be determined primarily by (a) fisheries, and (b) downstream basins. The latter would be determined by negotiation between basins, a requirement of SGMA. Under the policy of sustainable yield, If that requirement cannot be met, basin would have to be managed to re-enable the flow. This is a definition of sustainability. **Sustainable yield reserves a fraction of safe yield for the benefit of the surface waters.** There is currently a lack of consensus as to what percentage of safe yield should constitute sustainable yield.

In regard to "who has to give up water" it would be everybody that has to restrict pumping or change land use in order to make progress toward achieving sustainability as mandated under SGMA. LEGAL VALIDATION NEEDED

(4) BASIN TRANSFERS OUT OF BASIN

•What is the legality of transporting water (by truck or other conveyance) that is pumped in one groundwater basin or

watershed and moved for use to another groundwater basin or watershed?

•What remedies exist if someone hauls water from a basin declared to be in overdraft?

In general this would not be allowed as it is an appropriation, which is not allowed if a basin is in overdraft and covered by SGMA. However it might be allowed if the basin is not covered by SGMA, as there is no authority to prevent it. This could be prevented by ordinance, independent of SGMA

There is a special section on farm operations in :
2016_Water_Transfer_White_Paper 2.1.2 Individual Farm Operations and Small Water Districts http://www.water.ca.gov/watertransfers/

Water transfers that involve changes in point of diversion, place of use, or purpose of use to a post-1914 water right most often require the approval of the State Water Resources Control Board (SWRCB). Transfers that require the use of State, regional, or a local public agency's conveyance facilities require the owner of the conveyance facilities to determine that the transfers will not harm any other legal user of water, will not unreasonably affect fish and wildlife, and will not unreasonably affect the overall economy of the county from which the water is transferred.

Note that the above quote seems to be slanted toward surface water transfers and not groundwater transfers. LEGAL VALIDATION NEEDED

• Can surplus water be legally sold or transferred?

(Addressed under #2 above)

(5) BASIN TRANSFERS WITHIN BASIN

• Can surplus water be legally sold or transferred?

(Addressed under #2 above)

• If the law states landowners have the right to the beneficial use of water on their land, is it legal to sell or transfer that water because it is not being used on that land?

In general, in basins not regulated under SGMA, transfer is legal. The taking of the water would be considered appropriative, and would be a right junior to all overlying users in the basin.

In basins covered by SGMA, transfers would have to be approved by SGA. It is presumed that, if the basin is in critical overdraft, the transfer would not create an increase in net extractions from the basin. That suggests that curtailing crop use and moving water elsewhere might be allowed. See also above.

In a basin covered by a specific ordinance, the constraints of that ordinance would have to be addressed. LEGAL VALIDATION NEEDED

• If a local ordinance prohibits the sale or transfer of water from a property, if that ordinance is in conflict with a state law or the California State Constitution, is the local ordinance enforceable?

The question suggests that such conflicts could only be resolved in court. LEGAL VALIDATION NEEDED

•To maintain and preserve our County's aquifers, is it possible that the County could charge a fee for the sale or transfer of water from the aquifers in the event that it is legally permitted? The fee could be substantial enough to dissuade excessive water sales or transfers.

An SGA has the power to levy fees and assessments on property owners. This would primarily be to support the agency itself and the costs involved with data collection and analysis. The basis of the fee evaluation

It is unlikely that the scenario depicted in the question would exist, because if the goal of the SGA was to minimize use, it would simply ban sale or transfer, or would allow and encourage transfers when they would optimize basin recovery

(6) POWERS SGMA VS PROPERTY RIGHTS

•If the county, with the authority to regulate land use, creates an ordinance preventing private land owners from full beneficial use of their land (like farming), is that legal when the land around those same private land owners is being farmed or used in the same way those other private land owners are being prevented from?

•Explain "equal protection under the law" with regards to question #1 and water use on private property.

Presumably any county ordinance (as against the state-based SGMA) is open to legal challenge. Uneven application of an ordinance would be grounds for action. As no specific ordinance is addressed in the question, it is too vague for an answer. If the

question is addressed to SGMA regulation, then a landowner overlying a basin may be under different regulation (or none) to a neighbor ouside the basin boundary as defined in Bulletin 118. LEGAL VALIDATION NEEDED

•Are there limits on well permitting, if, for instance, the permit process prevents access to a lawful water right

There may be limits on the drilling of new wells, but it is unlikely that a well that provided water to a household (I think extraction of 2 afy or less) would be prevented and appear to exempt to SGMA regulation. LEGAL VALIDATION NEEDED

SGMA Frequently Asked Questions - County of San Diego:www.sandiegocounty.gov/content/sdc/pds/SGMA/FAQ.html

Who does SGMA affect? SGMA affects groundwater users located within a SGMA basin that is required to be sustainably managed. Domestic groundwater users that use less than 2 acre-feet per year (afy) are exempt from reporting requirements. On average, a single-family residence uses about 0.5 afy.

In the general case of the degree to which SGMA can impact property rights, the following site lists property disclosures that might be required.

https://propertyid.com/sustainable-groundwater-management-act

The above URL is from an organization that does property evaluation and advises obligations against the property that should be declared:

Impact to Individual Property Owners

In addition to the potentially negative environmental impact of subsidence, property owners may face other negative impacts as well. It is important for agents to protect themselves from liability by disclosing the potential impact of SGMA on a property to a potential buyer. SGMA gives GSAs the following powers over water rights on private properties:

1. *To impose fees and assessments against property owners.*
2. *To impose well spacing requirements on private properties.*
3. *To conduct investigation of water rights suspected of not complying.*
4. *To acquire property and water rights in spite of private property ownership.*
5. *To reclaim water not keeping with the Act's guidelines.*
6. *To require well registration to monitor and track private ownership water usage.*
7. *To regulate groundwater extractions of private property owners.*
8. *To adopt rules, regulations, ordinances, and resolutions over private wells.*
9. *To require well operators to measure and report extractions to government agencies.*
10. *To create and implement enforcement actions for non-compliance by property owners.*

11. *To require reporting of diversions to surface water storage to government agencies.*
12. *•If the county, with the authority to regulate land use, creates an ordinance preventing private land owners from full beneficial use of their land (like farming), is that legal when the land around those same private land owners is being farmed or used in the same way those other private land owners are being prevented from?*

(7) CONFLICT RESOLUTION

•We proved that the Santa Maria Groundwater basin was not in a state of overdraft in trial. The County claims it was in a state of overdraft. Can the County of San Luis Obispo claim a level three water deficiency on the Nipomo Mesa if there is no overdraft conditions in the Santa Maria Groundwater Basin? Jesse Hill attorney for 70 defendants on the Nipomo Mesa who proved the basin was not in a state of overdraft

This question applies to an adjudicated basin and therefore issues such as this could only be answered through examination of the court record. In the case of Nipomo, the issue would be the evidence from local water level monitoring. The consensus appears to be that water is recharged in the Santa Maria valley, and then moved northward to Nipomo and then to the Five Cities. Thus geologically Nipomo is 'downstream' of Santa Maria, and Five Cities is 'downstream' of Nipomo. It is therefore possible that withdrawals are taking place faster than water can flow northward. Conflicts might be resolved through geologic analysis. LEGAL VALIDATION NEEDED

•How do future adjudications tie into SGMA ? Does SGMA limit what a judge can do in an adjudication

SGMA exempts adjudicated basins, which are governed by the terms of the adjudication. Unless adjudication was to recommend forming an SGA for governance and management, an unlikely scenario, the issue is mute. Skeptics have said that all basins covered by SGMA will generate conflicts that will go to court. One would assume that a court decision would have to comply with SGMA requirements.

LEGAL VALIDATION NEEDED

• If a county represents a given area, can they take opposite sides of a legal battle for different sub-sets of the people they represent?

• Can the county use tax-payer money to support one subset of the people it represents against the others? Is this fair and equitable when all people are paying taxes?

As the County would be in conflict of interest, no. This is an interesting issue as the county is a participant in SGA governance based on decisions of the Board of Supervisors. The possibility of conflict exists in negotiations between neighboring basins, or between landowners on parcels represented by the County. LEGAL VALIDATION NEEDED

• If an agency claims to be using best management practices (BMP) but in fact is not and is doing what is most profitable instead, can they be prosecuted for the damage they create or cause by their actions?

Yes LEGAL VALIDATION NEEDED

(8) DISPUTES WITH PARTIES BORDERING A BASIN

•How will possible conflicts between managed basins be resolved (e.g. Salinas outflow to Monterey County)?

www.water.ca.gov/.../SGMA_GSP_Topic-6_Intra-and-Inter_Basin_Coordination_080...

SMGA requires that neighboring basins must integrate their basin plans. This indicates the counties would have to degree on the quantities of surface water and underflow moving across the county line

• Are there any legal pathways to resolve issues in fractured, bedrock aquifers either adjacent to, or below a defined basin, and does a basin under SGMA have any rights to question withdrawals immediately outsIde of the borders of the basin?

[PDF]Sustainable Groundwater Management Act - California Department of ...water.ca.gov/floodmgmt/watershed.../2016-04-27_Olvera_DWR_SGMA_WU.pdf

Apr 27, 2016 - Where Does SGMA Apply? • All 127 high- and medium-priority basins are subject to SGMA. • A "basin" is an alluvial aquifer, ***not a fractured bedrock***

aquifer. *• 127 priority basins account for: – 96% of average annual GW supply. – 88% of 2010 population overlying. GW basin area. 8 ..*

Based on the above, SGMA would consider fractured bedrock as being outside of a basin, and therefore beyond the control of the SGA. However it is possible that a particular case might go to judicial review. LEGAL VALIDATION NEEDED

• Deep wells in the Paso Robles basin - a couple of years ago, I heard County Environmental Health has been working from a draft ordinance covering the requirements for approval of deep wells that go deeper than the Paso Robles formation. Because the ordinance was just in draft form, it could not yet be made public. Is that still the circumstance? What are the regulations regarding punching deeper than the Paso Robles basin (and into the lower quality water of the Monterey or Santa Margarita formations beneath the Paso Robles formation?)

(Ref) Paso Robles Groundwater Basin Study, Phase 2, Numerical Model Development, Calibration, and Application, 2005

This states in the basin model that the basin is defined as the units ABOVE the bedrock, which is modeled as non-water bearing. Also Bulletin 118 defines a basin as defined by SGMA, and this states

F. "Groundwater Basin" means an aquifer or series of aquifers with a reasonably defined lateral and vertical extent, as defined in Bulletin 118 by Department of Water Resources. "Non-basin areas" are outside defined groundwater basins and contain smaller amounts of groundwater in consolidated sediments or fractured hard rock.

Thus it would seem that a well that taps ONLY bedrock might be legally exempt from coverage under SGMA. However it is extremely unlikely that a well would not be perforated within the covered strata. LEGAL VALIDATION NEEDED

(9) BASIN MANAGEMENT CONCERNING SUSTAINABILITY

•Does CA law address whether a new well must be reviewed for impacts on water supply in an area without an estimated safe yield? Might this be addressed by CEQA? (The County's Resource Management Report classifies around a dozen groundwater basins as having "no estimated safe yield.")

If there is no information on safe yield, there may be no basis for making decisions on the impacts of a new well. Water supply may be addressed under CEQA (i.e. analysis of water supply for Laetitia winery). Evidence of local water supply problems may arise from neighbors during project approval for a non-agricultural well. Agricultural wells are usually exempt from review under CEQA.. It is possible the county regulations specific to an area might be in effect. The well application checklist for well drillers to submit upon well completion does not address production or conflicts.. (dwr188_prd.pdf) LEGAL VALIDATION NEEDED

•How is overdaft of a basin-as-a-whole defined and through what mechanism is it determined? Condition of long-term overdraft

http://www.water.ca.gov/groundwater/sgm/definitions.cfm

The condition of a groundwater basin where the average annual amount of water extracted for a long-term period, generally 10 years or more, exceeds the long-term average annual supply of water to the basin, plus any temporary surplus. Overdraft during a period of drought is not sufficient to establish a condition of long-term overdraft if extractions and recharge are managed as necessary to ensure that reductions in groundwater levels or storage during a period of drought are offset by increases in groundwater levels or storage during other periods.

•If purveyors and appropriators can use surplus water, how can they be given a set volume of water if the surplus can change from year to year dependent upon rainfall and overliers use?

They can't be given a set volume water that is regarded as a temporary surplus, where the basin is in long-term overdraft. The SGA has the powers to allocate water on a temporary basis. LEGAL VALIDATION NEEDED

•What happens if overdraft is localized within a basin? How is it determined and then controlled ?

Once identified, this would be resolved by the SGA. It is presumed that the observation well network would be sufficiently designed to monitor local issues., and might result in local restrictions on pumping, or transfer of water across the basin. This does not appear to be addressed in SGMA documents. LEGAL VALIDATION NEEDED

•What density of monitoring wells should be put on place as a validation that overdraft is, or is not, taking place?

This would depend on the consultants building the basin model making recommendations. This does not appear to be addressed in SGMA documents.

•What police powers exist under SGMA to enforce safe-yield pumping? Who sues who ,and who pays?

https://propertyid.com/sustainable-groundwater-management-act

SGA powers

1. *To impose fees and assessments against property owners.*
2. *To impose well spacing requirements on private properties.*
3. *To conduct investigation of water rights suspected of not complying.*
4. *To acquire property and water rights in spite of private property ownership.*
5. *To reclaim water not keeping with the Act's guidelines.*
6. *To require well registration to monitor and track private ownership water usage.*
7. ***To regulate groundwater extractions of private property owners.***
8. ***To adopt rules, regulations, ordinances, and resolutions over private wells.***
9. ***To require well operators to measure and report extractions to government agencies.***
10. *To create and implement enforcement actions for non-compliance by property owners.*
11. *To require reporting of diversions to surface water storage to government agencies.*

•Can water levels at monitoring wells be made available to the general public? How would potential conflicts on privacy vs. information needed for basin management be resolved?

At the moment well records are private. This is a significant problem concerning independent monitoring of SGA performance LEGAL VALIDATION NEEDED

•In evaluating water demand for a project, do we need to consider short-term construction demands? These are temporary, but can be substantial when compared to a project's buildout water demand (such as a solar facility). Can we distinguish these as pre-project?

It is a CEQA checkoff item and can be included

•Given that basin levels will fluctuate based on rainfall/runoff, what will be the standard by which overdraft will be defined as a management issue for action, vs 'wait-and-see' on the expectation of short term impact? For example, would a moving average be employed as a trigger?

The condition of a groundwater basin where the average annual amount of water extracted for a long-term period, generally 10 years or more, exceeds the long-term average annual supply of water to the basin, plus any temporary surplus. Overdraft during a period of drought is not sufficient to establish a condition of long-term overdraft if extractions and recharge are managed as necessary to ensure that reductions in groundwater levels or storage during a period of drought are offset by increases in groundwater levels or storage during other periods. LEGAL VALIDATION NEEDED ON MANNER IN WHICH LONG TERM RECOVERY WILL BE DEFINED

(10) QUESTIONS NOT DIRECTLY DIRECTED TO SGMA ISSUES

•If "facts" being used to procure grant money are shown to be false, but the individuals filling out the grant applications are still using the false information to procure the funds, can these individuals be prosecuted?

https://www.grants.gov/web/grants/learn-grants/grant.../grant-fraud-responsibilities.html

Federal grant *dollars are susceptible to several forms of financial theft, most commonly in the form of specific federal violations, including: Embezzlement; Theft or bribery concerning* programs *receiving federal funds;* False *statements;* False *claims; Mail fraud and wire fraud. Each of these violations of* law *are subject to criminal prosecution, fines, restitution, and civil penalties..*

•. How can a property owner be taxed for the state water pipeline and the Nacimiento water pipeline if they do not receive any benefit/are in the zone of benefit for those projects?

A zone of benefit is a geographic area formed under County Service Area law to provide extended services not already being provided by any other entity. The **Nacimiento pipeline** project is owned, managed and operated by the San Luis Obispo County Flood Control and Water Conservation District (District). The District

is involved in update the Groundwater Management Plan for the County which includes the Paso Robles Groundwater basin.

s a significant problem concerning independent monitoring of SGA performance LEGAL VALIDATION NEEDED

• How can the State of California sell 4.1 million acre feet of water when they can only deliver 2.1 million acre feet?

• How can the State charge for water they do not deliver? INFORMATION NEEDED ON THESE 2 QUESTIONS

• Who is responsible for water running from one property to the next. What if the uphill landowner changes the direction or concentration of that runoff?

This seems like a civil issue.

http://www.bankrate.com/finance/real-estate/neighbors-funnel-rain-into-yard.aspx

Obviously, good drainage makes good neighbors — or something to that effect. And yes, it is not legal for a neighbor to direct stormwater to your yard, and it's worse if they've significantly altered the natural drainage flow through the land in the process.

You could contact the city or county to complain, but it's not likely they're going to show up with heavy equipment one day, tear out the offender's new drains and correct the problem. Inevitably, you will have to hammer out a solution with the neighbors. You could go to court to make these folks cease their actions and possibly receive recompense for damage. You would have to prove the neighbors unreasonably altered their property, resulting in surface-water damage to yours. In most states, by the way, you'd have to prove both damage and nuisance. All told, this route could prove costly and not exactly make for glowing neighborly relations with the uphill clan.

ADDITIONAL QUESTIONS PROBABLY REQUIRING ANSWERS FROM AUTHORITIES ON SGMA

Based on the sense of thinking behind some of the questions, We think a meeting between SGAs, WRAC, and County Staff with legal experts is needed to discuss the following issues. Could you look at these, and add/subtract, or even provide an answer from your research that could be used with the rest?

(1) What happens when somebody claims a prescriptive right to continue pumping at rates not compatible with SGA requirements?

(2) How will neighbor v. neighbor disputes be handled for those within a single SGA?

(3) How will claims on water level stability or change be validated when a landowner challenges the SGA restrictions on the basis of local conditions?

(4) Will GSA's be able to subdivide a basin into different pumping restrictions, or will restrictions be a one-size-fits all?

(5) If GSA decisions are based on interpretation of water level data, and if those decisions are challenged, to what degree is well data made public, both for GSA drilled wells and private wells used in the running analysis of conditions?

(6) What are tools by which conflicts between connected basins are resolved when claims about connectivity and volume of groundwater flow are in conflict.

(7) Would production from bedrock at the base of the basin be considered imported water, and exempt from pumping restrictions?

(8) What will the monitoring well density and geographic distribution have to be to satisfy sufficient monitoring standards for any model used?

(9) How will GSA managers define long term recovery from short term recovery, the latter being insufficient to change pumping regulation or define a surplus.

(10) If a surplus is established, would a neighboring and downstream basin without a surplus be entitled to a greater right of the water (i.e. Monterey below Paso Robles)

(11) If a basin appears to be fully recovered, does the SGA continue to police, or do all well-owners immediately switch to unrestrained pumping?

(12) How will an SGA report data to (a) landowners and (b) the public