

Groundwater Problems and Prospects_1_26_2015

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0:05:30 Speaker 1: Without further ado, let me introduce our guest speaker. Two weeks ago, in our last class, and you heard what I thought was a very fascinating set of presentations and devolving into a panel discussion from three people who were actively engaged in the negotiations, drafting, and other efforts that culminated in the enactment of the three-bill package of groundwater reform laws that were signed into law by Governor Brown last fall and which took effect on January 1, earlier this month. So that gave you the backdrop, the political and policy backdrop that we'd be remiss if we didn't spend some time sharing with you what that law is, and hopefully, explain in non-technical, layperson's terms the key provisions of that law. And we've got a great guest speaker to lead us through that discussion. We're gonna hear from David Aladjem, who's a partner at the Sacramento-based law firm of Downey Brand, one of the area's, Northern California's most prominent natural resources and water law firms. And there, David helps anchor a very substantial and well-respected water law practice. This is what he does. He received his bachelor's degree from Stanford University, a master's degree from Princeton University, and his law degree from that law school down the road, UC Berkeley School of Law. He specializes, as I say, in water and environmental law.

0:07:11 S1: Among other things he does in his day job is helping clients throughout California manage and resolve a variety of water resource management problems, especially those at the intersection of water rights, endangered species, and other environmental laws. And I can tell you, having seen David work for decades now, he's one of the most prominent water law attorneys in the state of California. He's focused, as we all have, quite closely on this groundwater legislation. And now as we move from the political process to the implementation process, he's done a lot of thinking and writing about the groundwater legislation, including, I've got it in my file over here, I'll wave it around for you later, a very nice summary on behalf of his law firm, of the key provisions of the 2014 groundwater legislation. So without further ado, David Aladjem.

0:08:18 David Aladjem: Just a question here. Do I need to stand behind this podium the entire time? Or am I free to move around, or..

0:08:22 S1: You can move around. We are taping this for posterity, and absent students. But as you can see, there are hanging mics, so if you use your booming law school voice, regardless of where you stand, the microphone should pick you up.

0:08:34 DA: Okay. And, I want to... Just as we begin, first of all, I want to

thank you very much for the opportunity to talk. It would help me to understand, how many of you are law students? How many of you are graduate students in some other field? And how many are simply here for the interest? So, Law students? And graduate students? Okay. In hydrology? Engineering?

0:09:04 Speaker 3: Engineering.

0:09:05 DA: Okay. A bunch of engineers, good. Okay. You'll have to bear, then, with my engineering lack of education, that I picked up on the street. And if I say something wrong, please forgive me. I'm a lawyer by training. What I want to do this afternoon, as Professor Frank said, is to start with political. To start with why is it that we had what I believe to be one of the major pieces of legislation in California water ever. And I just want to underscore that. For all of you law students, if you've taken water law... The very, most important pieces of legislation in California history are the 1914 Water Commission Act, 1960 Burns-Porter, arguably the 2009 legislative package which created the Delta Reform Act.

0:10:01 DA: And lo and behold, 100 years later, the 2014 groundwater legislation, the Sustainable Groundwater Management Act, or, as it's beginning to be known as SGMA. That's not a lot of statutes, and so I wanna explain how we got there, what the main provisions are. And because this is something that is actually arcane, even to lawyers, still, please, I wanna ask you, if you have a question, ask it. And if it's something that needs to be answered now, I'll answer it. If not, we'll hold the questions 'til the end. Good enough? Okay, let's get started. I wanna talk about why the legislation was passed, and what are its major components? Amongst the lawyers or law students, how many of you have taken water law? Anybody?

0:11:00 DA: Okay. When you go back to groundwater law, does the name Katz vs. Walkinshaw mean anything? Okay. Katz vs. Walkinshaw was indeed the first big water law case for groundwater. And what it did was to create a system whereby overlying water users had priority over others. And the others were largely cities. If you think about Southern California, first what you had, believe it or not, was agriculture. Then you gradually had cities developing, and they needed water. And the farmers said, "No, no, no, no, no." So you had, largely, farmers first with overlying rights, and then appropriators: Cities. The situation that developed, particularly in Southern California was, very quickly, the urban growth was so large that we could not sustain the demands for both agriculture and urban uses with the existing resources. So, what we did, and this is a pattern up and down the state of California. It's a pattern, in fact, across the west. We said, "We don't have enough local water, therefore, we will bring it in." Has anyone here heard of the Metropolitan Water District of Southern California? Okay. Anybody served by Metropolitan before they came to King Hall?

0:12:45 DA: Okay. Metropolitan was formed back, and I believe it was 1929, as a way for the urban Los Angeles area to obtain water from the Colorado River. If anybody's ever watched the movie "Chinatown", the city of Los Angeles had already tapped the other ones out. They needed more. The Colorado River was the place they decided to get it, and that was the reason they formed the Metropolitan Water District of Southern California. If somebody... If you're looking one evening, and you want a nice, little piece of video on YouTube, there is a really nice, little bit of water history you can find. In 1960, excuse me, 1963, President Kennedy went to the booming metropolis of Los Banos. If anybody's been there...

[chuckle]

0:13:44 DA: And dedicated the San Luis unit of the Central Valley Project. And there's actually a very nice tape of President Kennedy talking. What he was doing there is a second very big instance of importation of water. If anyone of you have ever driven from here to Southern California on Interstate 5, you'll note as you go down the west side of the San Joaquin Valley, there are huge now water [0:14:10] . That area was a barren wasteland. In fact, on some of the old maps, it says the Great California Desert or something to that effect. The farmers in that area were wise enough to say, "With water, this could be really productive," and that was the genesis for that part of the San Luis unit of of the CVP. It was bringing water from northern California to there. About the same time, or actually a little before, in 1960, the voters of California authorized the Burns-Porter Act. So, for law students, you can look that one up. And what that did was authorize \$1.7 billion of bonds, which is a lot of money back at that point in time, to build the state water project, which built Oroville reservoir and brings that water largely to Southern California. The reason I give you this history is it's important context. California, for most of the last 100 years, has solved its groundwater problems by bringing in additional surface water from somewhere else.

0:15:20 DA: Okay. So, everybody is so far following? Good. That solution, which we've used, has failed. Okay. Here we go. Since 2000, over the last 15 years, there have been, I believe, two above normal or wet years. There have been three sort of medium years. 10 years out of the last 15 have been dry or critically dry. So, we have an extended drought and a drought of this sort, we have not seen since California has been populated. That's problem one. Problem two, we have increased water demands in the Delta to protect threatened and endangered species beginning with the Central Valley Project Improvement Act of 1992, which reallocated 800,000 acre feet from agriculture to environmental needs, continue with Water Right Decision 1641 by the State Water Resources Control Board in 2000, and continuing, most recently, with a pair of biological opinions... Footnote, for those of you who are not law students, a biological opinion is a decision by either the National Marine Fishery Service or the US Fish and Wildlife Service, that says, "We are going to tell our fellow federal government agency, the Bureau of

Reclamation, in order not to jeopardize the continued existence of a threatened or endangered species, you have to act in the following way." It's a legally binding commitment by the federal government that says this is what we have to do to protect endangered species.

0:17:09 DA: Given all of that, there's a huge amount of pressure on the two export project, the Central Valley Project, the State Water Project, their reliability, I.e., how much water they deliver based upon their contracts has gone from 80 to 90% prior to 1987, to... You could argue about which the number is. I've heard estimates on average from 40 to 50%. So, think about that. Half the water that these guys are relying on has gone away. And that has been the basis for balancing groundwater basins throughout the state. Okay, faced with this, a whole lot of agencies, a whole lot of organizations said, "We gotta do something, because we cannot continue on with bringing in water because we don't have it anymore."

0:18:14 DA: And that, in my mind, was the real genesis of the groundwater legislation. The Association of California Water Agencies and the California Water Foundation both convened groups a little over a year ago. The ACWA Group convened probably in November or October of 2013. The Water Foundation was maybe December of 2013. And both of them released reports in about the February/March timeframe about just not quite a year ago. And those reports very clearly articulated several things, and this is what informs the legislation, and that's why I'm spending the time on it. First, because of the variety of groundwater basins in California, there is no simple one-size-fits-all.

0:19:11 DA: Two, you're going to have to manage these groundwater basins without the ability to bring in substantial amounts of water, either from the Central Valley Project, State Water Project, or anywhere else. The real break that's gotten used is basins need to be sustainable. I'll talk a lot more about that later. Third, and this flows from the first one because the theory, highly differentiated system of groundwater basins we have in California, it's better that the State give the first opportunity to manage to locals. But the State has an overriding responsibility to make sure that the groundwater basins in California are managed not only to protect to provide water right now, but also to provide water into the future. Professor Frank, have they seen the NASA photos on extractions of groundwater in the Central Valley?

0:20:30 S1: I believe Professor Fogg will give an engineering overview the first class, [0:20:33] this...

0:20:36 DA: Okay. If you think back to this, and there are all sorts of issues about the NASA work, but I think it's instructive. If memory serves me correctly, approximately over the last few years, the figure that NASA has thrown out is approximately one trillion cubic meters of groundwater have been extracted from the Central Valley without replenishment. You begin to

think about the magnitude of that number, and you can see why the administration said, "We're going to allow local organizations, local public agencies, to take the first crack at this. But if they don't, we need to step in because we have an obligation to all the people of the state, as well as to generations yet unborn, to manage and to steward these resources." So, big picture, those are the policies behind the Act, and that actually flows pretty neatly though all the pieces of the statute. Let me pause and take questions right now before we get into the Act. Okay? Here we go.

0:21:53 DA: I wanna skip through this. The general provision of the Act, which is codified Water Protection 113. For those of you who are not law students, don't worry about the numbers here. It basically captures this notion that local public agencies, no private corporations of any sort, need to control this resource. And as long as they do, the state is going to defer to them. And there's a test which we'll talk about. You can see the basic premise, let's let local public agencies figure it out. They have the incentive; they have the expertise in most cases. As one of my clients said about a very similar issue a few years ago when we were in a very testy meeting with the State Water Resources Control Board, the State Board staff person was saying, "Well, I don't believe that you're actually gonna manage these resources well."

0:22:56 DA: And this person said, "Why wouldn't we? It's our drinking water." And that is the ultimate reason that I think the State said, "We'll let the locals manage it for the first bill." Okay. The first step in the process of groundwater management, you're gonna have to bear with me, there are beginning to be a lot of acronyms here. The first is a GSA, a Groundwater Sustainability Agency. The first thing here is when you have a local public agency, whether it is as a special water district, in the county, a city, anything like that, do they want to get into the act and manage groundwater? Threshold question. If they do, any of those local agencies can actually serve as a GSA. If they decide they want to do this, they have to provide notice, and they have to have a public hearing.

0:24:00 DA: They have to say, "Okay, we're all gonna get into this together." You need to, as you're going through the process, provide notice, not only to the public, but also to other potential GSAs. The intent there is to not compel, but encourage local public agencies to work together. Or as we said, a lot of the time during the deliberations on the bills, "We want to encourage people to play well in the sandbox." Now, if you're going to be the GSA, you needed to, as part of this process, not only represent to DWR, the Department of Water Resources, but also to put into your notices here, that you are going to take account of all the interests in the basin. And when I say all the interests, there is a lengthy list in the statute, but it means local community groups, environmental groups, environmental justice groups, business groups. You can begin to see the legislation intended for this not to be the providence solely of a local public agency, they wanted someone who'd be accountable. They really wanted this to be a community-based process that really reflects the will of the community. Makes good sense.

0:25:34 DA: Now, if you have multiple GSAs in a groundwater basin, and this is going to be the rule rather than the exception, how do they coordinate their efforts? The statute is, I think, quite vague on this and having sat in the room when that piece of the statute was written, the reason is that no one could come up with a simple way to describe the process. What we wanted was that everybody, all these public agencies, to figure out how best they can work together. But the ways in which agencies can work together up in Glenn County are gonna be different than down in Livermore, down in Monterey, in Kern County in Southern California. So there is no simple answer and the statute is intentionally vague.

0:26:30 DA: You will hear already complaints from various and sundry folks saying, "Oh, I don't know what we're gonna do" and "Let's go to court. We're gonna have to see how that all plays out." I'm actually relatively hopeful that after this initial few months when people get accustomed to what's happening, they're gonna settle down and figure it out. Now, identifying who the GSAs are, is something where the legislature put a hard and fast deadline for the middle of 2017. And if not, the State Water Resource Control Board can come in and really start what's called state intervention. The reason that that date was chosen is that the two authors of the bill, senators now, Dickinson and Pavley, both agreed that this process of developing plans probably should take about five years, to be realistic, that's what it would take. And the thought that they had was if by the middle of that period, you haven't even figured out who's going to be sitting at the table, you're so far behind the curve, forget it, we're gonna come in, and we're gonna take this over. Those are the things that go into... The very first question, who is the GSA? Who is gonna be part of the development of these plans to manage groundwater? Questions? Yes?

0:28:08 Speaker 4: Is that for all basins or just the ones that are in critical [0:28:11] ?

0:28:12 DA: Did everybody hear the question? Yes? Okay. It's a very good question, and it is not for all basins; we're gonna get to that in a moment. But let me answer the question right now. There are literally, I think it's thousands of groundwater basins in California, as identified in DWR's Bulletin 118. There really are, however, not that many. There are only several hundred basins which have been identified as being really important in terms of providing water either for cities or for farms. And that are in the condition of overdraft. We're gonna talk about that in a moment. What the statute says is, any basin can be managed, but really what we're gonna do, we're gonna require management... We're gonna require planning for what are known as medium or high priority basins in the CASGEM system, and that's based on a complicated mix of population, water use, agriculture, etcetera. That's a very good question. Okay.

0:29:31 DA: Once we have figured out who's going to be managing these

basins, the question is, what's the basin? And there was a very strong consensus... Professor Frank was talking about the talk that Lester Snow was gonna be giving. Lester was very clear about this, and I think a lot of people agree with him, it's important to use the DWR Bulletin 118 basis, at least as a presumptive place to start. Otherwise, what will happen is you will find people who will argue about the basin boundaries from now until the cows come home, where we won't actually get the management that we need. So, what the statute sets up is a process whereby the basin and the boundaries are presumptive in Bulletin 118. But you can adjust them if you can make a technical show.

0:30:29 DA: As it indicates on the slide here, DWR is gonna come up with regs sometime by next January 1st. The regs are going to say, "If you want to adjust the basin boundaries, you're going to have the technical basis for adjusting. You're gonna have to show the basin can be managed sustainably," and hold with the question about, what is "sustainably"? And, then the agency that's proposing this boundary change has consulted with others. And that last one, though it doesn't seem to be very difficult, is actually, in my view, gonna be one of the most difficult things because agency X is going to say, "Hey, why don't we change this boundary?" Agency Y will say, "Well, maybe not entirely but we're gonna do this." And you're gonna suddenly get into this long and, I think, involved discussion in many groundwater basins about what the basin boundaries should be.

0:31:32 DA: DWR, when they did Bulletin 118 back in 1980 was using the best hydrology they have. A lot of that hydrology was based on work in the 1950s. And for those of you, grad students in hydrology and engineering, you kinda understand how much work has been done since then. I can tell you, some of the cases we're working on, there's a lot more and a lot better data. But if you get into that rabbit hole of really arguing about the details of basin boundary, it can take a very long time, be very expensive and really divert everybody from the goal of sustainable groundwater management.

0:32:17 DA: That's why this process is really sort of an off-to-the-side process. It's not intended to really detract from the five-year period of developing a groundwater sustainability plan. So, we're gonna get onto that just now. Okay, groundwater sustainability plan. Any questions about basins?

0:32:38 Speaker 5: Yeah, I've a question.

0:32:39 DA: Sorry.

0:32:40 S5: Are there any provisions for interstate boundaries, like for example, the Tahoe Basin?

0:32:48 DA: Really good question.

0:32:52 S1: David, excuse me, just for the tape, if you could...

0:32:55 DA: Okay. Sorry. Do you wanna repeat the question, or?

0:32:57 S5: Yeah. Are there provisions for interstate boundaries like for the Tahoe Basin?

0:33:01 DA: The question of interstate groundwater basins is a really interesting one. Bulletin 118, if I recall correctly actually has some provisions about that as does the California Water Code. But interstate groundwater basins were not discussed, I don't believe, ever in this legislation. The reason is, the issues about the Tahoe Basin there or some of the basins down in Southern California really weren't what was driving this legislation. What's driving the legislation is the condition of groundwater basins in the Central Valley, virtually every discussion about how would these basins function, et cetera, focused on the San Joaquin Valley.

0:33:49 DA: For those of you who haven't memorized Bulletin 118, if you think about the San Joaquin Valley from Stockton to Fresno, all that area is essentially one groundwater basin. Actually, a little further south of Fresno. It is divided in Bulletin 118 by county lines. Even I know that groundwater flows don't respect county lines. And so the question here, what we, as a state, were going to do with that? That was what was paramount. The interstate basins really weren't discussed.

0:34:32 S5: Okay.

0:34:34 DA: Okay. Groundwater... So, this is... How many people have every looked at or heaven forbid, read a general plan? Oh, gosh. I'm so sorry.

[chuckle]

0:34:48 DA: Okay. The centerpiece of this act is the development of what we call "groundwater sustainability plans". And what they are, very simply is management plans for groundwater basins. They're gonna function very much likely a general plan to guide growth and development in the use of this resource to make sure that the basin is managed to achieve sustainability. I'll get to that in a moment. As a general rule, the authorities in this, I think it's chapter five of the statute, are in addition to any authority that a local public agency might already have.

0:35:36 DA: So, if you're a county or a city, that's really not very much. So, those of you who aren't law students, counties and cities are vested with what's known as the "police power", 'cause they really have any power that the legislature might have unless the legislature had said, "No, you can't have it." On the other hand, most water agencies in California are what is known as "special districts". So, they only have very specific authorities. What this

legislation does is to augment those authorities in a dramatic fashion. And I'll talk to you about what those are. So, the procedure requirements... Let me just skip over this... The key here is the timing issue. If you have a basin that is overdrafted... Does everybody know what overdrafting is? Just wanna make sure. Okay. The deadline for you to complete your plan is 2020. If you have a basin that is known as a medium basin under the CASGEM system, it is not in a condition of overdraft, it's 2022. So, you can tell the legislation really tries to focus on those basins that have the most difficult problems first. And it makes good sense. It means that things are gonna get very interesting, very quickly.

0:37:02 DA: You can have an advisory committee, you have to do annual reporting. The CEQA exemption, I think, is worth spending a little bit of time on. Does everybody know what CEQA is or not? Should I... Okay. CEQA is an acronym for the California Environmental Quality Act. And what the legislature did in 1970... Believe it or not, under Governor Reagan's administration, was to say that when a local public agency or the state, any public agency really, wants to make a decision that is discretionary, they're not mandated to do it, they have to think about the potential consequences of that decision on the environment. So, if you're going to approve a new housing project, like the [0:38:00] [REDACTED] for example, you have to do an analysis of what would that do to traffic? To water use? To air quality? The noise, et cetera.

0:38:11 DA: And if you find that there will be adverse effects on the environment from this action that you want to take as a public agency, you need to mitigate those effects. You need to take actions to limit the adverse effects on the environment. One of the things that has happened in California in the last 45 years with CEQA is CEQA is a very, very effective tool to stop public agencies from doing [0:38:46] [REDACTED]. Because you sue under CEQA and then it takes several years to go through and have the court tell us who's right, et cetera. It's a very slow process. The legislature is aware of that problem. The governor, of course, had his CEQA reform effort and the legislature said, "Look. We want these plans to be developed, pronto. We want them in place by 2020 or 2022. We do not want them tied up in litigation." So, what the legislature did is to exempt the development of the plans from the requirements of CEQA.

0:39:30 DA: What the legislature didn't do, and this is something that I think has not yet been remarked upon very much, is to exempt the implementation of those plans from CEQA. So, you develop a plan, you go through, it's 2020 or 2022, and now you have a long list of things that you want to do. Those actions are subject to CEQA. So now if, for example, you want to cut back certain people's pumping, or you want to develop a new reservoir, or you want to do whatever, you have to go through the CEQA process on all of those activities.

0:40:14 DA: That is, in my mind, is going to be something that is gonna be really interesting to watch, because then the implement who will develop the

plans, and then people will try to implement them, and suddenly we'll go into slow gear. But that's, I think, an important thing as your understanding for management of groundwater in California, what is gonna be probably one of the biggest obstacles, probably in the five to 10-year range. There's gonna be a lot, for those of you who are law students, there's gonna be a huge amount of CEQA litigation, so that's a growth industry.

0:40:49 DA: Okay. Let me turn to the substantive requirements of the groundwater sustainability plan, and I'm actually gonna jump down to the bullet number four here: Measurable objectives to obtain sustainability. Does anybody have an idea, just intuitively and very generally, what the legislature meant by the term "sustainability"? Any ideas? Okay, you are all very, very similar to the rest of the legislature. I don't think anybody really understood what the term "sustainability meant", nor do I think we really have a good sense of it yet. I can tell you from a lawyer's perspective what I think it means, but this is going to be one of those areas where there is going to be an amazing amount of discussion, litigation and general... I'm gonna simply say litigation and let it go with that, over the next 10 to 15 years, at least, 'cause this is the core management objective that we came up with.

0:42:16 DA: Intuitively though, you know that sustainability means something that can be done for a long period of time without creating an adverse result, and in fact, that really is what the California Supreme Court has said was the previous standard for managing a groundwater basin. The legal term the California Supreme Court used in its San Fernando decision back in the 1970s is the groundwater basin needs to be managed for its safe yield, okay? This legislation changes that term to "sustainable yield", but it's basically the same concept, and let me give you the key components here. A sustainable... Managing a groundwater basin that is consistent with a sustainable yield means you're not gonna have an undesirable result, which begs the question, what's an undesirable result?

0:43:23 DA: Here's what the statute says, "A chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon." Now you could unpack each of those terms, and you can see how people are gonna argue over each and every one of them. It continues, "overdraft during a period of drought is not sufficient to establish a chronic lowering of groundwater levels." Makes perfect sense, but now how do you know when you're in a drought? How do you know that that's not the new normal? Really difficult questions. So that's the first criteria.

0:44:12 DA: Another one, "Significant and unreasonable reduction of groundwater storage." If you think back to Professor Fogg's lecture, I assume he talked about groundwater storage, "Significant and unreasonable seawater intrusion, significant and unreasonable degraded water quality, significant and unreasonable land subsidence," so you can tell these are all undesirable, and

that really was all of those things were articulated by the Supreme Court back in the '70s.

0:44:44 DA: Now the one that has gotten a fair amount of press, and I think a fair amount of attention, rightfully so, it's the new thing, but it's not really as you'll see in a moment, "Depletions of interconnected surface water that have significant and unreasonable adverse impacts on the beneficial uses of surface water", and for the law students, this is in the definition section, and that is Section 10721W.

0:45:15 DA: Let me talk a little bit about that last item, about the depletion of inter-connected surface water. Many of my colleagues in the Bar have been saying, "Oh my gosh, the sky is falling." And others would say, "Oh, how wonderful. We're finally going to see that groundwater and surface water are connected," and my view is neither is accurate. There are a series of old cases, by old, I mean almost 100 years, where the California Supreme Court has said on repeated occasions, "Where you have interconnected surface groundwater and surface water, and where the use of one adversely affects the other, an injunction will lie." And so what that means for the non-law students is when you have these situations... We all know that groundwater and surface water are interconnected together. It's a given, but where there is an appreciable connection, and the use of one adversely affects the other, then the legal system will step in. What I liked actually about this language in the statute 'cause it makes it very clear that we're gonna manage groundwater basins in that way; it hasn't always happened. But this is the heart of the act and what's going to be discussed, and it really, as you can see, intersects the world of hydrology, engineering, and law.

0:46:45 DA: So I'm gonna pause and take questions. Does this make sense? Yes?

0:46:51 Speaker 6: Sir, Thomas [0:46:51] [REDACTED] has been involved in the Scott River case, which is maybe the latest and most high profile example of this coming, and I know that the public trust option has been invoked in that case and just wondering what the potential for the public trust option has to play in conjunction with this new legislation?

0:47:14 DA: I'm gonna say let's hold that question 'til the end. I'm gonna let Professor Frank assess that 'cause he's counsel on the Scott River case, so and then we'll have a good discussion about that.

0:47:26 DA: Okay, back to the legislation, that's gonna be one of the big issues, but I want to put it off until we get through the act here. Okay, one of the key things is that there is no determination of water rights; there is no formal determination of water rights. On the other hand, any sort of plan is gonna have to try to figure out who has what rights and what can they do? So there is a tension there. The plan must be consistent with general plan. That

makes good sense. It needs to describe the physical setting of the basin and its characteristics, makes good sense.

0:48:07 DA: Measurable objectives. I'll give you a sense. I was on the phone this morning with a client that's trying to do this, and the question of these measurable objectives came up. And the client said, "Well, what does that mean?" I said, "Well, you get to decide, how are you going to track your progress from where you are today to where you need to be, and you get to define what those are, but then you're gonna have to live by them? So you're gonna have to figure that out. I don't know whether it is water level measurement, whether it is a pumpage, what the right number is and what the right metric is, but that's what you get to figure out, and that needs to be put into the plan. And then lastly, pretty obviously, you're gonna have to monitor, make sure that things are happening, and if there are adverse effects on the environment, you're gonna mitigate.

0:49:03 DA: I threw this slide in here because sometimes folks say, "Oh no, this is something we've never done before." And I picked one groundwater basin that I'm very... Or a series of basins I'm very familiar with down in Southern California, and I just listed here a whole bunch of different report and monitoring reports that they put out on a regular basis. For a well-run basin, this sort of mitigation and monitoring ability, if it isn't already, for the just standard operating procedure. But there are a lot of basins still today where we don't have the information, and that's gonna be the challenge over the next 20 years. Okay, new authorities, the special districts that I mentioned before are gonna have authorities to investigate what's happening to augment supplies if there's any augmentation to be had, to tell whether it is safe for the farmers, "No, you cannot put your well next to this other guy's." And I've seen it happen both in the urban and rural context. The... You can limit extractions. Obviously, that is one of the key tools that agencies are gonna use; it is one of the most controversial.

0:50:28 DA: The conjunctive use of surface and groundwater, every one in California who I talk to about this legislation, agreed that the ultimate solution such as it is, is we need to use our surface water when it's available and use groundwater when it's not. Yet, there are a number of different water agency acts that really don't allow them to do that. What the legislation did was to plug that up, and then last but similar is there are some areas where you can do groundwater transfers where I can find agency X. I can say to agency Y, "You can have my surface water. I'll use my groundwater, and I can use that as a management tool." Again, some of these acts don't allow for that or it's ambiguous or people have been sued if the act now plugs that hole. Rick, how much time do I have left?

0:51:32 S1: About 10 minutes or so.

0:51:38 DA: Okay. We're good. Funding is always a major issue. The new act

allows agencies to impose a number of different types of fees. Now, those are going to be basically under the constitutional rubric of either Proposition 218 or Proposition 13. They are the various voter approval requirements, but nonetheless, nonetheless, there is provision for new monies to come in; that's gonna be essential because the technical work that's gonna have to get done is huge. There is also new enforcement authorities. Many of these agencies whether it's cities, counties, or special districts do not have a quasi judicial enforcement authority. The administrative penalties are \$500 an acre foot which is similar to surface water, \$1,000, \$100 a day for violations and certain penalties. One of the challenges of the act, for implementing that act, excuse me, is going to be that there simply are not enough good groundwater hydrologists in the state, period.

0:52:56 DA: So those of you who are graduate students there, you got a job well within, well into the future. We do not understand a lot about our groundwater basins, we don't have the modeling capabilities; we really don't have the ability to manage in a state with already 40 million or thereabouts, that's gonna be 50 million very soon. So, DWR is supposed to provide technical assistance, but they don't have the ability, the staff, the money to be able to do this, and so it's going to be a real problem. They.. I know the folks at DWR very well, they are busting their tails to try to figure out how to do this, but they've been caught flat-footed here because they thought they were gonna do really not that much, and then suddenly, at the end of the legislative process, a lot of things happened. So, they're gonna have a number of different regulations with the issue in here, the most important one I think is the best management practices by January 2017.

0:54:02 DA: And, of course, there is \$100 million dollars in Proposition 1 for groundwater management. I believe when DWR starts distributing that, there will be a line of people. Okay. Once an agency finishes its GSP, now, it's going to send it over to DWR, and DWR is going to evaluate it. One of the common misconceptions here is that DWR is going to approve it. Not quite true. It's going to evaluate and provide comments back. Now, you may say, "Well, that really means approval." Again, I hearken back to what I started with, which is, "Local public agencies are going to be primary, the state is gonna be secondary, unless and until it has to step in." And this is how that got clippy with legislation, to review is whether that plan is likely to achieve the sustainability.

0:55:04 DA: And so the last thing here, this alternative proposal, and one of the more interesting pieces of the legislation. DWR, to their credit, said during some of the discussion, "We don't want to put everybody into a straitjacket. So if somebody has a different way to actually achieve the purpose of a sustainability plan, we wanna hear from them." I think that that is another under-recognized piece of the act, but one that could be very, very important as we go forward.

0:55:41 DA: What happens if you've got the ABC water district and the city of who knows it, and they simply are saying, "Forget it. We don't wanna do anything." There really was consensus very, very early on between Tim Quinn, the head of ACWA, Lester Snow, the head of the Water Foundation, the two authors, virtually everybody, that if you had people or agencies that did not want to address the problem, the state needed to come in. The administration made it very, very clear that there had to be what was initially called the state backstop. It is now called, I think it's the Chapter 11 State Intervention.

0:56:28 DA: These are, here are the triggers. No GSA by 2017. No GSP by 2020 or 2022. If the GSP is inadequate or not being implemented, and then you can see in 2022 or 2025, additional triggers kick in. The basic idea is if you are developing a plan or if you are not willing to develop a plan, if you're not willing to implement the plan and make sure it's effective, the state is going to intervene. There is very little criticism of that from anybody. For a lot of students, the timelines on developing or implementing the GSP or total if there's litigation there... Let me... Right over here.

0:57:25 DA: If you have a basin where the locals are not going to manage it, then the state water board steps in. What do they do? They can impose what's known as an interim plan. Essentially, they can have one hearing, and they can say, "Okay. We are going to put in place something that's kind of a do-no-harm," or as the old adage says, "When you're at the bottom of a hole, stop digging." That's what they're trying to do. Then they're gonna say... The Chair of the water board, Felicia Marcus, has said this publicly, "We don't want to be running groundwater basins, but we are going to make sure that your inability to get with the program and develop a GSP or implement it isn't gonna harm the state long-term."

0:58:22 DA: So that's what these interim plans are gonna do. They can limit extraction. Any interim plan has to be consistent with water right priorities and Article X Section 2 of the California Constitution, which forbids waste and unreasonable use of water. I think I'm about on time here. I'll be glad to take any questions afterwards, but, Professor Frank, all yours.

0:58:45 S1: Thank you, Dave. Alright. What I thought I would do is... We were originally gonna divide this up a little more equally, but then I had an epiphany over the weekend that David has done this presentation so often and so well that it would make more sense for him to just roll through it, and I would offer some supplemental comments and context from my perspective.

0:59:11 S1: I guess the first thing I'd say is to reiterate what you heard two weeks ago, in particular. From a political dynamic, this was an enormous development, and David has echoed this today, that the passage of this legislation is very consequential. It surprised a lot of people who thought, a lot of cynics and skeptics, who thought that California would never adopt comprehensive groundwater legislation at the state level. So, to that degree,

it's a big...

0:59:40 S1: Let me be the Cassandra to having said that and admiring the many people who have been mentioned, Lester Snow and Tim Quinn, and Dave Williams, and the folks at the Governor's office, and the legislative staff, who really did a marvelous job under difficult circumstances and difficult time constraints. What are some of the limitations of the legislation?

1:00:05 S1: First, as State Water Board Chair, Felicia Marcus mentioned at a water symposium in San Francisco on Saturday, this legislation is not intended to do anything to address, and will have precisely zero affect on the current drought. And now as we focus on... Almost toward the end of January, a month that is typically California's wettest month that provides more precipitation in the form of snow and rain than any other month of the year... And it looks like that by Sunday, the first day of February, we will have zero precipitation in January, which is a new state record. The point is that the drought that we've been experiencing for several years continues to get more critical and more dire.

1:00:56 S1: Given the timelines involved, this legislation is not a panacea, is not any kind of short-term fix. It's basically irrelevant, more on that in a moment. In terms of... I think, David has done an excellent job of addressing some of the key positive features. I think I want to echo one thing he said. At various points, littered throughout the legislation, are references to the connection between surface water and groundwater supplies. And for many years, our legal system has been ignoring a truth of science and engineering that those of you in those latter disciplines know full well that there... As David has acknowledged as well, there is a direct relationship correlation and interrelationship between surface water and groundwater flow.

1:01:50 S1: And on a programmatic basis, this legislation is the first time that has been recognized. Again, it's not the central focus of this legislation, but the fact that it that in several references throughout the legislation that scientific and engineering fact, is acknowledged in the law, it represents real progress because the lawyers have a... And the legal system for... It might be far too long, have ignored that interconnectivity and treated groundwater and surface water supply from a legal perspective, in terms of legal rights and obligations as two distinct... As two distinct resources. So, the fact that we've gotten past that or starting to get past it is important.

1:02:36 S1: The state role that David has mentioned... I would, to simplify the dynamic, I would talk about the... And he's absolutely correct that the state role is very much secondary. The primary focus and primary authority in this legislation is delegated to as yet undefined local governments or groups of governmental entities, who will self form into these groundwater sustainability agencies through a process which, in my view, is fairly vague and amorphous, as to how politically they're going to do that, whether it's

going to be a county that's gonna jump in and say, "We are the best entity." Or an irrigation district or water district or some collective organization, that's not clear. But, no doubt, and I don't think anybody would dispute, that under the legislation, it is local government and needs to be defined, created, groundwater sustainability agencies up and down the state, so will have the primary role. The state role is very much a backup role, as David has mentioned, but I would further parse it out to kind of the carrot and the stick.

1:03:40 S1: The Department of Water Resources really has the easier and more rewarding job because they're the carrot; they're there to provide technical assistance to provide review and reactions as to the adequacy of groundwater sustainability plans to... In the first instance, they've already predesignated what the boundaries of the groundwater basins are. And most importantly, as David mentioned, they also got the money. They are going to have a \$100,000 to dole out under the water bond, the successful water bond, to local agencies to help them with this process of implementing this legislation. That's very important.

1:04:21 S1: So, they're the carrot. They're gonna be perceived warmly and fuzzily by these groundwater sustainability agencies and local governments and water users, groundwater users, in general. The State Water Resources Control Board has the less enviable job of being the stick. They're the enforcers and they're the ones under the legislation to step in, if and when, as David has pointed out, the local governments, through these groundwater sustainability agencies don't meet their deadlines and hit their marks. And that role is actually very... Particularly, the role of the Water Board, the enforcement... The knuckle dragging enforcers who step in, if the local governments don't comply with the spirit and letter of the law on a timely basis. The legislation is drafted in such a way as to make it extremely difficult and unlikely that the Water Board will, in fact, step in. I think the bias built into the legislation is to create a system where that is the very, very much the exception and to encourage at any number of points for local government to self-form and to take on the responsibility contemplated for under the legislation.

1:05:40 S1: So let me just mention the three areas where I have concerns about the legislation, and it's easy to... Hindsight's 20/20, and it's easy for me, from my academic perch to talk about this. The... I've already mentioned one of the concerns. It's the separate to self-organize leads me to wonder who will wind up, who and which entities will wind up as these groundwater sustainability agencies? And in some parts of the States, and I wouldn't be so presumptuous as to name names for a groundwater basin, you've got districts up and down the San Joaquin Valley, in some cases, in the Salinas Valley, which is the other region of the state that got a lot of... Was mentioned a lot in terms of the problems now in the area of greatest crisis.

1:06:30 S1: I dare say you've got some of these local agencies that have been

part of the problem who are now being asked to self-form in this part of the solution, and I worry that again, I don't think there would be a vested interest for some of these organizations, water district, irrigation district, that have benefited from the lack of regulation before to step in and say, "Well, we will become the Groundwater Sustainability Agency," and I worry about the problem of the fox guarding the hen house, that the same entities that helped cause serious problems with non-sustainability and groundwater overdraft are going to put themselves in position to implement the law, that would require a great deal of scrutiny.

1:07:13 S1: The second thing is, and I'm not alone in this criticism or concern, is what I would characterize as the rather languid implementation period in [1:07:23] or prescribed under the legislation. Again, David has talked about this. A couple of years to self-form, two and a half years to self-form as groundwater sustainability agencies, five to seven years depending on the nature of the problems affecting the particular groundwater basin to adopt a groundwater sustainability plan, the Department of Water Resources is given two years to review and provide comments on a particular groundwater sustainability plan. And enforcement is not available to address a non-file or to proceed deficient groundwater sustainability plans for 10 years from the effective date of the legislation. Beyond that, it's not contemplated that it's not required that these groundwater sustainability plans achieve sustainability goals mandated under the legislation for some 20 years following the enactment and adoption of a groundwater sustainability plan.

1:08:30 S1: And it occurs to me that kind of languid schedule may work with respect to some of our groundwater basins of the state that are not currently or projected to be in crisis, but that's an awful long time for a number of groundwater basins in the Salinas Valley and in the San Joaquin Valley where they're suffering the kinds of problems that Professor Fogg talked to you about a couple weeks ago.

1:08:53 S1: But for me, the single biggest defect in the legislation, I've been pretty explicit about it, is that except for interim plans that are adopted by the state water resource and control board in that rare set of circumstances where it the board actually is required to step in, the law does not require, what I think is one critical element of any viable groundwater sustainability plan, and that is the requirement, an explicit requirement, that for each groundwater basin, there is a reporting by individual extractors of groundwater of how much water they're extracting from a given well over a given period of time.

1:09:39 S1: And I'm not an engineer; I'm not a hydrologist, but it strikes me as a layperson for this that it's going to be very difficult without that exceedingly basic information for groundwater sustainability agencies to develop viable and effective groundwater sustainability plans in the first instance and to actually implement them successfully. And there's the old

adage that politics is the art of the possible, and it may just not have been possible to include that explicit requirement for groundwater extraction data to be recorded, in much the same way as under our 100-year old system of regulating surface water diversions, that those surface diversions are reported.

1:10:25 S1: So hopefully, that's not to say that the individual groundwater sustainability agencies are not empowered to make that a requirement; they certainly have the authority and discretion to require that. But again, my question is and particularly in some of the areas in the state that are in most serious overdraft and where groundwater basins are mostly packed, whether those groundwater sustainability agencies will have the political will to include a requirement that the extractors from a particular basin will require that, and if they don't, whether the Department of Water Resources will be willing to exercise the fortitude to say that, "We don't believe this is an effective and adequate groundwater sustainability plan in the absence of such a requirement."

1:11:09 S1: So, it'll be very interesting. The one thing, to end on a happy and positive note, I absolutely agree with Dave Aladjem that everybody in this room, whether you're an engineering student or an ecology student or a law student, if this is an area in which you choose to work after you leave here with your degree, this is the full and poignant act for all of you.

[laughter]

1:11:34 S1: And you're well served, I think, to learn about this law and be ready to play a key role in helping to implement this landmark legislation. So I think I will stop there. We've got about eight minutes left for questions for either David or myself. Why don't come and join me up here and we'll just respond at will. On that Scott River question, I'm gonna duck that one only because, well, I'm not going to duck it, I'll offer some preliminary comments, but if you look at the syllabus, on the last class session in mid-March, we have an entire class session that's gonna be devoted to this very issue of the Scott River litigation, and Professor Carter and I will jointly teach that class session. We have a guest speaker as well from the Nature Conservancy. We'll talk about it in...

1:12:25 S?: Maurice Hall?

1:12:25 S1: Yes. Talk about interrelationships between surface water and groundwater, so we will debate it. And since I'm one of the attorneys representing the plaintiff, environmentalists and commercial fishing organization, and Thomas is a consultant for the county of Siskiyou, which is on the other side of the litigation, hopefully it will be a very lively and entertaining discussion. This legislation does not explicitly discuss or even mention the Public Trust Doctrine, but five years ago in the 2009 Delta

Legislation, that legislation includes a provision that for the first time, makes the Public Trust Doctrine part of California's water law and expressly says that the Public Trust Doctrine along with the Constitutional Doctrine of Reasonable Use, codified as Article X, Section 2 of the California Constitution are an overarching, important principle of California water law.

1:13:19 S1: So, the seeds of what you're getting at and of our lawsuit were really articulated in that five-year-old legislation, and one of the interesting challenges will be to see how the Public Trust Doctrine, which to date has not been specifically applied to groundwater except by the Superior Court, Trial Court, in the Scott River litigation, and we will see how that litigation evolves. And at some point, if we are successful, we meaning the plaintiffs, that the Public Trust Doctrine applies at least to certain categories of groundwater, that will have to be integrated in some as yet to be determined fashion with the stats you are seeing. I don't know if you want to add to that.

1:14:03 DA: I think you just touched, Professor Frank, on about three or four really good issues that we could go back and forth on... Let me just, very briefly... I'm too much of a lawyer to not have the last word here. I would agree. Professor Frank identified three really good concerns about the legislation. In terms of the self-organization point, I think everybody is still trying to feel their way, but what's really interesting, and the State Water Resource Control Board Chair, Felicia Marcus, has said this on repeated occasions. She has no problem being the 800-pound gorilla. And in talking to a number of water managers up and down the state, they see the State Water Resources Control Board as the 800-pound gorilla, and one of the provisions to the act that was near the end is if you have multiple agencies in... That overlie a basin, and let's say you have five agencies, and one of them is saying, "I'm not going to do anything," the other four can move forward, and the boom is not going to get lowered on them.

1:15:18 DA: So, what I anticipate is going to happen is you are going to see that scenario in a lot of the Central Valley. There are going to be some folks that are saying, "Forget it. Everybody else is going to move forward, and we'll see what happens." Professor Frank is absolutely correct about what... You have such great language. The languid implementation period, well, that's what the legislature decided on. And then lastly, I think that he pointed out that politics is the art of possible and in terms of actually acquiring extractions, my own sense, personally, from being in a lot of those meetings was there was a wink, wink, nod, nod. And we as a state are not going to mandate it, but we also understand that the only way to effectively achieve the sustainability goal is to monitor. We're going to let the locals take the political heat. And that was a way to get this thing through. And I actually think that was probably the correct [1:16:17] . So, questions? Yeah.

1:16:21 Speaker 7: So, sort of tying back to the languid implementation period. I know many people in the water industry that are interpreting

sustainability for some of these basins that are in chronic overdraft to mean to arrest the decline of the water level. It's not a restoration of water levels to some previous point. If one interprets the act to mean that they are required to look at results or conditions on the 1st of January 2015, is that the point at which they must arrest the decline in water levels, and we've got seven years before implementation starts, how much gaming of the system do you think is gonna go on? People who are going to just essentially race to the pump house between now and the time that they have to implement a plan?

1:17:04 DA: That's a really good question. Did everybody get the question?

1:17:07 S1: For the tape, why don't you tell us the question?

1:17:11 DA: The question here was, "If we understand the act to have a baseline date of January 1, 2015, are people going to try to game the system, engage in the classic race to the pump house, put themselves in a better position down the road?" The act actually, and I can't remember which provision it is, takes care of that, because it says, "Any pumping that you have after January 1, 2015 doesn't count in terms of trying to... If you are going to get into a situation, where you have competing prescriptive rights under the Pasadena versus Alhambra Decision doesn't count, and for that very reason. That actually came up pretty early in the discussion. Good point.

1:18:01 S1: Other questions?

1:18:02 Speaker 8: Yeah. I think from two weeks ago, Cindy Tuck from ACWA was speaking and said that ACWA represented 90% of the water distribution, and other... A lot of agencies involved. Given that they had such an instrumental position in forming the legislation, do you foresee that those agencies in ACWA are most likely to be the ones that take the helm, I guess, so to speak, and become those GSAs?

1:18:30 DA: For the record here, ACWA was instrumental in developing the legislation. Will ACWA members be the ones who implement the legislation by becoming GSAs? Probably. ACWA's membership is about 90% of the water agencies in California, and those are the folks who are presumptive other than cities and counties, and that's where there's gonna be a real interesting discussion to be GSAs. So, the answer's yes.

1:18:59 S1: It's an interesting back story. I was talking at the water conference again on Saturday with some people, the role of ACWA. My personal view, and this is just me talking... Is that the leadership of ACWA is "more progressive and more open to this than many of its members", and how in the world Tim Quinn and Kate Williams were able to pull their very diverse, and sometimes fractious group of water agencies from up and down the state into a position of support for this legislation is a marvel to behold. I'd like to...

1:19:32 DA: Actually, I can shed some light on that.

1:19:33 S1: Please.

1:19:36 DA: This is the reason... Let me back up to what I was saying early on that with the failure of our previous system of how we manage groundwater basin, we bring in essentially... Essentially, it's on a credit card. You're gonna bring in more water. As people began, through this current drought, to recognize that's not going to work, and I want to come back to what Professor Frank said. The 2009 Delta Reform Act really established a foothold that every region be self-sufficient and not dependent on someone else. Really, I said this isn't gonna work. So, ACWA began a process, and the Water Foundation followed very shortly with its own process, it was different, to say, "What should we do? How should we manage groundwater in California?" And what Tim Quinn, the executive director of ACWA, did was to get a group of people who were seen in the ACWA world as pretty heavy hitters, mostly water district managers, and they put together, with the assistance of staff, the report that sort of laid out a lot of this.

1:20:47 DA: I remember seeing some drafts early on, and that is what allowed the ACWA leadership to not only coalesce around a proposal that was pretty close to what the main outlines of the legislation was, but to everybody's surprise, it was pretty close to what the Water Foundation was coming up with in an independent process, and pretty close to what the administration had been circulating as an internal draft, and it was sort of about off on the the April timeframe last year when all these things came to, and everyone sort of looked around and said, "This isn't that far off." And to answer your question, Rick, that's when people began to say, "Maybe there's actually a chance of something happening."

1:21:35 S?: Nice.

1:21:36 S1: We are out of time, but we have a preview of coming attractions next Monday, February 2nd, we'll be looking at "Toward groundwater sustainability planning in an agro-urban basin." So we're gonna look at an individual one of these local organizations that could be instrumental in implementing the act, but for now, please join me in thanking David Aladjem.

[applause]

[background conversation]

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