

The Sax Report: An Impact-Based Test for the State Board, and More Basin Adjudications Coming to a Court Near You

BY RUSSELL MCGLOTHLIN, ESQ.

More groundwater basin adjudications -- such was the recommendation of the much-awaited Sax Report released by the State Water Resources Control Board ("Board") on January 19, 2002. The final report by law professor Joseph Sax (University of California, Berkeley) recommends a closely confined role for the Board's permitting power over groundwater and greater reliance on the courts for comprehensive groundwater management.

California Water Code section 1200 limits the Board's groundwater jurisdiction to "subterranean streams flowing through known and definite channels." All other groundwater is deemed percolating groundwater, which is not subject to the permitting process. This issue has generated substantial conflict recently, with particular criticism paid to the Board's 1999 draft decision in the Paula and Palma Basins, which some viewed as an unprecedented expansion of jurisdiction. As a result, the Board commissioned Professor Sax to review past criteria used for making the jurisdictional determination, and to recommend any future improvements.

Ultimately, the Sax Report recommends abandoning the existing standard, which predominately focuses on the presence or absence of a known channel comprised of a relatively impermeable bed and banks. This existing approach has led to significant conflict and uncertainty. Where the topography consists of narrow canyons

with bedrock walls, like that in the Garrapata Creek decision (SWRCB, D-1639 (1999)), the standard is clearly satisfied. However, as illustrated by the Paula and Palma Basins decision, the test might also be satisfied in large alluvial valleys where water is generally flowing down-gradient between distant mountains, which act as the requisite banks. Under this expansive approach, many of the state's groundwater basins could be subject to the Board's jurisdiction.

As the Sax Report explains, the focus on the geologic properties of bed and banks overlooks the statute's purpose. The intent of the statute was to prevent circumvention of the Board's jurisdiction over surface water bodies by groundwater pumping that significantly impacts a surface stream, either by capturing tributary water or inducing greater percolation from the stream. As Professor Sax correctly observes, the bed and banks test is inappropriate for realizing this goal. Instead, he recommends an impact-based test which focuses on whether the groundwater pumping will appreciably and directly diminish the flow of a surface stream. Specifically, he provides criteria which could be used to establish presumptions (and rebuttals) of jurisdiction, including the proximity of a well to a stream's recharge area (1,000 feet), clay separation between the well and the surface supply, and demonstrated amounts of stream depletion.

The suggested change to an impact-based test is logical and commendable. However, where possible, the Board should also attempt to develop specific guidelines to lend certainty to the process and avoid arbitrary and inconsistent results. Indeed, Professor Sax indicates that with greater experience and technical assistance, the Board might develop numerical value guidelines in some river systems or areas, and thus evolve toward a more fully quantitative test of presumptive jurisdiction. Through Professor Sax's survey of the regulatory regimes of other western states, it is apparent that there is precedent for similar "bright line" guidelines, notably in Oregon and Colorado. However, he also correctly notes that bright line rules tend to limit the decision-making discretion that may be warranted in certain circumstances. Accordingly, there may need to be exceptions to the bright line rules to deal with the diverse hydrological conditions throughout California.

Professor Sax also weighs in on proposals for legislation to expand the Board's groundwater jurisdiction to accomplish a more integrated regulatory system. He counsels against such proposals for practical reasons. In addition to longstanding political resistance to such proposals, he raises the complex issue of fairness to existing groundwater users and perplexing questions of implementation that would result in trying to coordinate relative priorities and conditions into a single management structure. Finally, the Sax

Report notes that the exemption of riparian and overlying uses from such a scheme would result in an incomplete form of regulatory management.

For these reasons, he recommends that efforts to enhance groundwater management should de-emphasize legislated regulatory expansion. Instead, the Sax Report recommends that the Board rely on its existing jurisdiction under Water Code section 275 to address waste, unreasonable use and methods of use, and implementation of the public trust doctrine. Moreover, it notes that under existing common law, courts have the ability to protect surface stream rights from extractions of ground-water, and vice versa.

Finally, the Sax Report advises that additional attention be given to the basin-wide management that has been accomplished through basin adjudications, using the more successful adjudications in Southern California as models. This advice is prudent. A statewide groundwater regulatory system would be hard to enact, riddled with exceptions, and difficult to adapt to local needs and particularities. For this reason, the Sax Report appears correct in its assertion that individual basin adjudications, with court-imposed management plans, offer the most promising means of managing groundwater resources.

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