

“ [T]he status of groundwater in regard to Federal Reserved Water Rights is not settled law. And the Act could be read to create such a right...”



## **Sustainable Groundwater Management Act Federal and Tribal Water Rights**

The historic groundwater legislation of 2014<sup>1</sup>, in part, creates the Sustainable Groundwater Management Act<sup>1</sup> (the “Act”), which permits the election of a Groundwater Sustainability Agency (“GSA”)<sup>2</sup> for all groundwater basins in the state,<sup>3</sup> and requires the development of a Groundwater Sustainability Plan (“GSP”)<sup>4</sup> for those all medium- and high-priority basins designated by the Department of Water Resources (“DWR”). The Act implicates Federal and Tribal water rights in two primary areas – a question as to the participation of Federal and Tribal water interests in the development of GSPs, and a statement regarding the priority of Federal and Tribal water rights in the setting of extraction limitations and the adjudication of groundwater rights.

### **Groundwater Sustainability Plans:**

- **Participation of Federal Entities and Tribes:** The Act provides that the federal government or any federally recognized Indian tribe may voluntarily agree to participate in the preparation or administration of a groundwater sustainability plan or groundwater management through a joint powers authority or other agreement with local agencies in the basin. However, this discretion is left entirely up to the tribe or federal interest: “A participating tribe shall be eligible to participate fully in planning, financing, and management under this part, including eligibility for grants and technical assistance, if any exercise of regulatory authority, enforcement, or imposition and collection of fees is pursuant to the tribe’s independent authority and not pursuant to authority granted to a groundwater sustainability agency under this part.”<sup>5</sup>
- **Recognition of Federal and Tribal Rights:** In undertaking its activities pursuant to the Act, a groundwater sustainability agency must consider the interests of all beneficial uses and users of groundwater, including “the federal government, including, but not limited to, the military and managers of federal lands” and “California Native American tribes.”<sup>6</sup> The Act further states that, in the management of a groundwater basin by a groundwater sustainability agency or by the State Water Resources Control Board, “federally-reserved water rights to groundwater shall be respected in full. In case of conflict between federal and state law in that adjudication or management, federal law shall prevail. The voluntary or involuntary participation of a holder of rights in that adjudication or management shall not subject that holder to state law regarding other proceedings or matters not authorized by federal law. This subdivision is declaratory of

existing law.”<sup>7</sup> However, the status of groundwater in regard to Federal Reserved Water Rights is not settled law. And the Act could be read to create such a right, which would require prioritization of Federal and Tribal water rights in the setting of groundwater extraction limits pursuant to a GSP.

- **Risks:** As the Act cannot require the participation of Federal and Tribal interests in the creation of GSPs, there is significant concern that the efficacy of a GSP –and the efforts of GSAs and cooperation parties – could be lessened in cases where Federal and Tribal interests decline to participate in the planning process. In such cases, if no changes in groundwater pumping are made on federal and Tribal lands or those landholders decline to participate in the funding of other sustainability measures, this could undermine the efforts under the GSP.

### Adjudications:

- **Priority of Reserved Rights:** The Act does not require or provide mechanisms for the adjudication of groundwater rights. However, it does provide that, in an adjudication of rights to the use of groundwater, “federally-reserved water rights to groundwater shall be respected in full. In case of conflict between federal and state law in that adjudication or management, federal law shall prevail. The voluntary or involuntary participation of a holder of rights in that adjudication or management shall not subject that holder to state law regarding other proceedings or matters not authorized by federal law. This subdivision is declaratory of existing law.”<sup>8</sup> Contrary to the implication of this language, the status of groundwater in regard to Federal Reserved Water Rights is not settled law. And the Act could be read to create such a right, which would elevate Federal and Tribal water rights in the event of an adjudication.
- **Risks:** As described above, the Act cannot require participation of Federal and Tribal interests in the creation of a GSP. In order to ensure that Federal and Tribal water rights can nonetheless be made subject to the sustainable management under a GSP, the only option may be to initiate an adjudication of the basin – however, such an adjudication could be subject to the language above regarding federally-reserved water rights.

<sup>1</sup> Senate Bill 1168 (Pavley), Senate Bill 1319 (Pavley), and Assembly Bill 1739 (Dickinson).

<sup>2</sup> See Water Code § 10723 et seq.

<sup>3</sup> See Water Code §§ 10720.3, 10723, 10724.

<sup>4</sup> The Act mandates compliance for all non-exempt groundwater basins designated by the Department of Water Resources (“DWR”) as medium- and high -priority basins. (Water Code § 10720.7(a)(1).) However, the Act encourages low- and very low-priority basins to be managed pursuant to a Plan as well. (Water Code § 10720.7(b).)

<sup>5</sup> Wat. Code, § 10720.3(c).

<sup>6</sup> Wat. Code, § 10723.2 (g), (h).

<sup>7</sup> Wat. Code, § 10720.3(d).

<sup>8</sup> Wat. Code, § 10720.3(d).

