DEMAND MANAGEMENT WHITE PAPER

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1. INTRODUCTION

The purpose of this paper is to examine the legal basis and other considerations, including constraints and risks that should be considered for a demand management program under the Sustainable Groundwater Management Act (SGMA). The paper defines demand management, describes different demand management measures, summarizes authority to implement demand management measures under SGMA and other laws, and describes other practical considerations in whether and how to implement a demand management program.

Enacted in 2014, SGMA is still a relatively new comprehensive statutory scheme for groundwater management. Groundwater basins subject to SGMA have only recently begun groundwater management through the adoption of groundwater sustainability plans (GSPs) in either 2020 for critically overdrafted basins or 2022 for all other basins. There are few appellate cases that have interpreted SGMA's provisions. Consequently, the legal authorities summarized in this paper are in many respects untested, while other authorities have evolved and will continue to evolve over time. While this paper summarizes legal authorities and offers insights into the potential application of those authorities, this paper does not reflect the formal position of the Salinas Valley Basin Groundwater Sustainability Agency (Salinas Valley Basin GSA), or any other agency that contributed to this report, nor is it intended to be used as authority to constrain what any agency with jurisdiction over groundwater may determine through SGMA or other legal process as the most practical and efficient way to manage groundwater in the Salinas Valley Basin. This paper recognizes that demand management measures, if implemented, need to be crafted for the unique characteristics of the groundwater basin at issue.

This paper was funded through a Sustainable Groundwater Management Grant Program award to Salinas Valley Basin GSA from the California Department of Water Resources. Salinas Valley Basin GSA and its special counsel, Minasian Law, LLP, were the primary authors of this paper and developed this paper with input from staff and legal counsel for the following agencies:

Arroyo Seco GSA;
Marina Coast Water District GSA;
Monterey County Water Resources Agency; and,
County of Monterey.

For this paper, these agencies and Salinas Valley Basin GSA are collectively referred to as the "Groundwater Agencies".

As noted above, the purpose of this paper is to foster collaboration and common understanding of demand management measures under SGMA and other applicable laws. Nothing in this paper shall be binding or otherwise precedential upon the Groundwater Agencies or any individual agency.

2. DEFINING THE PHRASE "DEMAND MANAGEMENT" AND DEVELOPING EXAMPLES

Neither SGMA (Water Code §§ 10720 et seq.) nor its regulations (Cal. Code Regs., Tit. 23, §§ 340 et seq.) define the phrase "demand management". For purposes of this paper, the Groundwater Agencies utilized the following definition:

> "Demand management" means water conservation measures, programs, and incentives that minimize or prevent the waste of water, prevent undesirable results, and promote the reasonable and efficient use and reuse of available water supplies.

Demand management is an umbrella term covering a variety of potential actions, policies, and programs designed to prevent undesirable results under established caselaw and SGMA. A March 2023 stakeholder assessment on demand management approach and feasibility commissioned by the Salinas Valley Basin GSA indicated that many stakeholders in the Basin erroneously equated demand management primarily with strict water use allocations. The stakeholder assessment observed "a compelling dichotomy…of a community of stakeholders that have more questions than answers, more uncertainty than confidence, more sense of risk and threat than solutions, and potentially more misinformation than accuracies." (Salinas Valley Basin GSA's Demand Management Workshops and Assessments can be viewed here.)

One anticipated outcome of this paper is to assist stakeholders and the Groundwater Agencies in properly framing the breadth of potential demand management measures. While allocations are one example of a demand management measure, it is not the only example. Demand management measures can be broadly categorized as designed to (a) prevent undesirable results; (b) maintain status quo groundwater conditions; or (c) improve existing groundwater conditions. Moreover, demand management measures can be implemented at differing timescales. Short-term demand management measures could be utilized to respond to

emergencies, to address drought conditions, or as interim strategies until a project or other management action can be constructed and implemented. Long-term demand management measures could be implemented to aid in avoiding falling below SGMA minimum thresholds or achieving the measurable objectives over SGMA's 20-year planning horizon.

To be effective, demand management measures must be carefully tailored to the area where they are implemented. No demand management measure is a one-size-fits all. Different measures could be successful in one groundwater subbasin, but unsuccessful in another. Even within a particular subbasin, certain measures may be appropriate for one area, but not the entire subbasin. Accordingly, the demand management measures discussed herein must be carefully considered in the context of where they may be implemented. Additionally, SGMA contains an overarching limitation that "Nothing in [SGMA], or in any groundwater management plan adopted pursuant to [SGMA], determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights." (Water Code § 10720.5, subd. (b).)

To develop this paper, representatives of the Groundwater Agencies met throughout 2024 to discuss content and organization. The Groundwater Agencies developed a list of demand management measures for consideration. This list, while comprehensive, is not intended to be exhaustive. These example demand management measures and the corresponding section of this paper where they are discussed include:

3.1 Data availability and Access;

3.2 Agricultural Water Use Efficiencies;

3.3 Urban Water Use Efficiencies
3.4 Time of Use/Scheduling Groundwater Extractions
3.5 Land Fallowing
3.6 Land Retirement/Repurposing (Voluntary and Involuntary)
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3.15 Taxes

It should be noted that there may be other demand management measures that any or all Groundwater Agencies may wish to consider in the future.

3. LEGAL AUTHORITY TO IMPLEMENT DEMAND MANAGEMENT MEASURES AND OTHER CONSIDERATIONS

For each identified demand management measure, the following topics will be addressed in this paper: (i) legal authority to implement; and (ii) other considerations in the potential implementation of the demand management measure.

3.1. Data Availability and Access

The Groundwater Agencies consider access to information to be a form of demand management. Included in this concept is availability of well metering and other real time data of groundwater usage and conditions and a public or semi-public data exchange via a dashboard or other data delivery format. The California Legislature, in adopting SGMA, intended "[t]o improve data collection and understanding about groundwater." (Water Code § 10720.1, subd. (f).)

3.1.1. Data Availability and Access – Legal Authority to Implement

Under SGMA, GSAs have explicit statutory authority to require groundwater measurement devices:

(a) A groundwater sustainability agency may require through its groundwater sustainability plan that the use of every groundwater extraction facility within the management area of the groundwater sustainability agency be measured by a water-measuring device satisfactory to the groundwater sustainability agency.
(b) All costs associated with the purchase and installation of the water-measuring device shall be borne by the owner or operator of each groundwater extraction facility. The water-measuring devices shall be installed by the groundwater sustainability agency or, at the groundwater sustainability agency's option, by the owner or operator of the groundwater extraction facility. Water-measuring devices shall be calibrated on a reasonable schedule as may be determined by the groundwater sustainability agency.
(c) A groundwater sustainability agency may require, through its groundwater sustainability plan, that the owner or operator of a groundwater extraction facility within the groundwater sustainability agency file an annual statement

with the groundwater sustainability agency setting forth the total extraction in acre-feet of groundwater from the facility during the previous water year.

(d) In addition to the measurement of groundwater extractions pursuant to subdivision (a), a groundwater sustainability agency may use any other reasonable method to determine groundwater extraction.

(e) This section does not apply to de minimis extractors.

(Water Code § 10725.8.) Moreover, the California Legislature, in adopting SGMA, intended "[t]o improve data collection and understanding about groundwater". (Water Code § 10720.1, subd. (f).) Thus, the catchall authority of a GSA in Water Code section 10725.2(a) to "perform any act necessary or proper to carry out the purposes of this part" likely includes authority of the GSA to require data and information collection concerning groundwater usage and conditions and to publicize the same.

There are two qualifying phrases in Water Code section 10725.8. First, in both subsection (a) and (c), the GSA may only exercise the authority "through its groundwater sustainability plan". Second, subsection (a) states that the GSA may require water-measuring devices for "every groundwater extraction facility within the management area of the [GSA]", while subsection (e) exempts de minimis extractors, which are those extractors using 2 acre-feet or less of water per year for domestic purposes.

In considering transparence of data versus privacy interests, GSAs have considerable discretion in deciding the degree to which groundwater data is made publicly available. While not express in the language of the statute, given the broad discretion afforded GSAs, a GSA may elect to limit access to data or provide data access to only certain parties. For example, the Kaweah Subbasin GSAs created the Kaweah Water Dashboard where landowners can create accounts to track their owner-specific water information associated with SGMA compliance. (The Kaweah Water Dashboard can be viewed here.) Alternatively, GSAs may elect to make groundwater data publicly available, modeling the presentation of data to something like the California Statewide Groundwater Elevation Monitoring (CASGEM) Program or the Water Data Library. If GSAs wish to publicly provide well-specific groundwater extraction data, care should be taken to obtain well owner support and to comply with applicable law. (See, e.g., Gov. Code § 7927.410 [limiting disclosure of "utility usage data" and other personal data except under limited circumstances].) Making pumping data public eliminates or greatly reduces questions regarding

the accuracy of the data, such as concerns with underreporting or overreporting the amount of groundwater pumped.

3.1.2. Data Availability and Access – Considerations

The Monterey County Water Resources Agency oversees an existing Groundwater Extraction Management System, known as GEMS. Originally enacted in 1993, GEMS was recently modified by Monterey County Water Resources Agency on October 1, 2024 through adoption of Ordinance No. 5426 that, among other terms, adopts well registration and modifies groundwater reporting requirements. (Ordinance No. 5426 can be viewed here.) Monthly reporting of extractions is required for every "Well Owner" or "Well Operator", as defined in the Ordinance. Each reporting well had to have a discharge pipe with an inside diameter of at least three inches. Historically, the GEMS program has achieved a high rate of self-reporting annually, typically above 95%. Ordinance 5426 authorizes the Water Resources Agency to develop policies and procedures to ensure consistent and equitable measurement of extractions and contemplates interactions and data exchange with other entities engaged in the management of groundwater resources within Monterey County. The GEMS data is aggregated and summarized in an annual report, but is otherwise not publicly available by extraction facility or sub-region.

The Tri-County Water Authority is a GSA within both the Tule and Tulare Lake Subbasins covering the southern portions of Kings and Tulare Counties. Both are critically overdrafted subbasins that have been placed on probation under SGMA by the State Water Resources Control Board (since paused due to ongoing litigation). On January 23, 2025, the Tri-County GSA approved imposing a $100 per landowner per month penalty on non-domestic well landowners with unregistered wells beginning March 1, 2025.

Other demand management measures addressed hereafter, including fees tied to groundwater extraction and extraction allocations, would require some form of accurate and defensible measurement of groundwater extractions, either metering or alternatives such as remote sensing.

Within the Salinas Valley Basin, the six subbasins[1] that are managed exclusively by Salinas Valley Basin GSA or in coordination with other GSAs recognize that "accurate extraction

[1] These include: (1) 180/400 Foot Aquifer Subbasin (critically overdrafted); (2) Eastside Subbasin (high priority); (3) Forebay Subbasin (medium priority); (4) Langley Subbasin (high priority); (5) Monterey Subbasin (medium

data is fundamental to sustainable management". (See, e.g., Salinas Valley Groundwater Basin Eastside Aquifer Subbasin Groundwater Sustainability Plan, p. 9-91.) Each GSP includes an implementation action to expand and enhance GEMS. Thus, the Groundwater Agencies have satisfied the legal prerequisite to exercise this authority "through its groundwater sustainability plan". (Water Code § 10725.8, subds (a), (c).)

3.2. Agricultural Water Use Efficiencies

Agricultural water use efficiencies are mandated or incentivized programs that modify behavior in a manner that reduces groundwater extraction. Agricultural water use efficiencies include irrigation system upgrades, switching to less water intensive crops, and rebates.

3.2.1. Agricultural Water Use Efficiencies – Legal Authority to Implement

SGMA requires that GSPs include measures addressing conservation and implementation of efficient water management practices and "water conservation methods to improve the efficiency of water use." (Water Code § 10727.4, subds. (h), (i).) Moreover, SGMA at Water Code section 10720.5, subdivision (a), requires that groundwater management be consistent with Article X, section 2, of the California Constitution which requires, in part, that the "conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."

While SGMA requires the GSP include efficient water management practices and conservation measures to improve the efficiency of water, a GSA is limited in its ability to directly mandate specific conservation practices. For example, it is doubtful that a GSA could dictate a certain type of less water intensive crop be grown or a certain irrigation method be adopted. However, the GSA could adopt regulations or take other action, such as imposing allocations or a limit on total extractions (see Section 3.9, below), that may indirectly incentivize agricultural water use efficiencies. A GSA's powers can be used to create an environment that encourages innovation and water use efficiency and only require specific land or water use practices that are explicitly authorized by SGMA or other applicable law.

priority); and (6) Upper Valley Subbasin (medium priority). A seventh subbasin, the Seaside Subbasin, is adjudicated.

3.2.2. Agricultural Water Use Efficiencies – Considerations

Agricultural use represents approximately 90% of all groundwater use in the Salinas Valley. (See 2023 Groundwater Extraction Report, p. 3, available here.) Over the last thirty years, total irrigated acres have remained steady at approximately 180,000 acres. However, during that same period, the use of efficient drip irrigation has significantly increased as the most utilized current method of irrigation with about 80% irrigated acreage utilizing drip irrigation. (*Id.* pp. 11-14.)

Four of the six GSPs for the Salinas Valley Basin contemplate conservation and agricultural best management practices (BMPs) as a management action:

- 180/400 Foot Aquifer Subbasin GSP – Management Action 3: Conservation and Agricultural BMPs
- Eastside Aquifer Subbasin GSP – Management Action E1: Conservation and Agricultural BMPs
- Forebay Aquifer Subbasin GSP – Management Act A2: Conservation and Agricultural BMPs
- Upper Valley Aquifer Subbasin GSP – Management Action A2: Conservation and Agricultural BMPs

These conservation measures are nearly identical for each subbasin. The GSPs contemplate incorporation of evapotranspiration data with soil moisture sensors, soil nutrient data, and flow meter data to help inform more efficient irrigation practices. Rollout of this management action is voluntary through education and outreach spearheaded by Salinas Valley Basin GSA.

3.3. Urban Water Use Efficiencies

Urban water use efficiencies are mandated or incentivized programs aimed at reducing water consumption, conserving water resources and lowering costs. Urban water use efficiency measures include water waste prevention efforts, metering, conservation inducing pricing, public education and outreach regarding water wise practices, plumbing retrofits, and rebates for water conserving appliance installation and landscaping retrofits.

3.3.1. Urban Water Use Efficiencies – Legal Authority to Implement

SGMA requires that GSPs include measures addressing conservation and implementation of efficient water management practices and "water conservation methods to improve the

efficiency of water use." (Water Code § 10727.4, subds. (h), (i).) Moreover, SGMA requires that groundwater management be consistent with Article X, section 2, of the California Constitution which requires, in part, that the "conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." Finally, independent of SGMA, there are several legislative enactments requiring enhanced urban water conservation and planning, including the Urban Water Management Planning Act (Water Code §§ 10610 et seq.), the Water Conservation Act of 2009 (Stats 2009-10, 7th Ex. Sess., c. 4 (S.B.7)), the 2018 Water Efficiency Legislation (A.B. 1668 and S.B. 606), and regulations to "Make Conservation a California Way of Life" (23 Cal. Code Regs. §§ 965 et seq.).

The California legislature has already adopted the Urban Water Management Planning Act (Water Code §§ 10610-10656) and Urban Water Use Efficiency Standards for urban retail water suppliers (Water Code § 10608.16). Through these and other measures, the Legislature has established compulsory rules for urban water use efficiency standards. It is unclear whether a GSA may impose, through its GSP or rulemaking authority, additional or alternative urban water use efficiency standards. For example, the attempt to impose through a GSP a per capita daily water use reduction that is more aggressive than the reduction already required by an urban retail water supplier pursuant to the adopted legislation could arguably be preempted by the comprehensive statutory scheme.

3.3.2. Urban Water Use Efficiencies – Considerations

Urban areas within the Salinas Valley represent approximately 10% of all groundwater extractions. (2023 Groundwater Extraction Summary Report, p. 3.) These urban areas are subject to a number of existing legislative mandates to increase water conservation, including efficiency standards for indoor use, outdoor use, and water lost to leaks. These new efficiency standards, when aggregated, become the urban supplier's water use objective. (See, e.g., Water Code § 10609.20.) Urban suppliers that use more water than their water use objective subjects the supplier to information orders from the State Water Resources Control Board in 2024 and conservation orders starting in 2026. (Water Code § 10609.26.)

Urban Water Management Plans have been prepared by the urban suppliers in the Salinas Valley, including by California Water Service for its Salinas District, Marina Coast Water District, City of Greenfield, City of Soledad, and California American Water Company for its

satellite system near Chualar. Among other analyses, these Plans are required to include descriptions of demand management measures, including (i) water waste prevention ordinances; (ii) metering; (iii) conservation pricing; (iv) public education and outreach; (v) programs to assess and manage distribution system real loss; (vi) water conservation program coordination and staffing support; and (vii) other demand management measures that have a significant impact on water use as measured in gallons per capita per day, including innovative measures, if implemented. (Water Code § 10631, subds. (e)(1)(B) (i)-(vii).)

3.4. Time of Use/Scheduling Groundwater Extractions

Time of use is a mechanism to diversify the timing of groundwater extractions to avoid well interference and other problems associated with well owners extracting groundwater at the same time.

Use of treated wastewater for irrigation in lieu of or to minimize groundwater extraction is becoming increasingly common. Wastewater treatment plants have limited storage capacity and in the event of a supply shortage landowners are forced to revert to groundwater. Additionally, some agricultural users prefer to irrigate at times when wind and sunlight are less intense and evaporation rates are low, such as between the hours of 6 a.m. and 9 a.m.

Another common time of use constraint relates to rates for electric power. Power providers, such as Pacific Gas & Electric Company (PG&E), have restructured electric rates to incentivize off-peak electric use. Beginning in 2023, PG&E increased most of its agricultural rate classes by over 18%. In 2021 and 2022 PG&E transitioned all its agricultural rate plans to a revamped time of use (TOU) rate structure. In general, PG&E's TOU rate structure dramatically increases the price of electricity (in some cases nearly double) for usage during the hours of 4 p.m. to 9 p.m. The TOU rate structure incentivizes agricultural customers to shift their electric load from these high-cost periods to lower cost periods.

In other areas of California, PG&E's TOU rate structure has led to unintended negative consequences for groundwater management. For example, in Butte County during the 1990s there were largescale groundwater substitution water transfers whereby surface water right holders sold the surface water that they normally used for irrigation to the California Drought Water Bank and then pumped an equivalent amount of groundwater in substitution of the surface water sold. PG&E's TOU rates incentivized groundwater extraction in the evenings and

weekends, thereby allegedly causing significant well interference, impacts to nearby domestic wells, and greater surface water depletion from creeks, rivers and earthen canals. These events resulted in Butte County voters adopting an initiative that severely restrained future groundwater substitution transfers.

In adopting SGMA and providing a role for existing local agencies, the legislature recognized that anticipating and addressing these types of conditions may be more efficiently accomplished by local parties who routinely address common problems.

3.4.1. Time of Use/Scheduling Groundwater Extractions – Legal Authority to Implement

SGMA authorizes GSAs to "impose reasonable operating regulations on existing groundwater wells to minimize well interference, including requiring extractors to operate on a rotational basis" and "to control groundwater extractions by regulating, limiting, or suspending extractions from individual groundwater wells or extractions from groundwater wells in the aggregate…". (Water Code § 10726.4, subds. (a)(1)-(2).)

SGMA requires that regulations requiring greater organization or scheduling groundwater extractions be "reasonable". Reasonableness, particularly in the water law context, is generally understood to vary with the facts and circumstances of the particular case. (See, e.g., *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 354.) What constitutes reasonable regulations at one point in time, may no longer be reasonable at a different point in time due to changed circumstances. (*Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132, 140 ["[W]hat is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved in vacuo isolated from state-wide considerations of transcendent importance."].)

3.4.2. Time of Use/Scheduling Groundwater Extractions – Considerations

Representatives of the Groundwater Agencies doubt whether PG&E's TOU rates currently pose a problem for groundwater management in the Salinas Valley. To the extent regulating the timing of groundwater extraction becomes necessary, implementation of the regulation needs to ensure that the cost incentive is distributed equitably. For example, if

PG&E's TOU rates make electric rates for groundwater extraction on the weekends less costly, then consideration should be given to allow all extractors to rotate pumping schedules and take advantage of those reduced electric rates.

In 2010, Pajaro Valley Water Management Agency and the City of Watsonville completed their Recycled Water Facility (RWF) designed to eliminate groundwater overdraft and halt seawater intrusion. Wastewater is conveyed from homes and businesses in Watsonville to the RWF where it is disinfected and mixed with groundwater for distribution to the Agency's coastal distribution system. The Agency's coastal distribution system supplies water to 7,000 acres of coastal farmland most impacted by seawater intrusion. Demand for recycled water is approximately 10,000 acre-feet per year, while supply is approximately 5,000 acre-feet per year. To manage this imbalance, the Agency adopted terms and conditions for the use of recycled water, including rules regarding water delivery and scheduling. In general, landowners seeking recycled water are required to complete a water delivery order form, with eventual deliveries scheduled on a first received, first served basis. Limited exceptions to this prioritization are made to protect crops in critical stages, such as transplanting or germination stages. In periods of high demand, such as during the summer months, Agency employees will occasionally need to notify landowners of the need to delay irrigation and reschedule the delivery. The Agency adopted a pricing structure to incentivize use of recycled water; in 2024 landowners extracting groundwater within the coastal distribution system are charged $452 per acre-foot plus an estimated $100 to $150 per acre-foot in electricity costs, while the Agency's recycled water cost is $477 per acre-foot and is delivered already pressurized to the landowner's turnout.

3.5. Land Fallowing

Land fallowing is a method of temporarily reducing or eliminating groundwater extraction by either (1) shifting the crop grown to a less water intensive crop or (2) idling the acreage such that no crops are grown for a period of time.

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3.5.1. Land Fallowing – Legal Authority to Implement

While SGMA broadly authorizes a GSA to control groundwater extractions by "regulating, limiting, or suspending extractions from individual groundwater wells or extraction from groundwater wells in the aggregate" (Water Code § 10726.4, subd. (a)(2)), SGMA only authorizes a GSA to "provide for a program of voluntary fallowing of agricultural lands or validate an existing program." (Water Code § 10726.2.)

3.5.2. Land Fallowing – Considerations

Establishing a land fallowing program requires regulatory oversight by the agency responsible for monitoring, measuring, and managing groundwater and development of associated rules and regulations. As a threshold matter, the responsible agency will need an accurate estimation of what would occur in the absence of the land fallowing action. This is to ensure that the fallowing results in tangible groundwater benefits. Fallowing is a customary agricultural practice whereby landowners elect to set aside acreage without compensation. Reasons for uncompensated fallowing include weed abatement, crop rotation, to allow for land or irrigation improvements, or to break virus or pest cycles, such as the existing Monterey County prohibition on growing lettuce in December. The regulating agency may choose to ensure that this customary or baseline fallowing remains uncompensated and that the program only compensates landowners that fallow a field that would have otherwise been planted in the absence of the participation in the fallowing program.

A crop shifting program would require accurate groundwater extraction measurements to quantify, and compensate, for the reduced groundwater extractions. The regulating agency would want to ensure groundwater benefits accrue from, for example, a farmer electing to forego growing their typical melon crop with an evapotranspiration of applied water (ETAW) figure of 1.1 acre-feet per acre and instead planting a lower ETAW crop such as safflower at 0.7 acre-feet per acre.

The amount of acreage proposed for a fallowing program should be verified either by the regulating agency, or third-party mapping like those produced by the United States Department of Agriculture, Farm Service Agency (FSA).

A program of this type may be a "project" under the California Environmental Quality Act (CEQA), requiring some level of environmental review prior to adoption. Fallowing otherwise productive agricultural lands could have environmental impacts associated with air quality, soil, water quality, or aquatic and terrestrial species.

Rules for monitoring and verification could be developed as part of the CEQA process, or independently pursuant to a fallowing policy. Topics that a monitoring and verification policy should address, include:

- Establish rules identifying or prioritizing areas eligible for fallowing;
- Confirm crop shift or land fallowing as specified in the proposal;
- Ensure no application of groundwater or surface water (unless minimally irrigated cover crops are authorized); and
- Establish rules allowing or disallowing non-irrigated or minimally irrigated cover crops.

Finally, and while not part of the formal CEQA analysis, a fallowing program should assess and ensure mitigation of any direct and indirect economic effects of fallowing. Productive agricultural lands support several ancillary businesses, including farm labor, fertilizer and seed sales, farm equipment sales and service, and various markets for agricultural commodities. In the fallowing context for surface water demand reduction, the amount of water made available by land fallowing may not exceed 20% of the water that would have been applied or stored by the water supplier in the absence of the fallowing program, unless a larger percentage is adopted following notice and public hearing. (Water Code § 1745.05, subd. (b); see also § 1810, subd. (d).) The fallowing policy may include a similar cap on total acreage that could participate in the program to avoid or minimize economic impacts.

3.6. Land Retirement/Repurposing (Voluntary and Involuntary)

Land retirement is a practice to take agricultural lands permanently out of production. The purchasing agency typically places a deed restriction on the land to prevent growing crops with irrigation water. Retired lands may, subject to specific restrictions, be used for dry farming, be restored with native plant communities, or repurposed for other land development to offset impacts to jobs and economic activity.

3.6.1. Land Retirement/Repurposing (Voluntary and Involuntary) – Legal Authority to Implement

SGMA authorizes a GSA to "acquire by grant, purchase, lease, gift, device, contract, construction, or otherwise, and hold, use, enjoy, sell, let, and dispose of, real and personal property of every kind, including lands…". (Water Code § 10726.2.)

SGMA does not explicitly empower GSAs to acquire property involuntarily by condemnation. However, "a groundwater sustainability agency may exercise any of the powers described in this chapter in implementing this part, in addition to, and not as a limitation on, any existing authority…". (Water Code § 10725, subd. (a).) Thus, GSAs may utilize the power of condemnation if authorized pursuant to its non-SGMA authority.

While many GSAs are authorized under non-SGMA authorities to acquire property by condemnation, there are several risks and other factors to consider prior to its use. Legal counsel with experience in condemnation proceedings should be consulted early in the process. Acquiring agricultural property by condemnation for the purpose of retiring the land introduces a host of legal issues that must be carefully navigated. For example, property cannot be taken unless its proposed use is a public use authorized by law and the taking is necessary to that use. (See Code Civ. Proc. §§ 1240.010-1240.040, 1245.21-1245.390, 1240.610-1240.700.) Public necessity in the context of retiring productive agricultural land requires that three elements be established: (1) the public interest and necessity require the condemnation of the agricultural property; (2) the condemnation of agricultural property is located in the manner that will be most compatible with the greatest public good and least private injury; and (3) the acquisition of the particular agricultural property is necessary for the project. (Code Civ. Proc. § 1240.030.) These elements may be difficult to establish in an involuntary land retirement program because it must be established that the *specific acreage* sought to be condemned is necessary for groundwater sustainability, as opposed to other acreage that could be acquired. The acreage proposed for condemnation must be uniquely necessary for implementation of the GSP and achieving sustainability compared to other acreage in the subbasin. In many instances, this will be hard to demonstrate.

Another complexity is judicial recognition that compliance with CEQA is a prerequisite to a public agency's condemnation of property for a proposed project. (See, e.g., *City of Stockton v. Marina Towers LLC* (2009) 171 Cal.App.4th 93, 108.) Since a land retirement program

contemplates a change in the underlying use of the acquired property, CEQA requires an analysis of the environmental impacts of the proposed change. (Cf. *Silveira v. Las Gallinas Valley Sanitation District* (1997) 54 Cal.App.4th 980 [EIR not necessary for project creating odor buffer adjacent to sanitation plan because there were no plans to change or alter the acquired property].) Among other substantive requirements, CEQA requires an analysis of a reasonable range of alternatives to the proposed project, which would likely include other voluntary means of acquiring property within the subbasin to reduce or eliminate groundwater extraction.

Finally, it is likely that condemnation of productive agricultural land would have to be identified as a purpose for the proposed revenue source in the GSA's funding plan for GSP implementation. However, doing so may jeopardize the likelihood of success of a fee (potential for majority protest) or make it more difficult to pass an assessment (majority vote) or special tax (two-thirds vote) because voting landowners may object to the GSA's use of condemnation. (See also Sections 3.12 through 3.15, below.)

While many GSAs have the authority to condemn real property, there are considerable complexities and risks in exercising that authority. A voluntary land retirement program between a willing seller and a willing GSA purchaser is a more feasible demand management measure and exposes the GSA to less legal risk.

3.6.2. Land Retirement/Repurposing (Voluntary and Involuntary) – Considerations

In 2024, Monterey County adopted Ordinance No. 5414 establishing "regulations to mitigate for development of farmland" and "to protect Monterey County's most productive and valuable farmland from conversion to non-agricultural use." (Ordinance No. 5414 can be viewed here.) Any land retirement program in Monterey County would require compliance with Ordinance No. 5414. Additionally, representatives of the Groundwater Agencies thought such a voluntary land retirement program, if implemented, would likely be limited to marginally productive farmland in the Salinas Valley. Much of the Salinas Valley is considered prime farmland or farmland of statewide importance, so there may not be many parcels with marginal farmland that may be suitable for a voluntary land retirement program. (Monterey County Farmland Data Availability is available here.)

Compliance with CEQA would require a GSA to identify how the use of the acquired farmland will change after the purchase and sale. For example, the farmland may be repurposed for habitat restoration, solar power generation, non-irrigated farming like grazing, groundwater recharge, temporary fallowing, or to enhance recreation or parks. Any associated environmental impacts of repurposing the farmland would have to be identified and mitigated, to the extent feasible.

There are several social and ecological implications associated with land retirement. Strategic landscape-level planning for land retirement will help assess benefits and costs. Coordinating the program with the Groundwater Agencies and stakeholder community will be key. Some lands may be unsuitable for retirement, given factors such as fertile soils or their location in areas without critical groundwater sustainability issues. Other areas may be prioritized for retirement given potential for habitat restoration or with other co-benefits like suitability for groundwater recharge, recreation, or proximity to and ability to mitigate critical groundwater sustainability issues.

The Groundwater Agencies and stakeholders should discuss any state or federal Endangered Species Act complications, or implications with the Williamson Act, which places farmland under 10-year contracts to protect and maintain agricultural landscapes.

Finally, the Groundwater Agencies and stakeholders should consider financial incentives that encourage voluntary purchase and sale of eligible farmland while at the same time ensuring that there are no permanent impacts to the local economy. Productive farmland supports the local farming economy, including agricultural workers and communities that depend on agriculture. Like the topic of land fallowing (Section 3.5, above), measures should be undertaken to ensure there are no irreversible economic impacts from land retirement.

3.7 Groundwater Conservation Easements (Temporary or Permanent)

Groundwater conservation easements are voluntary legal agreements between a landowner and a non-profit corporation or other qualified entity which contain temporary or permanent restrictions on groundwater extraction in exchange for direct payment or tax benefits. Groundwater conservation easements are being utilized in Colorado's San Luis Valley as a new alternative to traditional regulatory or government led conservation approaches.

3.7.1. Groundwater Conservation Easements (Temporary or Permanent) – Legal Authority to Implement

SGMA authorizes a GSA to "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 operate any and all works or improvements, within or outside the agency, necessary or property to carry out any of the purposes of this part." (Water Code § 10726.2, subd. (a).)

The entities authorized to acquire and hold conservation easements in California include a tax-exempt nonprofit organization qualified under section 501(c)(3) of the Internal Revenue Code (26 U.S. Code § 501(c)(3)) or the "state or any city, county, city and county, district, or other state or local governmental entity, if otherwise authorized to acquire and hold title to real property and if the conservation easement is voluntarily conveyed." (Civ. Code § 815.3, subds. (a), (b).)

California law declares it to be "the public policy and in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations" to preserve land in its "natural, scenic, agricultural, historical, forested, or open-space condition". (Civ. Code § 815.) "A conservation easement shall be perpetual in duration." (*Id.* § 815.2, subd. (b).) California's conservation laws do not explicitly reference preservation of water or groundwater resources but do express one purpose of a conservation easement is to "retain land predominantly in its natural…condition". (*Id.* § 815.1.) Land in its natural condition was not irrigated through the extraction of groundwater, so an easement to limit or preclude the extraction of groundwater is likely a way to preserve the land's natural condition.

California law requires its conservation easements to be perpetual in nature. (Civ. Code § 815.2, subd. (b).) This introduces concerns of forfeiture or abandonment of the groundwater rights encumbered by the conservation easement. In California, overlying rights to groundwater are correlative in nature, which provides an overlying water right holder with the right to use a reasonable amount of the common supply. (See, e.g., *Niles Sand & Gravel Co. v. Alameda County Water District* (1974) 37 Cal.App.3d 924, 934.) While overlying groundwater rights are generally not subject to forfeiture for non-use (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 933), a landowner entering into a perpetual conservation easement to limit or

preclude groundwater use is a factual distinction that California cases have not yet addressed. It introduces uncertainty in whether the overlying right can be preserved given the perpetual groundwater conservation easement. Such easements may have the effect of stripping the overlying land of a correlative share of groundwater, meaning the other overlying users may draw slightly more water from the common pool given the easement terms as to the encumbered property. (Cf. Water Code §§ 1005.1-1005.4 [laws enacted to support conjunctive use programs, but not specific to preservation of groundwater by conservation easement].) Other states, such as Colorado, have enacted laws allowing for temporary easements and preservation of encumbered water rights to address these concerns.

A GSA or nonprofit organization contemplating acquisition of a groundwater conservation easement would need to establish a way to protect the groundwater acquired under the easement otherwise there would be no guarantee that the purchase would contribute to overall water savings for the subbasin and advancement of SGMA's sustainability goals. The concept of groundwater conservation easements under current California law may necessitate allocations or other extraction restrictions implemented in tandem to preserve the in lieu recharge attributable to the purchase of the conservation easement.

Reliable data measuring prior groundwater extraction is necessary in cases where landowners wish to donate some, but not all, of their overlying right. If prior extraction is unknown or uncertain, the acquiring party will be unable to value the easement and monitor and verify how much water is saved from the easement. Valuation of groundwater conservation easements is typically calculated by appraising the value of the land in its current state (e.g., productive agriculture) and deducting the value of the land with the conservation easement (e.g., reducing extractions by 50%). Some, but not all, of the lands within the Salinas Valley have sufficient data to allow for this potential partial acquisition of overlying rights.

3.7.2. Groundwater Conservation Easements (Temporary or Permanent) – Considerations

Colorado enacted legislation to make conservation easements more attractive to participating landowners. The Colorado legislature appropriated $45 million to pay for conservation easements and participation was characterized as a credit against payment of Colorado state income taxes. These credits could be transferred and used by other parties

unaffiliated with the conservation easement and the use of the tax credit was not restricted to use by the landowner foregoing water use. The credit results in a 1:1 offset of tax owed for other income and, therefore, is significantly different than the typical federal tax code or California deductible conservation easement which is keyed to charitable contribution rules (roughly a 40% deduction on income or estate taxes).

Existing Colorado law and special legislation enacted by the Colorado legislature facilitated interest and participation by landowners in groundwater conservation easements. Existing Colorado law placed farmers at risk of state intervention and forced curtailment of groundwater use due to unsustainable groundwater extraction, particularly in the San Luis Valley. The special legislation appropriating $45 million and a transferable 1:1 tax credit presented a much more appealing option to many landowners compared to mandatory reductions.

In California, state legislation may be necessary to create the same types of incentives. While SGMA does contemplate the potential for mandatory reductions and state intervention, California does not allow for temporary conservation easements, nor does it explicitly preserve water rights donated to a conservation easement. Additionally, California does not currently provide a tax credit against California income for donated easements unless the easement is permanent.

In Colorado, it was observed that the success of groundwater conservation easements was influenced by the quality of the groundwater governance institution. Groundwater conservation easements were more successful where the landowners had clear and enforceable property rights to the groundwater they conserved. (*Groundwater Conservation Easements – Evaluating an Innovative New Tool for Aquifer Sustainability*, March 2024, Katherine Wright, Travis Brammer & Shawn Regan, p. 16.) Easements in adjudicated areas were more effective than easements in unadjudicated areas.

As SGMA compliance continues to unfold over the 20-year planning horizon, groundwater conservation easements may be effective at supporting and maintaining sustainability, particularly if California passes legislation to facilitate their effectiveness.

3.8. Water Trading/Transfers

Water trading or water transfers are policy instruments that allow for the buying and selling of water allocations to/from other subbasin users. Trading/transfers are, therefore,

relevant in an area where allocations are being implemented or where a subbasin has extensive and accurate data on historical groundwater extractions.

A trading/transfer policy may include restrictions intended to avoid excessive concentration of extraction in one geographic location, or from a particular aquifer depth, or limitations on transferring water outside the subbasin.

3.8.1. Water Trading/Transfers – Legal Authority to Implement

A GSA under SGMA may regulate groundwater, as follows:

> (3) To authorize the 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.

(Water Code § 10726.4, subds. (a)(3)-(4).)

Governor Newsom's Water Resilience Portfolio (July 2020) contained Item 3.6 directing state agencies to create an interagency team to "create flexibility for GSAs to trade water within basins by enabling and incentivizing transactional approaches, including groundwater markets, with rules that safeguard natural resources, small- and medium-sized farms, and water supply and quality for disadvantaged communities." Action 21.3 directs the development of "best practices for inter- and intra-basin groundwater trading programs that protect communities, economies, and the environment, including standards for measuring, reporting, accounting, and monitoring groundwater use and trading."

In response to the Water Resilience Portfolio, the California Water Commission in May 2022 released "A State Role in Supporting Groundwater Trading with Safeguards for Vulnerable Users: Findings and Next Steps." Notable portions of this report are outlined below.

Without groundwater allocations or extensive historical extraction data, trading/transfer has no basis. Allocations and historical extraction data provide limits on the amount of groundwater that can be extracted by an individual user and a consistent unit to trade/transfer. In

the absence of historical extraction data, establishing allocations is a necessary precursor to developing a groundwater trading/transfer program. Thus, the viability and defensibility of the trading/transfer program will depend in large part on the viability and defensibility of a GSA's allocation approach (discuss in Section 3.9, below).

Accurate and reliable groundwater extraction measurement is foundational to groundwater trading. Without it, trading programs could exacerbate overextraction, erode public trust, and fail to function properly, especially as a mechanism to ensure groundwater sustainability and compliance with SGMA.

Adopting a water trading/transfer policy may require compliance with CEQA because it may be considered a discretionary project proposed to be carried out by a public agency which may cause either a direct physical change in the environment, or reasonably foreseeable indirect physical change in the environment. (Pub. Res. Code §§ 21065, 21080, subd. (a).) The CEQA analysis should contain a thorough description of the trading/transfer policy and assessment of any resulting environmental impacts. For example, reduced extraction from the transferor's area may result in less irrigated agriculture that could have impacts to terrestrial or aquatic resources. Increased extraction in the transferee's area may cause adverse impacts to disadvantaged communities, groundwater dependent ecosystems, or neighboring groundwater users.

3.8.2. Water Trading/Transfers – Considerations

A water trading/transfer policy can provide a voluntary, flexible tool to help alleviate the economic burdens of using less groundwater. This aligns with one of SGMA's key policy priorities to enhance local control of groundwater resources while maintaining or achieving sustainability. A trading/transfer policy could drive innovation and further water use efficiencies given market incentives would exist to monetize conserved water.

The process for developing the policy and conducting market transactions should be visible and understandable for all stakeholders, including the public availability of accurate and reliable extraction and water use data and timely reporting of market activity. Foundationally, these transactions should sustain or enhance groundwater conditions in the subbasin, advance the terms of the GSP, and compliance with SGMA.

The trading/transfer policy should have robust rules ensuring "no injury" to third parties and the environment. Third party concerns could exist if the transferee concentrates extraction

that causes well interference, water quality issues, or other impacts with neighboring groundwater users. Similarly, concentrated extraction could impact groundwater dependent ecosystems (GDEs), impact interconnected surface water, or have localized water quality impacts to plant or aquatic species. The "no injury" metric should extend to disadvantaged communities that do not always participate in public processes yet typically are disproportionately impacted by poor groundwater conditions.

The GSA administering the trading/transfer policy plays a key role in ensuring responsible transactions that advance the GSP and SGMA implementation. The GSA fulfills the role of broker between the transferor and transferee, is responsible for ensuring compliance with any monitoring or mitigation measures, confirming "no injury" from the transaction, and adherence to the policy.

The California Water Commission developed a groundwater trading paper that summarizes factors that lead to implementation of a well-managed groundwater trading program:

1) Accessible processes for eligible participants to participate in the trading program.
2) Sufficient participation for the program to meet its goals.
3) Sufficient funding, capacity, and expertise to run the program efficiently and enforce market rules.
4) Transparent, accurate, and timely data used to monitor the success and impact of the program.
5) A transparent process for monitoring and reporting on the progress of impacts of the program.
6) Clearly identified triggers for stopping or changing the program before it leads to harmful impacts.
7) A mitigation plan in place for swiftly addressing and effectively correcting unintended negative consequences, including abuses of market power[fn].
8) Consistent enforcement with clear consequences for breaking the rules.

(California Water Commission, *A State Role in Supporting Groundwater Trading with Safeguards for Vulnerable Users: Findings and Next Steps* (May 2022), p. 18.)

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3.9. Allocations

Allocations are policy instruments that stipulate how much groundwater can be extracted over a given period and how to distribute the total volume among subbasin users.

3.9.1 Allocations – Legal Authority to Implement

A GSA has the authority under SGMA:

> 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 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 as a final determination of rights to extract groundwater from the basin or any portion of the basin.

(Water Code § 10726.4, subd. (a)(2).) Other laws may provide additional authority to make water allocation decisions. (See, e.g., Water Code § 22252.3 [Authorizing California Irrigation Districts to provide an "allocation of water to lands based on the type of crop grown".].)

While SGMA provides GSAs with powers necessary to reduce extractions by imposing allocations, SGMA leaves unchanged the common law system of water rights, stating "nothing in [SGMA], or in any groundwater management plan adopted pursuant to [SGMA], determines or alters…groundwater rights under common law." (Water Code § 10720.5, subd. (b).) SGMA also states that a "limitation on extractions by a groundwater sustainability agency shall not be construed as a final determination of rights to extract groundwater from the basin or any portion of the basin." (*Id.* § 10726.4, subd. (a)(2).)

Deciding to impose allocations can be a difficult task for GSAs, as it involves limiting access to groundwater resources upon which agriculture, cities, towns, and the local economy depend. However, in some subbasins, failure to impose allocations may result in the GSP being considered deficient, thus subjecting that subbasin to potential state intervention and loss of local control. (See, e.g., Water Code §§ 10735 et seq.) GSAs are required to manage groundwater

sustainably in accordance with SGMA, including reducing extractions if necessary to achieve the sustainability goal, yet they do not have the authority to change or modify groundwater rights. The decision to impose allocations, therefore, entails legal risk and should be carefully considered, undertaken only after a robust public process, and supported by adequate technical data to ensure the allocation is durable and as legally defensible as possible.

As discussed in Section 3.11 (Groundwater Adjudication), any person aggrieved by a GSA's allocation may initiate litigation asserting that the allocation is inconsistent with common law water rights. This litigation may be a direct challenge to the GSP or seek to require DWR to consider whether the GSP is deficient under SGMA. However, as discussed in Section 3.9.2, GSAs in California have developed and adopted allocations with support from affected stakeholders.

3.9.2. Allocations – Considerations

Different approaches to impose allocations have been utilized in subbasins subject to SGMA. For example, the GSP developed for the Lower Tule River Irrigation District GSA within the critically overdrafted Tule Subbasin in Tulare County adopted a "gross acreage method" of dividing sustainable yield. (Lower Tule River Irrigation District GSA GSP, § 2, p. 2-23.) This approach divides the available groundwater between overlying landowners proportionate to property size, thus treating all landowners equally irrespective of irrigated acreage or whether the landowner even has developed groundwater extraction facilities. This method recognizes the correlative nature of overlying rights to groundwater but does not fully capture legal limitations and nuances such as groundwater appropriation (typically for municipal uses), prescription, or recovery of developed water. Similarly, concerns have been raised with this approach because it does not distinguish between those that invested significantly in groundwater extraction facilities and the beneficial use of groundwater (e.g., agricultural or municipal and industrial distribution) and those that have not invested anything to develop and utilize the right.

East Kaweah GSA within the critically overdrafted Kaweah Subbasin in Tulare County adopted an allocation methodology that focuses on "eligible land" and "irrigated land". Eligible land are parcels greater than two acres, thus attempting to exclude the allocation approach for lands within urban areas and de minimis domestic users. (EKGSA Rules & Regulations, § 1.05.)

Irrigated land means eligible land that as of January 31, 2020, was irrigated through documented third-party sources, such as enrolled in the irrigated lands regulatory program. (See *id.* at § 1.10.) Using irrigated lands, rather than gross acreage, has the effect of recognizing and prioritizing existing groundwater users. However, the approach does not recognize unexercised or dormant overlying rights, may disproportionately impact farmers that grow high water demand crops, and may limit future land conversion (e.g., grazing to orchard).

The GSP for the Oxnard Subbasin, a critically overdrafted subbasin in Ventura County, utilizes an allocation method based on pro-rata reduction in historic extraction. The Fox Canyon Groundwater Management Agency, which pre-existed SGMA's enactment, established an allocation system for the Oxnard Subbasin by ordinance adopted on October 23, 2019. (The ordinance can be viewed here.) The ordinance established a base-period of 2005 through 2014 and a "base-period extraction", which is the average annual extraction during the base period. Allocations are then established based on a fraction of the base-period extractions to achieve sustainability. This approach reduces conflict amongst pumpers because all receive the same proportionate reduction based on historic use. However, unlike an acreage-based allocation approach, allocations based on historic use do not follow the priorities in groundwater rights, nor do historic use allocations recognize any appropriative or prescriptive rights that may exist at common law. Finally, this approach requires reliable historic information to establish baseline extraction, which may not exist or may not be sufficiently reliable to utilize for an allocation methodology.

Another allocation approach considers the complexities of groundwater law and apply it to the unique local circumstances of the subbasin subject to the allocation. The resulting allocation method attempts to mimic what may result from a comprehensive adjudication. This approach is the most likely to survive judicial scrutiny, particularly if a coalition of impacted users agree with the methodology. In the Borrego Valley Groundwater Basin, a critically overdrafted subbasin, Borrego Water District negotiated with other major water users to develop an allocation approach that reflected and aligned with California's groundwater laws. After reaching settlement and agreeing to an allocation methodology, the settling parties decided to initiate a friendly adjudication in hopes of having the court quickly affirm the settlement and support the GSP. On July 20, 2020, the court approved notice of commencement of groundwater adjudication for the Borrego Valley Groundwater Basin, and by April 8, 2021, the court approved

a stipulated judgment establishing the Borrego Springs Watermaster as the entity responsible for managing groundwater use in the basin consistent with the terms of the judgment. (The judgment can be viewed here.)

Applying this allocation method would require GSAs to assess relative rights to groundwater. GSAs are well-suited to utilize this approach, should allocations be necessary, given their groundwater expertise and experience and that GSPs are required by SGMA to include water budgets and, importantly, a quantification of all flows into the groundwater system by water source type such as precipitation, applied water, and surface water systems like rivers and lakes. (23 Cal. Code Regs § 354.18.) Details regarding the basin setting in the Salinas Valley and a summary of California groundwater laws are attached in Exhibit 1.

If a GSA elects to pursue allocations within its subbasin, effort should be made to navigate the legal concepts and principles set forth in Exhibit 1. However, as described above, GSAs have determined that groundwater allocation programs are necessary to comply with SGMA.

3.10. Limits Or Prohibitions On New Wells

Limits or prohibitions on new wells including moratoriums, prohibitions, and extraction restrictions are also types of demand management strategies. A moratorium is a temporary prohibition of an activity, in this case construction of new groundwater extraction facilities. A prohibition is a permanent cessation of new groundwater extraction facilities. An extraction restriction establishes limits on extractions from new wells. The authority regarding well permitting rests primarily with counties, and not with GSAs under SGMA.

3.10.1. Limits or Prohibitions on New Wells – Legal Authority to Implement

A GSA under SGMA has the authority:

(a)(1) To impose spacing requirements on new groundwater well construction to minimize well interference and impose reasonable operating regulations on existing groundwater wells to minimize well interference, including requiring extractors to operate on a rotation basis.

(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.
>
> (b) This section does not authorize a groundwater sustainability agency to issue permits for the construction, modification, or abandonment of groundwater wells, except as authorized by a county with authority to issue those permits. A groundwater sustainability agency may request of the county, and the county shall consider, that the county forward permit requests for the construction of new groundwater wells, the enlarging of existing groundwater wells, and the reactivation of abandoned groundwater wells to the groundwater sustainability agency before permit approval.

(Water Code § 10726.4, subds. (a)(1)-(2), (b).)

In addition, some of the Groundwater Agencies individually hold police powers, which is the legal basis for all planning and land use regulation and emanates from the Tenth Amendment to the United States Constitution and entitles states to take actions to protect the public's health, safety, and welfare. The California Constitution grants the same power to cities and counties but limits the grant to the extent that local regulations may not conflict with state law. (Cal. Const., Art. XI, § 7; *Miller v. Board of Public Works* (1925) 195 Cal. 477.)

Limits or prohibitions on new wells, whether temporary or permanent, implicates the law associated with dormant overlying groundwater rights. (See Exhibit 1, Summary of California Groundwater Law.) These are landowners that have never extracted groundwater or did not pump during a prior prescriptive period. The scope and extent of dormant overlying rights in California is not well-settled. However, the California Supreme Court has "encouraged the trial courts to be creative in devising physical solutions to complex water problems to ensure a fair result consistent with the constitution's reasonable-use mandate." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 288 [citing *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, 574].) Moreover, the court in *Santa Maria* suggested that courts have the authority to limit overlying rights because "it stands to reason that when there is a shortage, the court must determine how much each of the overlying owners is using in order to

fairly allocate the available supply among them." (*Id.* At p. 298.) The court in *City of Barstow* reached a similar conclusion that "courts should have some discretion to limit the future groundwater use of an overlying owner who has exercised the water right and to reduce to a reasonable level the amount the overlying user takes from an overdrafted basin." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, n. 13.)

In addition to issues of prescription, the doctrine of subordination provides a separate legal basis to limit overlying water rights. In the case of *In re Water of Long Valley Stream System* (1979) 25 Cal.3d 339, the California Supreme Court approved the State Water Resources Control Board's subordination of dormant riparian rights in the surface water context. (*Id.* At pp. 355, 357-359.) Note, this case is a riparian surface water case, but overlying correlative rights in groundwater law is closely analogous with the riparian surface water right. The court in *Long Valley* held that the priority of dormant riparian rights could be subordinated to the rights of the presently exercised riparian and appropriative rights in that water system. (*Id.*) The court relied extensively on Article X, section 2, of the California Constitution that requires all waters to be put to reasonable and beneficial use.

One court in California decided not to apply the holding of *Long Valley* to unexercised overlying groundwater rights. In *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, the court declined to subordinate users that had never extracted. (*Id.* At pp. 87-89.) However, as part of the recent groundwater basin adjudication reform laws, the California legislature explicitly permits the court to apply the principles set forth in *Long Valley* within a comprehensive groundwater basin adjudication. (Code Civ. Proc. § 830, subd. (b)(7).) Also, the California Supreme Court in *City of Barstow* explained that the subordination principle of *Long Valley* may need to be applied in the future to subordinate dormant overlying rights "to harmonize groundwater shortages with a fair allocation of future use." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, n. 13.)

Concerning potential adoption of a new well moratorium, many GSAs such as counties and cities hold police powers separate from SGMA that would authorize a lawfully constructed and adopted moratorium. "A moratorium is by its nature an interim or temporary measure which contemplates future resolution or performance of issues and matters held temporarily in abeyance." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1187.) Thus, a well moratorium should be considered as an interim solution,

such as in response to prolonged drought or until other projects and management actions could be constructed or implemented. A moratorium is derivative of the police power and, while broad, "its exercise cannot be divorced from the requirements of procedural due process." (*Id.*) The degree to which due process applies depends on the specifics of the moratorium and whether the adopting agency is exercising quasi-legislative or quasi-adjudicatory powers. Failure to properly structure a moratorium exposes the agency to claims of violating due process and inverse condemnation/taking claims. (See, e.g., *Monks v. City of Rancho Palos Verdes* 167 Cal.App.4th 263 [city's moratorium on constructing development in vicinity of recent landslides deprived landowner's parcels of all economically beneficial use].)

3.10.2. Limits or Prohibitions on New Wells – Considerations

In an overdrafted subbasin, dormant rights present numerous policy and legal challenges. Disputes often arise over the equity in allowing late comers to pump an equal share of groundwater compared to longtime groundwater extractors that have invested significantly in utilizing the groundwater resource. Conversely, late comers could validly question why their groundwater rights should be limited or taken away while other users have caused conditions of groundwater overdraft.

While a GSA is authorized to impose limits or even prohibitions on new well extractions, careful consideration should be exercised to ensure property rights are respected, to the extent possible, and to ensure the action is as legally defensible as possible. To the extent it becomes necessary to address dormant right holders in an over-drafted subbasin, a GSA is best positioned to legally defend that decision by reasonably concluding that such action is necessary to the sustainable management of the subbasin and should rely upon a variety of legal authorities in support, including SGMA, Article X, section 2 of the California Constitution, case law, and the adjudication reform legislation.

3.11. Groundwater Adjudication

Groundwater adjudications involve determination of rights to groundwater through a court process. Adjudications can either be a subset of parties (e.g., within a SGMA management area) or in most cases are "comprehensive", meaning all right holders in a subbasin. Groundwater adjudications are highly fact-dependent and involve disputes over a host of

technical and legal issues, resulting in lengthy and expensive judicial proceedings. Typically, they are completed through multiple phases of trial, beginning with defining the area subject to the adjudication (i.e., the DWR Bulletin 118 subbasin, or something else), then later phases to resolve issues of prescription, safe yield, and allocations.

3.11.1. Groundwater Adjudication – Legal Authority to Implement

In 2015, the year following SGMA's enactment, the California Legislature adopted significant reforms to groundwater adjudication laws to align the process with SGMA and institute new measures attempting to expedite an adjudication proceeding. (Water Code §§ 10737 et seq.; Code Civ. Proc. §§ 830 et seq.)

Any "person" may initiate a groundwater adjudication by filing an action in the appropriate superior court. A "person" includes, but is not limited to "counties, local agencies, state agencies, federal agencies, tribes, business entities, and individuals." (Code Civ. Proc. § 832, subd. (j).) However, the rules are clear that adjudications cannot be used as a substitute for the SGMA process, nor can they be used solely to delay formation of a GSA or development and implementation of GSPs. (Water Code § 10737.2.) The SGMA process moves forward irrespective of the pendency of a comprehensive groundwater adjudication.

Adjudication provides landowners an alternative approach to a subbasin's management by litigating the issues and advocating for the court to adopt judgment or a physical solution that fits their needs. While adjudications can be advantageous because they provide certainty regarding relative water right priorities and will result in a physical solution (Code Civ. Proc. § 834, subd. (b)), an adjudication is still expensive and time consuming. Lawyers, expert witnesses, and possibly a special master to determine safe yield and other technical issues will be required to shepherd the process to final judgment. (*Id.* § 845.) Even though the adjudication reform laws attempted to address frequent time sinks, adjudications under the new laws can still be time consuming given multiple trial phases are often necessary to resolve complex technical and legal issues. (*Id.* at § 840, subd. (b)(5).)

The SGMA process, including implementation of the GSP, will continue despite the adjudication filing. (*Id.* § 830, subd. (a)(4).) The court is required to "manage the proceedings in a manner that minimizes interference with the timely completion and implementation of a groundwater sustainability plan, avoids redundancy and unnecessary cost in the development of

technical information and a physical solution, and is consistent with the attainment of sustainable groundwater management within the timeframes established by [SGMA]." (Water Code § 10737.2.) Further, the court has the power to stay the adjudication if the court believes the adjudication is duplicative or counterproductive to the GSA's efforts. (*Id.*; see also Code Civ. Proc. § 848, subd. (a)(1).)

Filing an adjudication will require landowners to track production, report groundwater extractions past and present, and estimate future water use requirements. (Code Civ. Proc. § 842 subds. (a)(2), (d)(2).) An adjudication may result in a court-imposed injunction limiting new wells and/or restricting extractions during the pendency of the adjudication, depending on whether the basin is in a "condition of long-term overdraft." (*Id.* §§ 847, subds. (a), (b), 832, subd. (d) [defining "condition of long-term overdraft].) Finally, as discussed in Section 3.10.1 above, and in Exhibit 1, a court is enabled in a comprehensive adjudication to "consider applying the principles established in *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339", meaning a court could limit or extinguish dormant overlying rights exercise. (Code Civ. Proc. § 830, subd. (b)(7).) This principle was applied in *Antelope Valley Groundwater Cases* (2021) 63 Cal.App.5th 17, 47 where a landowner's future exercise of their correlative rights was subordinated to the present exercise by correlative right holders who demonstrated their existing reasonable and beneficial uses of groundwater.

3.11.2. Groundwater Adjudication – Considerations

Recent adjudications in California under the adjudication reform laws (Code Civ. Proc. §§ 830 et seq.) have been utilized in circumstances where there is significant uncertainty in the subbasin regarding water right priorities, there is diminished trust in the GSA or the data underlying the GSP, or significant disputes exist regarding the GSA's actions, such as allocations or fees. These adjudications have been initiated in subbasins designated as critically overdrafted under SGMA. While costly and time consuming, some parties prefer the eventual certainty of a final court judgment, as opposed to participating in the local SGMA process.

One of the hallmarks of SGMA is local control. In adopting SGMA, the legislature desired to "enhance local management of groundwater" and to "manage groundwater basins through the actions of local government agencies to the greatest extent feasible". (Water Code § 10720.1, subds. (b), (h).) SGMA grants GSAs a host of powers to accomplish these objectives,

including general authorities to augment groundwater supply or to reduce groundwater demand. A GSA is well-suited to interface with groundwater users and other local stakeholders to achieve sustainability collectively and collaboratively. A GSA can create the circumstances and impose regulatory nudges that are occasionally necessary to drive innovation in a way that maximizes the beneficial use of water, while protecting or even restoring environmental uses of water. The SGMA plan is designed to be iterative and will change as technical understanding and community priorities change over time.

In contrast to SGMA's carefully crafted principles, some view an adjudication as being more inflexible and less suited to adapt over time. A prospective plaintiff should carefully consider the advantages to local control, stakeholder engagement and influence in the process, and the adaptability of SGMA implementation over time compared to an adjudication.

3.12. Groundwater Extraction Fee

Fees can be used as policy instruments when designed on the basis of the volume of groundwater extraction, either directly by measuring and charging for the extraction itself (e.g., acre-foot of water), or indirectly by charging for a correlate of water use, such as irrigated acreage, crop and evaporative duty.

3.12.1. Groundwater Extraction Fee – Legal Authority to Implement

Under SGMA, a GSA's authority to impose fees vary depending on when the authority is exercised. At any time, including before adoption of a GSP, a GSA "may impose fees, including, but not limited to, permit fees and fees on groundwater extraction or other regulated activity, to fund the cost of a groundwater sustainability program". (Water Code § 10730, subd. (a).) This is commonly referred to as a regulatory fee imposed under Proposition 26. The purpose of section 10730 fees is largely to fund administration of a groundwater sustainability program, such as "preparation, adoption, and amendment of a groundwater sustainability plan, and investigations, inspections, compliance assistance, enforcement, and program administration, including a prudent reserve." (*Id.*) Section 10730 fees may not be used to fund any capital improvement project.

After a GSA adopts a GSP, it "may impose fees on the extraction of groundwater from the basin to fund the costs of groundwater management…". (Water Code § 10730.2, subd. (a).)

Imposition of these fees must follow the substantive and procedural requirements of new or enhanced fees for property related services under Proposition 218. (*Id.* at subd. (d).) The fee may be used to fund a broad array of SGMA activities, including: (1) administration, operation and maintenance, including a prudent reserve; (2) acquisition of lands or other property, facilities, and services; (3) supply, production, treatment, or distribution of water; and (4) other activities necessary or convenient to implement the plan. (*Id.* at subd. (a)(1)-(4).)

Both section 10730 and section 10730.2 state that the fee authority granted to a GSA are in addition to any other powers the GSA may have under any other law, such as the GSA's enabling legislation. Both section 10730 and section 10730.2 generally exempt the imposition of fees on de minimis extractors.

A third source of financial authority is set forth in Water Code section 10730.4, which imbues GSAs with authorities held by local agencies that have adopted pre-SGMA groundwater management plans pursuant to Part 2.75 (commencing with section 10750) of the Water Code. Before levying a fee or assessment under these provisions, the GSA "shall hold an election on the proposition of whether or not the local agency shall be authorized to levy a groundwater management assessment or fix and collect fees for the replenishment or extraction of groundwater." (Water Code § 10754.3.) An affirmative majority vote must be obtained before the GSA can proceed with either the proposed fee or assessment. (*Id.*)

Some have argued that fees adopted under section 10730 lapse or terminate once a GSA adopts its GSP and, thus, any new exactions post-GSP become subject to the fee process under section 10730.2. Others argue that pre-GSP fees can continue to be imposed after the adoption of the GSP and that fees adopted under section 10730 may continue post-GSP.

Section 10730.2 grants GSAs broad authority to impose new or enhanced fees for SGMA purposes and implementation of the GSP and makes those fees subject only to the fee provisions of Proposition 218 (Article 13D, section 6, of the California Constitution). This grant of authority is broad, so caution should be exercised in the GSA's exercise of this authority to ensure that the proposed exaction is properly characterized as a property related "fee" or "charge" and not an "assessment" under Proposition 218. An "assessment" under Proposition 218 "means a levy or charge upon real property by an agency for a special benefit conferred upon the real property". (Cal. Const., Art. 13D, § 2, subd. (b).) A "fee or charge" under Proposition 218 "means any levy other than an ad valorem tax, a special tax, or an assessment

imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (*Id.* at subd. (e).)

The procedures for adoption and the substantive requirements differ under Proposition 218 depending on whether the proposed levy is an assessment or a fee. The requirements for new or enhanced assessments are set forth in section 4 of Article 13D of the California Constitution. The requirements for new or enhanced fees are set forth in section 6 of Article 13D of the California Constitution. One key difference is assessments require majority *approval* of property owners while fees can be defeated by majority *protest* of property owners. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 215.)

The directive in section 10730.2 to impose fees pursuant to section 6 of Article 13D of the California Constitution raises at least two issues to carefully consider. First, the California Supreme Court in *City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191 determined a groundwater extraction charge for recharge projects was not a property related fee subject to section 6 of Article 13D. The salient fact in *San Buenaventura* was that groundwater recharge does not "'deliver' water 'via groundwater' to any particular parcel or set of parcels" and, instead, recharge services merely "conserves and replenishes groundwater that flows through an interconnected series of underground basins, none of which corresponds with parcel boundaries". (*Id.* at p. 1208.) Consequently, fees charged for groundwater recharge are not subject to section 6 of Article 13D because it is not a cost of "providing a service to a parcel of property." (*Id.*) It is unclear whether groundwater extraction charges imposed by GSAs to fund the costs of groundwater management could be seen as analogous to the fees endorsed as non-property related levies in *San Buenaventura.* At a minimum, careful consideration should be given to the procedures pursuant to which a GSA seeks to impose fees under section 10730.2 to fund recharge projects, including for example, acquisition of water rights, land, or other facilities to distribute water for enhanced aquifer recharge. The special characteristics of the fee, and the person or entity upon whom it is imposed, will determine the appropriate procedure for implementing the fee/charge/assessment/or tax.

Second, the broad ability to recover SGMA costs as fees through section 10730.2 may, in some circumstances, run afoul of the California Constitution. Under Article II, section 10 of the California Constitution, a law enacted by a voter initiative may be amended or repealed by the Legislature only with the approval of the electorate, unless the initiative statute provides

otherwise. (Cal. Const., art. II, § 10, subd. (c).) The purpose of this limitation is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025.) In 1996 the California electorate adopted Proposition 218 as an amendment to the California Constitution. The voters identified different procedures and substantive requirements for property related "fees" compared to "assessments". Some may argue that the Legislature through its adoption of section 10730.2 does not have the authority to modify or amend this distinction established by the voters in Proposition 218. A GSA should avoid relying on section 10730.2 and the fee adoption process specified therein if the proposed exaction is actually a new or enhanced assessment or tax and not a fee or charge.

3.12.2. Groundwater Extraction Fee – Considerations

The laws governing cost recovery for public agencies, including the Groundwater Agencies, are complex and continue to evolve. The unique characteristic of any proposed groundwater extraction fee should be specifically vetted by subject matter experts to ensure the process is appropriately structured, implemented, and defensible.

In considering a new or increased fee based on groundwater extraction the GSA should first analyze its funding needs. The funding need will, in turn, answer whether the GSA may impose a regulatory fee, property related fee, assessment, or special tax. Funding need will also inform the scope of the prosed new or enhanced exaction. For example, a fee to cover the administrative costs of the GSA, such as cost of board meetings, staff, legal counsel, website, and general operations, may be appropriately distributed across all the subbasins managed by the GSA. In contrast, it may not be appropriate to similarly disperse the costs of a project or management action that only benefits one of the multiple subbasins managed by the GSA.

California imposes what is known as the "pay first" rule requiring that "a taxpayer ordinarily must pay a tax before commencing a court action to challenge the collection of the tax." (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1116.) The pay-first rule advances an important public policy that "ensures that essential public services are not disrupted during the pendency of tax challenges." (*Andai v. City of Stockton* (2006) 137 Cal.App.4th 86, 90.) In a case of first impression, the court in *Mojave Pistachios, LLC. v.*

Superior Court (2024) 99 Cal.App.5th 605 applied the pay-first rule to a challenge of fees imposed by a GSA under SGMA. "We therefore conclude that section 10726.6(d) of SGMA requires a person who seeks to challenge a groundwater fee imposed under SGMA to first pay the fee before bringing an action for refund." (*Id.* at p. 632.)

3.13. Fee Tied to Excess Extractions

Many GSAs, particularly those managing critically overdrafted subbasins, have linked their rate structure with groundwater allocations. A fee tied to excess extractions is dependent upon good and verifiable data regarding extractions and other water sources contributing to groundwater conditions. These GSAs establish separate rate structures for different sources of groundwater, as follows:

> - Native groundwater: groundwater that accrues to the subbasin from rainfall, natural infiltration from lakes and streams, and other natural inflows. All overlying landowners have a correlative right to native groundwater.
>
> - Return flows: imported surface water that is used on irrigated land that then percolates into the subbasin; also called "foreign" water or "foreign-in-time" if captured and stored in a reservoir for later release/use. The right to recapture this groundwater is held by the importer.
>
> - Salvaged water: water that would have been wasted to the sea or out of the basin during the rainy season but for the dams and reservoirs that capture and save it. Entities responsible for salvaging the water that augments natural recharge are entitled to a priority right to the increment of basin supply attributable to the salvaged supply.

(*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266.) Return flows and salvaged water are occasionally called "developed" water because it is water that would not be present in a basin but for human efforts, such as importing surface water to the basin, building reservoirs to store water for later use, or salvaging water from waste. The practical reason for the developed water principle is to award the party responsible for the augmented yield with the "fruits of his endeavors in bringing into the basin water that would not otherwise be there." (*Id.* at p. 301.)

Following these principles, the GSAs determine native yield and typically do not charge any fees associated with a landowner extracting their respective share of native yield. Moreover, the GSAs will typically not charge a fee for lawful recovery of return flows or salvaged water by the person or entity responsible for its development. Fees are imposed for amounts extracted

more than the native yield share, unless the landowner demonstrates they are recapturing return flows and/or salvaged water that they are entitled to recapture.

For example, native yield may be 1 acre-foot per overlying acre that may be extracted by landowners at no cost. However, each acre-foot extracted more than the native yield that is not their share of return flow or salvaged water, is charged either a fee or a penalty. Some GSAs impose tiered conservation pricing increasing the per acre-foot cost as more groundwater is extracted above native yield. Some GSAs also impose a total cap on annual groundwater extraction directly tying the pricing structure to allocations.

GSAs that impose fees for extracting more than native yield, rather than penalties, typically have cost of service analysis to justify the amount of the fee. These analyses focus on the cost of acquiring alternative surface water supplies or developing and implementing projects or management actions to recover or replenish groundwater extracted in excess the sustainable yield.

3.13.1. Fee Tied to Excess Extractions – Legal Authority to Implement

The legal authority to impose a fee tied to extraction in excess of the sustainable yield is the same as a GSA's authority to impose fees on extractions set forth in section 3.5 above.

In addition, in many basins that impose fees on excess extractions the structure employed is nearly identical in function to an allocation without using quite the same verbiage. Thus, the content of Section 3.9 should be considered here as well.

3.13.2. Fee Tied to Excess Extractions – Considerations

Other demand management measures must be put into practice to successfully implement a fee tied to excess extractions. The GSA must require meters or other methods to accurately measure groundwater extraction. Well owners/operators should have access to their well production data and understand groundwater conditions by readily available means. The GSA must conduct adequate technical analysis for the quantification of native yield, return flows (if any), and salvaged water (if any). After these prerequisites are met, the GSA can determine the appropriate funding mechanism (regulatory fee, property fee, benefit assessment, or special tax).

Mojave Pistachios, LLC (Mojave) *v. Superior Court* offers insight into some of the potential challenges to imposing fees on excess extraction. Mojave planted permanent crops over about 3,200 acres and began extracting groundwater for irrigation in 1975. Following the passage of SGMA, Indian Wells Valley Groundwater Authority determined that all groundwater extractions, except those of the Federal Government and de minimis users, would be subject to a basin replenishment fee of $2,130 per acre-foot to fund acquisition of supplemental water and mitigating damage to shallow wells that may be impacted by declining groundwater levels. For Mojave, this amounted to over $8,000,000 per year.

Mojave's initial lawsuit contained twenty causes of action, including claims for violation of SGMA, the California constitution, regulatory and physical takings of private property, and due process violations. Most of these claims focused on the allegation that the Authority's GSP illegally deprived Mojave of vested appurtenant overlying water rights to pump groundwater. These claims were largely dismissed without reaching the merits because Mojave had not paid the fees prior to initiating legal action, thus violating the "pay-first" rule (discussed in Section 3.12.3, above). Given this decision, future litigants will pay the fee for excess extractions under protest and pursue these and potentially other claims to a decision on the merits.

The court in *Mojave Pistachios* acknowledged the possibility for abuse by a GSA in its implementation of fees for excess extraction:

> In reaching this holding, we are mindful that a rigid application of the 'pay-first' rule could allow local groundwater sustainability agencies to impose unreasonable fees that target certain uses, knowing they would be unable to afford to pay the fees under protest, and that those users could eventually be run out of business. However, that is not the case before us today, and we decline to resolve the slippery issue of determining when, if ever, a fee or tax would be so extraordinarily high that the 'pay-first' rule should not apply.[fn]

(*Mojave Pistachio*, 99 Cal.App.5th at p. 633.)

Fees for excess extraction should be tied to usage volumes and not differentiate based on the use type (e.g., agricultural versus urban, or different crops, etc.). Moreover, this fee structure may be problematic for basins without feasible supplemental water supplies.

Similar fee structures have resulted in landowner groups filing adjudications to quiet title to their rights to groundwater. Mojave brought a separate action seeking to quiet title to its water rights and a physical solution, which was then expanded into a comprehensive adjudication of

the water rights in that basin. Similarly, the subbasins managed by Fox Canyon Groundwater Management Agency are in the adjudication process due to adoption of an ordinance that limited extraction and imposed a surcharge on excess extraction.

Finally, since what constitutes excess extraction will likely vary by subbasin, it may be difficult to apply a fee for excess extraction universally across the entire Salinas Valley Basin.

3.14. Penalties

Penalties are a form of enforcement for extraction restrictions that limit when, where, or how much groundwater can be extracted. Penalties are not considered allocations. Penalties are typically used to limit extraction in specific areas, such as those vulnerable to seawater intrusion, or at specific times, such as to prevent undesirable results during drought.

3.14.1. Penalties – Legal Authority to Implement

SGMA contains two penalty provisions. First, related to unauthorized groundwater extractions:

> A person who extracts groundwater in excess of the amount that a person is authorized to extract under a rule, regulation, ordinance, or resolution adopted pursuant to Section 10725.2, shall be subject to a civil penalty not to exceed five hundred dollars ($500) per acre-foot extracted in excess of the amount that person is authorized to extract.

(Water Code § 10732, subd.(a)(1).)

The second penalty provision relates to a violation of a rule, regulation, ordinance or resolution adopted by the GSA unrelated to the extraction of water such as, for example, a rule requiring metering or well registration with the GSA. SGMA provides:

> A person who violates any rule, regulation, ordinance, or resolution adopted pursuant to Section 10725.2 shall be liable for a civil penalty not to exceed one thousand dollars ($1,000) plus one hundred dollars ($100) for each additional day on which the violation continues if the person fails to comply within 30 days after the local agency has notified the person of the violation.

(*Id.*, subd. (a)(2).)

The imposition of penalties hinges on a violation of a rule, regulation, ordinance or resolution. Thus, the validity of the penalty depends on the lawful adoption of the rule, regulation, ordinance or resolution. SGMA requires that rules, regulations, ordinances and

resolutions be adopted "in compliance with procedural requirements applicable to adoption of a rule, regulation, ordinance, or resolution by the groundwater sustainability agency. (Water Code § 10725.2, subd. (b).)

3.14.2. Penalties – Considerations

Contemporaneously with developing a rule, regulation, ordinance or resolution that would form the basis for the potential penalties, the GSA should determine the procedure(s) for imposing penalties. SGMA provides two options: (1) the GSA may bring an action in superior court to determine whether a violation occurred and to impose a civil penalty; or (2) the GSA may administratively impose a civil penalty after providing notice and opportunity for a hearing. (Water Code § 10732, subds. (b)(1)-(2).)

If the GSA elects to administratively impose civil liability, then the rule, regulation, ordinance or resolution or a separately adopted policy should detail the procedures that will be employed to afford due process to the person receiving notice of violation. Since such a proceeding would be adjudicative, due process requires that the GSA ensure a fair tribunal, including a hearing and adjudicators/decisionmakers that are impartial and without financial interest or other bias.

To the extent any or all the Groundwater Agencies wish to pursue penalties for excess extractions in other subbasins or areas, the affected GSP(s) should be amended to align the GSP with the potential adoption of penalties.

3.15. Taxes

Like fees and penalties, taxes are a method to charge groundwater extractors according to the intensity of their groundwater usage, either by directly measuring and charging for the extraction itself, or indirectly charging for a correlate of water consumption such as total acreage or irrigated acreage. Taxes can be used to encourage conservation of the groundwater resource or as a means of funding the purposes of the GSA.

3.15.1. Taxes – Legal Authority to Implement

GSAs that are also separate governing bodies with legislative authority (such as counties, cities and some special purpose districts) may impose special taxes. A "special tax" is authorized

under the California Constitution, Article 13C, section 2, and is defined as "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." (Cal. Const., Art. 13C, § 1, subd. (d).) A special tax should be contrasted with a "general tax", which means any tax imposed for general governmental purposes" (*id.* at subd. (a)) and an ad valorem tax, which is limited under Proposition 13 to not more than 1% of a property's assessed value (*id.* at Art. 13A, §§ 1, *et seq*.).

> Pursuant to these definitions, a tax is special whenever expenditure of its revenues is limited to specific purposes; this is true even though there may be multiple specific purposes for which revenues may be spent. [Citation.] A tax is general only when its revenues are placed into the general fund and are available for expenditure for any and all governmental purposes. [Citation.]

(*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1185.)

Moreover, a special tax should be distinguished from an assessment under Proposition 218. A "special assessment is a charge levied against real property within a particular district for the purpose of conferring a special benefit on the assessed properties beyond any benefit received by the general public." (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1319.) Only landowners that receive a special benefit are charged for the proportional cost of that special benefit. An assessment is in reality "a compulsory charge to recoup the cost of public improvement made for the special benefit of a particular property." (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 142 (superseded by constitutional amendment).) In contrast, a "'special tax'…is imposed to provide benefits to the general public, and it is possible that those burdened by the tax may enjoy no benefit from its expenditure." (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 442.) A special tax is uniformly applied and charged to individuals regardless of special benefit.

A GSA must provide a notice and public hearing for the special tax. Thereafter, the GSA proposes an ordinance or resolution to begin the electoral process to adopt the special tax. The ordinance or resolution must contain details about the special tax, including the type of tax and rate to be levied, the method of collection, and the election date to approve the levy of the tax. (Gov. Code § 53724, subd. (a).) Approval of the ordinance or resolution must be by two-thirds of all members of the legislative body of the local government or district. (*Id.* at subd. (b).) Thereafter, the special tax must "submitted to the electorate and approved by a two-thirds vote". (Cal. Const., art. 13C, §2, subd. (d).)

A special tax is collected by the County Assessor through the property tax roll. The GSA must create a separate account to deposit the collected proceeds to ensure that the funds are used for their intended purpose and to support transparency and accounting of the tax proceeds.

Many challenges relate to whether certain exactions constitute a special tax. For example, in *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, the city's proposed Rental Unit Business Tax was deemed to be a general tax imposed for the primary purpose of generating revenue for all governmental purposes. The general tax was deemed invalid because the City imposed it without obtaining the necessary majority vote of qualified voters. Other cases challenge whether a special tax is actually an improper general tax. (*Nielson v. City of California City* (2005) 133 Cal.App.4th 1296 [flat-rate parcel tax was not an unconstitutional general tax, but rather a special tax].)

Other challenges relate to the conduct of the tax election and obtaining the requisite two-thirds affirmative vote. In *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, the city's proposed special tax on hotel room revenue was invalid because only certain landowners, rather than the entire electorate, were entitled to vote.

Proposition 218 states that "the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge." (Cal. Const, Art. 13C, § 3.) The initiative power authorizes local voters to reduce a public agency's revenue sources, including water rates and other delivery charges. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205.)

3.15.2. Taxes – Considerations

Successful implementation of GSPs and compliance with SGMA will require reliable funding streams. There is considerable discretion and flexibility over what funding mechanisms to use and how the GSA may communicate and engage with ratepayers and beneficiaries of groundwater within a basin.

Determining whether to propose a special tax, or other form of levy, should involve legal counsel and technical consultants. Step one in the process should be an evaluation of revenue requirements of the agency. This will inform the funding mechanisms and appropriate legal

processes to utilize. The following chart offers a comparison of funding options available to the Groundwater Agencies and summarizes the content in Sections 3.12 through 3.15:

Funding Mechanism	Authority	Ballot	Approval	Collection	Public Outreach	Example Funded Activity
Regulatory Fee	Proposition 26	No	Board Approval	Direct or County Tax Roll	Public Meeting Notice	GSA Administration
Property Fee	Proposition 218	No	No Majority Protest followed by Board Approval	Direct or County Tax Roll	Mailed Notices followed by Public Hearing	Groundwater Extraction Fee
Assessment	Proposition 218	Yes	Majority vote of ballots received followed by Board Approval	County Tax Roll	Mailed Notices followed by Public Hearing	SGMA Projects that Benefit Portions of, but not all, the Subbasin
Special Tax	California Constitution, Government Code	Yes	Two-thirds Board Approval and Electorate	County Tax Roll	Mailed Notices followed by Public Hearing	Funding Specific Purposes, e.g., Groundwater Management
Penalties	SGMA	No	Board Approval	By the GSA or Superior Court	Public Meeting Notice	Extractions in Excess of Sustainable Yield

(See, e.g., Resource Guide, Funding SGMA Implementation, DWR (March 2024).)

Exhibit 1

Salinas Valley Basin Setting

Most of the groundwater in the Salinas Valley accrues from precipitation and surface water sources, such as the Salinas River. The Salinas Valley does not have imported foreign water, such as those that occur in many other subbasins from purchases of water from the State Water Project or Central Valley Project. However, the Nacimiento Dam and Reservoir and San Antonio Dam and Reservoir capture and store water that may be considered developed foreign-in-time or salvaged water belonging to the developers. Monterey County Water Resources Agency operates these Reservoirs to store winter flows for release during summer to maximize recharge of the groundwater basin by infiltration through the streambed of the Salinas River. It is estimated by the Agency that the project has resulted in an annual average increase in groundwater recharge of 30,000 acre-feet per year. (Agency Engineer's Report (2003).)

There are three sources of surface water supply in the Salinas Valley that are diverted for direct use: (1) a small amount of surface water is diverted from the Arroyo Seco for agricultural uses; (2) recycled urban wastewater is treated and applied to agricultural land under the Castroville Seawater Intrusion Project (CSIP); and (3) the Salinas River Diversion Facility diverts surface water from the Salinas River north of the City of Marina and distributes it to the CSIP system. The Groundwater Agencies would need to determine benefits from direct or in lieu recharge attributable to CSIP.

In addition, the Salinas Valley has available native groundwater and recharge from rainfall sources subject to groundwater law in California. Rights to groundwater in California is a broad and complex area of the law. For the purposes of this paper, only general concepts are provided to serve as an introduction of applicable legal principles and how such principles potentially intersect with demand management measures, such as groundwater allocations.

Summary of California Groundwater Law

California groundwater rights are overlying, appropriative, or prescriptive. An overlying right is the right of a landowner to pump groundwater from beneath that land for beneficial use on the same land. The overlying right is only for native groundwater and is correlative, meaning all overlying landowners have equal rights to groundwater up to the cumulative limit of the sustainable yield of the subbasin. Much like a surface water riparian right, in times of insufficient

native groundwater such as during drought, each landowner is subject to the same pro-rata reduction in groundwater extraction. (*Katz v. Walkingshaw)* (1903) 141 Cal. 116.

An appropriative right to groundwater is use of water for a non-overlying use. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908.) Most appropriative users are municipal water providers. Only surplus water may be appropriated, meaning any portion of the safe yield that overlying landowners do not need for reasonable and beneficial use. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266.) No excess groundwater is available for appropriation when the overlying landowners are utilizing the full safe yield of the subbasin. (*Id.*) This means that the overlying right is superior to the appropriative right. However, an appropriator can prescript as against overlying users. In subbasins that have been overdrafted for extended periods, appropriative extractors may make prescriptive right claims. Resolving claims of prescription are complex and highly fact dependent. GSAs are not authorized under SGMA to resolve issues of prescription.

Concerning municipal uses of groundwater, Water Code section 106 provides that it is the policy of the State that the "use of water for domestic purposes is the highest use of water." This general statement of policy in section 106 does not override the water right priority system nor has any case determined that landscaping water use is protected as municipal use. However, there are surface water cases in the context of shortage among riparian holders, where those using water for domestic purposes were given priority over agricultural water users. (See, e.g., *Deetz v. Carter* (1965) 232 Cal.App.2d 851.) The court interpreted section 106 to provide "the apportionment of water between riparian claimants, need for domestic purposes receives first preference." (*Id.*) No cases have interpreted the general statement in section 106 as overriding the existing priority system or putting an appropriator ahead of a riparian or overlying user.

Water Code section 106.5 states "It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses." This section is general and does not suggest any priority be given to municipal uses, only that the ability to acquire and hold such rights be protected. There is no case allowing a junior domestic appropriator to use groundwater prior to a senior overlying groundwater right holder.

In 2012, California adopted a "Human Right to Water", declaring that "every human being has the right to safe, clean, affordable, and accessible water for human consumption,

cooking, and sanitary purposes." (Water Code § 106.3.) This provision has not been directly interpreted by a court considering a claim of an appropriator as against an overlying right holder. However, the State Water Resources Control Board is citing to and using section 106.3 in its staff reports supporting probationary designations for subbasins that do not have accepted GSPs. For example, "[a]ccess in the [Tule] subbasin to safe, clean, and affordable water to human consumption would be enhanced by addressing the recommended deficiencies related to lowering groundwater levels and groundwater quality degradation. (Tule Subbasin Probationary Hearing Draft Staff Report, March 2024, p. 132.) At a minimum, an allocation decision should consider impacts, if any, to the Human Right to Water statute.

All water use and water rights in California are subject to a 1928 amendment that added Article X, section 2, to the California Constitution. The amendment has generally been construed as applying a rule of reasonable use regardless of basis of water right and that a water right does not extend to waste or unreasonable use of water. SGMA provides that "[g]roundwater management pursuant to this part shall be consistent with Section 2 of Article X of the California Constitution." (Water Code § 10720.5.) Under SGMA, GSAs are required to develop GSPs to ensure the subbasin is operated within its sustainable yield. DWR's SGMA regulations require GSAs to quantitatively define undesirable results for the subbasin, which in turn define sustainable yield. (Cal. Code Regs., tit. 23, §§ 350 et seq.) In addition, the State Water Resources Control Board concluded in a report of referee to the Monterey Superior Court that "[a]lthough SGMA does not directly determine or alter surface or groundwater rights, the definition of undesirable results and sustainable yield developed by groundwater sustainability agencies for their basin would likely assist a court or the [State Water Resources Control] Board in making findings necessary for a determination of water rights or demonstration of injury to water right holders.[fn] (Wat. Code § 10720.5.)." (*Salinas Valley Water Coalition v. Monterey County Water Resources Agency et al.*, Monterey County Superior Court, Case No. 17CV000157, Report of Referee by State Water Resources Control Board (2019), p. 31.)

In *Stanford Vina Ranch Irrigation Company v. State Water Resources Control Board* (2020) 50 Cal.App.4th 976, the court determined that senior surface water right holders did not possess rights to use water inconsistent with regulations established by the State Water Resources Control Board designed to protect the instream fishery. This case is controversial and any extension of its holding, including applying its holding in a groundwater context, would likely

also be controversial. Nonetheless, GSAs wishing to defend allocation decisions may analogize to this case given GSAs hold broad legislative powers to develop and implement GSPs to avoid undesirable results. It is possible that a court could determine that the overlying and appropriative right holders do not have the right to pump groundwater in a manner that causes undesirable results or is inconsistent with the GSP. *Stanford Vina* concluded that "since there was and is no property right in an unreasonable use, there has been no taking or damaging of property by the deprivation of such use and, accordingly, the deprivation is not compensable." (*Stanford Vina Ranch Irrigation Company v. State Water Resources Control Board* (2020) 50 Cal.App.5th 976, 1007.)