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Complex Interactions Between Federally Reserved Rights to Groundwater and California's Groundwater Regime Highlight Importance of Coordinating with Tribes Under State's Sustainable Groundwater Management Act

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COMPLEX INTERACTIONS BETWEEN FEDERALLY RESERVED RIGHTS TO GROUNDWATER AND CALIFORNIA'S GROUNDWATER REGIME HIGHLIGHT IMPORTANCE OF COORDINATING WITH TRIBES UNDER STATE'S SUSTAINABLE GROUNDWATER MANAGEMENT ACT

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I. TRIBAL PARTICIPATION IN THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT

In 2014, the California Legislature passed the Sustainable Groundwater Management Act (SGMA), which implements a comprehensive framework for the regulation of groundwater in California. SGMA relies on local agency leadership to achieve "sustainable groundwater management," defined as the management and use of groundwater without an "undesirable result," such as unreasonable reduction of groundwater storage, degradation of quality, seawater intrusion, or land subsidence. Under the new law, certain high- and medium-priority basins will be required to adopt sustainable groundwater management plans the end of January 2022, and to attain sustainable groundwater management by 2040. While SGMA contains several provisions pertaining to tribes, it raises many more questions than it answers about how the new regulations will affect the more than one hundred federally recognized Indian tribes that reside in California.

Much of the uncertainty about SGMA's impact on tribes and vice versa stems from the fact that federally recognized tribes are sovereign entities that often fall outside of state regulation; tribes have a government-to-government relationship with the U.S. federal government. This means that, with regard to their federal water rights, federal tribes can effectively ignore SGMA if they so choose, which poses potential problems for the state and local sustainability

agencies, because sustainably managing an aquifer generally requires managing the total amount of water removed from the aquifer by all users. If a local sustainability agency cannot control — or doesn't even know — the amount of groundwater used by a tribe, it will be more difficult for that agency to manage its groundwater basin. As a result, SGMA seeks to pull federal tribes into local considerations of groundwater management and conservation; it provides that tribes "may voluntarily agree to participate in the preparation or administration of a groundwater sustainability plan" and are "eligible to participate fully in planning, financing, and management." Still, the Act does not — and cannot — that federally recognized tribes participate or in fact do anything at all.

The question of whether to participate in the SGMA process raises complex issues for tribes, and since the first deadlines under SGMA have not yet passed, the tribes appear to be in a "wait and see" mode — they are waiting to see how the process takes shape and plays out before deciding whether to participate. To date, no tribe has fully begun participating in a local SGMA process of developing a sustainability agency or groundwater plan. In part, this is likely the result of tribes' concerns that participating in the SGMA process — a state law to which they are not subject — will impinge on their sovereignty. Tribes may not want to be forced to report to the state; instead, they wish to preserve their government-to-government relationship at the federal level. For similar reasons, tribes may be hesitant to share their groundwater data and knowledge about the hydrogeology of any aquifers underlying their reservation. Moreover, even if tribes are interested in coordinating with local agencies or the state, they may lack institutionalized mechanisms for doing so, because historically many of them have coordinated with federal, rather than state, agencies. Collaborating with local entities under a state law may be an uncomfortable posture and new procedure for tribes. Thus, for those tribes who may be interested in participating, establishing a formal relationship between tribes and the state that doesn't entail the state regulating tribes will be a major challenge moving forward.

But if tribes opt not to participate in the SGMA process, what does that mean for the basins that they overlie? It could mean future havoc for basin plans if tribes assert federally reserved water rights after the basin plans are established. SGMA guidance documents have appropriately emphasized how to contact and invite tribes to participate, but they have not named the risks of not including tribal participants. If a tribe asserts a federally reserved water right after a basin plan has been established, it may render the basin plan ineffective by bringing the total amount of groundwater extracted from the basin above the amount required to achieve "sustainable groundwater management."

The potential for this situation to arise is the result of the nature of the water rights that federal tribes living on reservations may be able to claim. Under the *Winters* doctrine, when Congress reserves land for an Indian reservation, Congress also reserves water rights for the tribes living on the reservation. Those tribes have a right to the amount of water necessary to fulfill the purposes for which the reservation was created, which can include the amount needed to farm all the "practically irrigable acreage" on the reservation. That "reserved" water right is a federal right and thus usually paramount to rights later perfected under state law. As a result, unlike holders of state water rights, tribes with

federal water rights need not follow the reasonable and beneficial use doctrines that are part of the California water law regime for both groundwater and surface water rights. Nor do they lose the water right from non-use — federally reserved water rights are not subject to abandonment, so tribes may come forward and assert a water right at any time — including potentially after a basin plan has been established under SGMA.

The concern that tribes will disrupt existing water allocation regimes by suddenly claiming or exercising their reserved water rights is not new, however. Historically, tribal claims of federally reserved water rights were made with respect to surface water, which presented complex issues for the appropriative rights systems employed in western states like California because they affected the priority of existing rights. Whereas priority date under the state system is based on the date when the appropriation was initiated, federally reserved water rights have a priority date that goes back at least as far as the date on which the reservation lands were set aside. As a result, a tribe claiming a federally reserved right to surface water today could bump down in priority all the rights established after the date on which the reservation was created.

II. POTENTIAL INTERACTIONS BETWEEN FEDERALLY RESERVED GROUNDWATER RIGHTS AND CALIFORNIA'S GROUNDWATER REGIME

Similar problems arise in the context of groundwater, which recent case law, including the Eastern District of California's decision in *Agua Caliente*, suggests can also be the subject of federally reserved water rights. California manages state groundwater rights under a water rights system that merges three different types of water rights — overlying, or correlative rights; appropriative rights; and prescriptive rights. The California Supreme Court first recognized correlative and appropriative rights to groundwater in 1903 in the landmark case *Katz v. Walkinshaw.* Under this groundwater rights regime, users whose land lies above an aquifer are vested with overlying rights, which allow groundwater extraction for use on the overlying land subject only to the limitation that the amount extracted is reasonable for use on the overlying parcels compared to the demands of other overlying users. Appropriative rights are established according to a first-in-time, first-in-right system and relate to groundwater extraction for use on property that does not overlie the aquifer. These rights are junior to overlying rights — appropriators may only use "surplus" water, or water in excess of what is required by overlying users and that will not result in aquifer overdraft. Finally, prescriptive rights can be created by the open and adverse continuous use of groundwater in an overdrafted basin for the prescriptive period, which in California is five years. Thus appropriative rights can shed their junior status as compared to overlying rights if they become prescriptive rights through this process. How federally reserved rights to groundwater will interact with or fit in to this complex state groundwater rights system remains largely an open question.

If the tribe's land overlies a groundwater source, it may begin pumping under the correlative rights doctrine, making a claim to the correlative right of "reasonable use" under state law. Under that state law correlative right, if there is insufficient water to meet the demands of all overlying landowners, then each

must reduce their use in relation to the other overlying landowners.

If, however, the tribe claimed their groundwater right was a federally reserved right, three potential scenarios could occur. First, if the date of creation of the tribe's groundwater right preceded perfection of all other overlying groundwater rights, the tribe's right would probably be absolute and superior, rather than correlative, to others. Granting a tribe its entire allotment in this scenario would likely follow the California Supreme Court's rule for coordinating state surface water appropriative and riparian rights, which provides that appropriative rights supersede subsequent riparian rights and vice versa. Riparian surface water rights, like overlying groundwater rights, are correlative. As a result, the tribe's federally reserved right could effectively preempt the state water rights of other users, thus making sustainable groundwater management more difficult, especially in times of scarcity or if the tribe's water right is large relative to the total amount of water available in the basin.

In a second scenario, all overlying groundwater rights could predate a tribe's reserved right. Under this scenario, because federal reserved rights cannot interfere with prior state water rights, the tribe's right would likely be satisfied after the overlying rights, similar to a state appropriative groundwater right.

Finally, in a third scenario, the date of the creation of the tribe's groundwater right could fall between the dates when other overlying groundwater rights in the basin vested. In this scenario, three potential outcomes exist for coordinating overlying users' rights with the tribe's reserved right to groundwater: (1) the tribe's right might be enjoyed in its entirety, preempting all subsequent overlying users, with all overlying users (including those predating the tribe's reserved right) sharing in shortage, which means all overlying users reduce use proportionally if there is not enough water to meet their total demand; (2) because some overlying rights precede the tribe's reserved right, the tribe's right might be satisfied after all overlying rights; or (3) the tribe's right might, together with other overlying state groundwater rights holders, reduce use proportionally in times of shortage. This scenario – where a tribal reserved right is created subsequent to some overlying groundwater rights but before some others – mimics a scenario left unresolved in California surface water law when a surface water appropriative right is both predated by and followed by separate correlative, riparian rights to the same waterbody. According to the authors of one water law casebook, in this surface water situation, "[i]f you cannot find a solution [to this quandary], do not worry. Neither can we. To our knowledge, moreover, no court has ever confronted this Gordian knot in a published opinion. This issue typically does not arise because title to most private land in California was acquired before rival appropriative water rights were perfected." Because tribes like the Agua Caliente Band of Cahuila Indians, located in Southern California's Coachella Valley, may hold reserved rights to groundwater with priority dates around the time when overlying groundwater rights first vested – the Agua Caliente's *Winters* right to groundwater would date to 1876 – this "Gordian knot" might become more common as tribal reserved rights to groundwater are increasingly recognized.

In addition, tribes sometimes pump water from an aquifer and deliver it to lands that do not overlie that aquifer. Under California groundwater law, this

situation would make them state law appropriators. If the tribe claimed a federal reserved right to groundwater in this distant aquifer, however, their reserved right would probably function like reserved rights to surface water: the tribe's groundwater right would be fulfilled before appropriators with priority dates after the establishment of their reservation and after appropriators with earlier priority dates. Meanwhile, a tribal reserved right to groundwater that it uses on lands that do not overlie an aquifer might be fulfilled subsequent to all overlying groundwater rights, like state appropriative rights, or in conjunction with overlying groundwater rights as described above.

III. CONCLUSION

These complexities highlight the importance of aboriginal rights to groundwater — tribal reserved rights with priority dates of time immemorial. Aboriginal groundwater rights with a priority date of time immemorial would almost certainly resolve the legal headaches described above, with tribal rights trumping all state groundwater rights. Another post in this series discusses the aboriginal rights claim in the *Agua Caliente* case.

Ultimately, under either the correlative rights or the *Winters* doctrines, a federally recognized tribe on a reservation overlying an aquifer could claim a right to the groundwater at any time, even if it has not previously been pumping. With a claim under the state correlative rights system, this would likely pose a fairly manageable problem for groundwater managers, since the tribe's right would be limited by what is reasonable use in relation to other overlying users. But an absolute, non-correlative, federally reserved claim to groundwater might frustrate basin plans and the established groundwater rights regime. This is not to say that tribes are in any way at fault for unsustainable groundwater management in California; in fact, aquifer overdraft throughout the state is largely the result of historic non-enforcement of the groundwater rights regime except through litigation and adjudication in some basins. Rather, the intersection of tribes' federally reserved rights to groundwater and the California groundwater regime engenders extreme legal complexities and uncertainty that may have unintended consequences for groundwater management under SGMA.

Further uncertainty for basin managers might arise from questions like: if a reservation both overlies an aquifer and is crossed by surface water, may a tribe decide which water resource to make the subject of its federally reserved right (i.e., whether to claim a federally reserved right in the surface water or the groundwater)? Can it make a claim to some of both the surface water and the groundwater? If a reservation overlies two different aquifers, may a tribe claim a federally reserved right in one and a correlative right in the other? Given that courts have only somewhat recently begun to find federally reserved rights in groundwater, these and many other questions about the interaction between California's groundwater rights system and federally reserved groundwater rights remain unresolved. In the end, it is in the interest of state and local agencies to attempt to overcome hurdles like tribes' concerns about sovereignty in order to coordinate with them on groundwater to ensure that SGMA can be implemented effectively while respecting tribal water rights.

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