

GROUNDWATER LAW ON THE CENTRAL COAST

AN EDUCATIONAL FORUM
SPONSORED BY THE
SAN LUIS OBISPO COUNTY
WATER RESOURCES
ADVISORY COMMITTEE

APRIL 4, 2018

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SLIDESHOW A PROJECT OF

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HINT!

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Or proceed through presentation and restart audio files as desired by clicking the arrows and speaker icon at the bottom left of slides.

SLO COUNTY WATER
RESOURCES ADVISORY
COMMITTEE
**SPECIAL
PRESENTATION**

WRAC Chairperson: *Andy Pease*
City of San Luis Obispo

WRAC Secretary: *Ray Dienzo*
SLO County Public Works Staff Engineer

Moderator: *Linda Chipping*
Former WRAC Chairperson, San Luis Coastal RCD

Special Thanks to Aaron Floyd, City of San Luis Obispo and the
WRAC Water Law Forum Subcommittee including
Andy Pease, Debbie Peterson and David Chipping

Purpose

To provide critical legal information to the community and local decision-makers on groundwater management, with the overall goal of supporting regional water resilience, cooperation, and fairness. Forum is informational and educational only. WRAC has invited guest speakers with expertise in water law to share with us their interpretations of the Sustainable Groundwater Management Act (SGMA) and California water law, in general.

All opinions expressed by forum speakers are their own and do not reflect the views or opinions of the County or County staff.

Views and opinions of our guest speakers are provided for educational and informational purposes only and should not be construed as legal advice or an offer to provide legal services on any subject matter.



FORUM SPEAKERS

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TOPICS OF DISCUSSION

01

JURISDICTION OF
THE STATE
WATER BOARD

02

WATER RIGHTS

03

GROUNDWATER
MANAGEMENT &
THE SUSTAINABLE
GROUNDWATER
MANAGEMENT ACT

04

ADJUDICATION

05

THE STATE'S ROLE
UNDER THE
SUSTAINABLE
GROUNDWATER
MANAGEMENT ACT



JURISDICTION OF THE STATE WATER BOARD

Led by Nicole Kuenzi



JURISDICTION OF THE STATE WATER BOARD

PERMITTING AUTHORITY

- California operates under a hybrid system of water rights
 - Surface Water – Riparian and Appropriative water rights
 - Groundwater – Overlying, Appropriative, and Prescriptive water rights
- State Water Board (SWB) Permitting Authority
 - Extends to – Surface water and Post-1914 Surface water diversions, not pursuant to a Riparian right
 - Does not extend to – Percolating Groundwater, Riparian rights, or Pre-1914 Appropriative water rights



JURISDICTION OF THE STATE WATER BOARD

OTHER AUTHORITIES

- To Prevent Wasteful and Unreasonable Use of water – Applicable to all water rights
- Protect Public Trust – Reserved interest of the public in certain types of uses, primarily in-stream uses related to navigation, fishing, recreation, and other types of ecological interests
 - Public Trust Doctrine holds that no one can acquire a vested property right to divert water in a manner that harms public trust uses where protecting those uses would be feasible
 - Directly limited to Surface water with possible exceptions when Groundwater is tributary to Surface water and extractions can impact those uses



JURISDICTION OF THE STATE WATER BOARD

AUTHORITY

- Certain Disputes – State Water Board has concurrent jurisdiction with Court of Law
 - Waste and Unreasonable Use
 - Priority of rights
 - Public Trust interests
- New and Extended Water Board Authorities under the Sustainable Groundwater Management Act (SGMA)
 - Reporting
 - Intervention: Declaring “Probationary” status, Establishing interim plans
 - Enforcement



JURISDICTION OF THE STATE WATER BOARD

UNDERFLOW AND GROUNDWATER: SUBTERRANEAN STREAMS

- Percolating Groundwater outside jurisdiction of SWB except as pertains to Waste and Unreasonable Use and Public Trust
- Subterranean Streams – Water under the surface of the ground, flowing in a known and definite channel; Treated as Surface water
 - Four Part Test
 - Subsurface channel must be present
 - Channel must have relatively impermeable bed and banks
 - Course of channel must be known or capable of being determined
 - Water must be flowing in the channel
 - Test doesn't address the interconnection of subterranean streams and Surface water or Groundwater and Surface water



JURISDICTION OF THE STATE WATER BOARD

UNDERFLOW AND GROUNDWATER: UNDERFLOW

- Underflow is not defined in the Water Code
- Underflow as used in historical court opinion
 - Surface stream that is subterranean
 - Subterranean stream that is closely interconnected with surface portion of stream immediately under surface – a type of subterranean stream
- Considered a common source, correlatively shared with Surface water riparian rights and Appropriative water rights



JURISDICTION OF THE STATE WATER BOARD

GROUNDWATER RECHARGE PROJECTS

- Diverting Surface water to underground storage subject to SWB permitting
 - Existing permit change to allow for diversion to underground storage
 - New appropriation of high flow events diverted to underground storage
 - Exception – Pre-existing pre-1914 water right changed and used to divert water to underground storage and to subsequent beneficial use does not need formal approval as long as change doesn't injure any other water users
- SWB Considering – What is high flow? How can it be collected in a way which is protective of other water users and wildlife?
- State streamlining short-term, temporary permits for peak flow events while standard permitting process is on-going
- Important to stakeholders that regulation of Groundwater occur at local level with SGMA



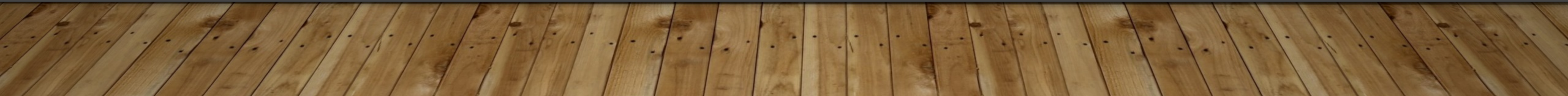
WATER RIGHTS

Led by Wayne Lemieux



WATER RIGHTS

BASIC TYPES OF
GROUNDWATER RIGHTS



GROUNDWATER RIGHTS

- Overlying Right – Right of a property owner to pump water from a basin under the property owner’s land for use on the land
- Appropriative Right – Right of someone to pump from a basin who is not an overlying owner in surplus of the needs of the overlying owner
 - Property owner whose land is not overlying basin
 - Property owner with land overlying basin but not using water on land overlying the basin
- Adverse Right – “Appropriator” who pumps water in excess of the surplus needs of the overlying owner
- Prescriptive Right – What accrues when “appropriator” pumps water through adverse use in excess of surplus water for 5 continuous years



Note: Audio crackle is part of original recording.

GROUNDWATER RIGHTS

- Federal Reserved Water Rights – When the United States sets aside land (for reservations or public lands), there is included an implied reservation for enough water to fulfill the purposes for which the land is set aside
- Pueblo Right – Spanish, then Mexican water rights given to pueblos; San Diego, Los Angeles and San Francisco adjudicated with pueblo rights

Eddy v. Simpson 3 Cal. 249, 58 Am.Dec. 408 (1850)

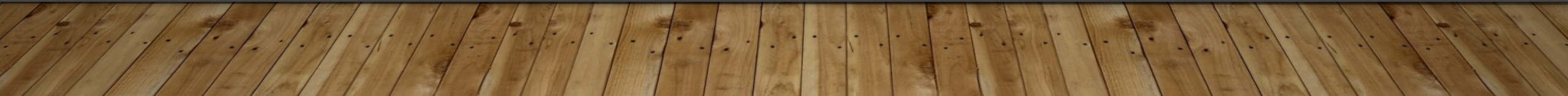
First CA water rights case, based on Germanic or Welsh mining laws

Rights formed by judicial decree, not benefitted by careful analysis of legislature



WATER RIGHTS

CONCEPTS



CONCEPTS

Correlative Right – Peculiar to overlying owners;
When basin is being pumped beyond its yield, all must
reduce pumping a correlative amount

Reasonable and Beneficial Use – California
Constitutional basis, Article 10, Section 2; No one has a
right to wasteful or inefficient use of water, regardless
of underlying water right



WATER RIGHTS HISTORIC USE

- Not a legal term; Measurement of water use over a reasonable period of time
- Urban use versus Agricultural use
- GSAs will provide determination in cut-back disputes
- Component of a water rights analysis
 - What five years to determine prescriptive rights?
 - Court identifies a specific time period, usually prior to initiation of lawsuit
 - SGMA requires that no pumping after 2015 can be considered as part of five-year baseline
 - GSAs and Courts will have latitude to determine time period
- Courts must adhere to CA water rights when implementing a physical solution, an equitable resolution of competing demands to a single supply which prohibits waste and unreasonable use
- GSAs form process to look at each aspect of water rights and use, especially in historical context



WATER RIGHTS

CONSERVATION

DEVELOPED WATER

RETURN FLOWS

WATER BANKING

CONSERVATION AND WATER RIGHTS

- Conservation through statutes, use of recycled water and pumping reductions
- Usufructuary Right – The right to use water, not actual ownership of it; If you don't use it, you don't have a right to it
- Developed Water – Water which wouldn't exist without the efforts of someone; Generally, those who spend the money to develop the water, get the water
 - Water stored behind dams and in reservoirs
 - Water pumped, diverted, or channeled in aqueducts



CONSERVATION AND WATER RIGHTS

RETURN FLOW

- Water which returns to surface or groundwater after human use
- Imported water stored in the ground still belongs to City of LA, who imported it
 - *City of Los Angeles v. City of San Fernando, 14 Cal.3d 199 (1975)*
- Glendale pumped LA's imported water but LA retained rights to the return waters
 - *City of Los Angeles v. City of Glendale, 23 Cal.2d 68 (1943)*
- Other return flows: Treated wastewater, irrigation tailwater, washing, industrial uses
- Consider how water percolates and inevitable losses



WATER BANKING

- **Accounting of water imported, stored or undelivered which is intended for future use or transfer**
- **Consider where water percolates and its future availability, water quality, over-saturation of nearby root zones, subsidence due to extraction**
- **Banked water floats, native water takes priority**
- **GSA's will determine protocol for banking and extracting**



WATER RIGHTS

SELLING RIGHTS

CONJUNCTIVE USE

WATER TRANSFERS

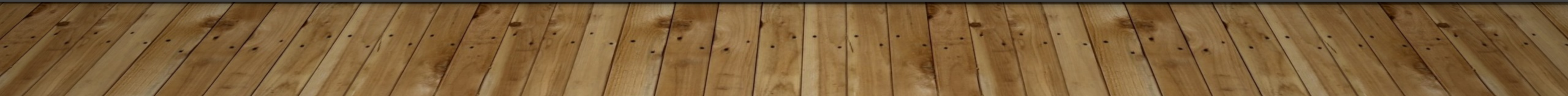
POSSESSION AND TRANSFERS

- Buying and Selling Rights – Typically adjudications and GSAs control
 - Water Master – Given powers to oversee transfers; Repository of data
 - Generally approve water transfers
 - Generally prohibit water exportations
- Conjunctive Use – Coordinated management of all sources of water to maximize sufficient yield, including banking of surplus waters; SGMA will allow for development of necessary accounting measures which will facilitate effective conjunctive use in basins
- **Transfers**
 - **Intra-basin transfers and banking – Prove it to stop it**
 - **Exportations out of basin – Prove it to do it**
- State to import GSA accounting structures to streamline permitting process for conjunctive use projects



GROUNDWATER MANAGEMENT & THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT (SGMA)

Led by Stephanie Osler Hastings



SUSTAINABLE GROUNDWATER MANAGEMENT ACT

- Applies to all percolating groundwater in the State
- Specific requirements for “Priority” basins; Medium and High priorities
- Priority Basins – Designated by the Department of Water Resources (DWR) as requiring management; Required to form a Groundwater Sustainability Agency (GSA) and a Groundwater Sustainability Plan (GSP)
- Other Basins – Still subject to SGMA but not required to meet above requirements; May voluntarily adopt a plan or undertake other management techniques



[Link to text of Groundwater Sustainability Act](#)

GROUNDWATER MANAGEMENT & THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT (SGMA)

CAN COUNTIES, CITIES
OR WATER DISTRICTS
OVERRIDE GSAS?

CAN OTHER AGENCIES OVERRIDE GSAs?

- Counties and cities may use their police powers to manage groundwater
- Under SGMA, GSAs may do the exact same thing
- SGMA powers are found in addition to, and do not conflict with, any powers an existing public agency already has
- Concurrent jurisdiction; Preferably worked out between the agencies as part of joining agreement; GSAs may have preemption
- Decisions can be challenged



GROUNDWATER MANAGEMENT & THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT (SGMA)

SAFE YIELD,
SUSTAINABLE YIELD,
AND SGMA'S
UNDESIRABLE RESULTS

SAFE YIELD AND SUSTAINABLE YIELD

- Safe Yield versus Sustainable Yield
- Safe Yield – Quantity of water that can be reliably extracted from a basin over a long-term period annually; Has to reflect the long-term hydrology of the basin; Considers temporary surplus water
- Temporary Surplus – Quantity of water that can be extracted in excess of safe yield without causing undesirable results
- Sustainable Yield – Essentially the same as safe yield; Management of a basin that avoids undesirable results from SGMA statute; Must take into account the effects on adjacent or related surface water supplies



SGMA'S UNDESIRABLE RESULTS

- Overdraft/Chronic lowering of water levels
- Water quality degradation
- Seawater intrusion
- Adversely affecting surface water
- Reduction of groundwater storage
- Subsidence which interferes with surface land uses
- GSAs must establish management techniques to avoid significant, adverse impacts



GROUNDWATER MANAGEMENT & THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT (SGMA)

POWERS OF A
GROUNDWATER
SUSTAINABILITY
AGENCY (GSA)

CAN SGMA CHANGE
GROUNDWATER
RIGHTS?

GSA POWERS AND WATER RIGHTS AFFECTED BY SGMA

- Required to adopt Groundwater Sustainability Plan (GSP)
- Given comprehensive management powers, including ability to require metering, monitoring, and accounting
- Can charge fees and put limitations on well drilling, placement, and pumping
- Exception: GSAs do not adjudicate or alter water rights
- GSA must take individual water rights into consideration when creating GSP
- Litigation Considerations: What is the measure of your water right compared with the imperative of the GSA to create a plan for sustainability in the basin? Will you get more from a judge? Did the GSA exceed their authority? If you're over a basin in overdraft, it's possible that your correlative right is less than what you're currently pumping.



GROUNDWATER MANAGEMENT & THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT (SGMA)

CAN PUMPERS GOVERN
THEMSELVES AND/OR
CAN THEY BE ON A GSA?

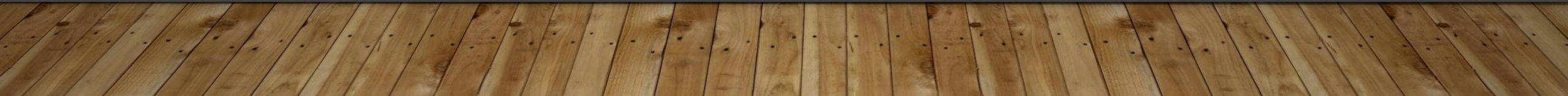
CAN PUMPERS GOVERN THEMSELVES AND/OR CAN THEY HAVE A SEAT ON A GSA?

- Requirements are put on the GSAs and they, therefore, are the managers
- Provisions make stakeholder participation available with notice and hearing requirements
- Allows for stakeholder committees to provide input on the development of the GSP
- Individual pumpers subject to the management of the GSA
- Private landowners can be appointed by a public agency to a seat on the GSA



GROUNDWATER MANAGEMENT & THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT (SGMA)

SUB BASINS IN
OVERDRAFT



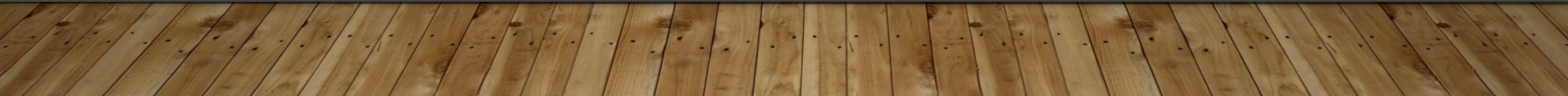
SUB BASINS IN OVERDRAFT

- Subterranean flow must be considered
- Smallest basin described by Department of Water Resources (DWR) can include several smaller sub basins
- In considering whether to designate a basin “Probationary”, DWR will take into account if there’s an area of the basin with a plan in place likely to achieve sustainability
 - Area with plan may be excepted from the probationary designation
 - State will then work with area of basin which needs to catch up



GROUNDWATER MANAGEMENT & THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT (SGMA)

SGMA AND PRIVACY



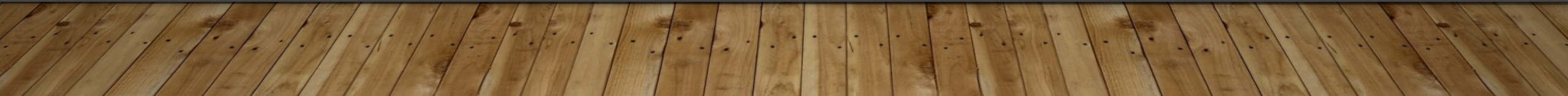
SGMA AND PRIVACY

- SGMA requires production of an abundance of information from every pumper in a basin
- Some pumpers may believe that information is proprietary and/or protected by trade secret laws
- Ways to evaluate disclosure: Same requirements and exceptions as Public Records Act (PRA)
- GSA will hold all information but only disclose to public as required by PRA at the advice of GSA legal counsel
- Some Exceptions: Trade secrets, geophysical information (groundwater well info), information that does not advance the public interest
- Within litigation, data may be discoverable



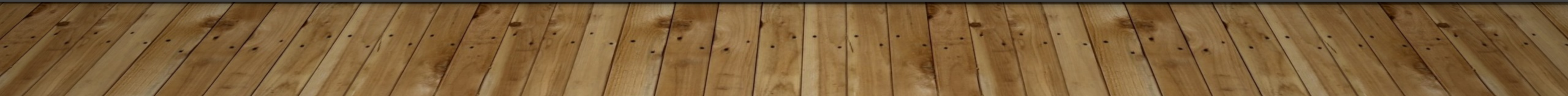
ADJUDICATION

Led by Stephanie Osler Hastings



ADJUDICATION

ADJUDICATED BASINS
AND SGMA



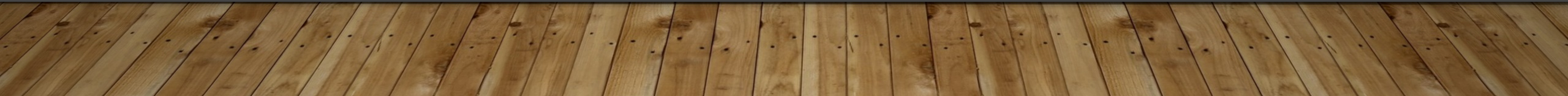
ADJUDICATED BASINS AND SGMA

- Formerly adjudicated basins, as identified in the SGMA statute, are exempt
- There are conflict areas where the adjudicated boundary doesn't match the Dept. of Water Resources (DWR) basin boundary – Fringe Areas
- Fringe Areas Options: Adopt alternative plan as a mechanism to become incorporated into the prior adjudication; Amend the prior adjudication; Establish GSA for fringe area
- Future adjudicated basins will not be declared “Probationary”



ADJUDICATION

STREAMLINED
ADJUDICATIONS



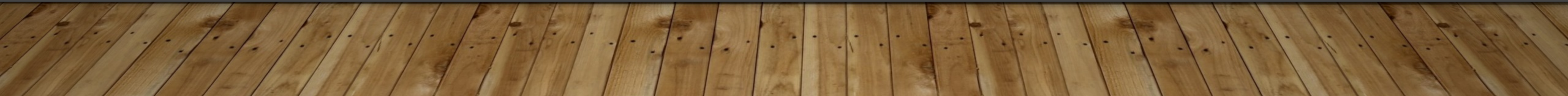
STREAMLINED ADJUDICATIONS

Post-SGMA statute has created mechanisms for streamlining adjudications, making them faster, more efficient, and less expensive than past comprehensive groundwater litigation and adjudications.



ADJUDICATION

FUTURE
ADJUDICATIONS AND
THE POWER OF JUDGES



FUTURE ADJUDICATIONS AND THE POWER OF JUDGES

- Procedurally – Court must be coordinating the process of adjudication with what’s going on with SGMA implementation by monitoring and receiving information from DWR
- Substantially – Court cannot adjudicate a basin in a way which impairs sustainable groundwater management
- Cannot use litigation to avoid SGMA
- Court must make finding that it is not interfering with sustainable groundwater management
- Court has ability to stay litigation one year (or longer for good cause) while GSA is preparing its plan
- Court has significant interest in letting technical record be developed by GSA and then refer to it as it undertakes its analysis of water rights



FUTURE ADJUDICATIONS AND THE POWER OF JUDGES

- Only courts can adjudicate water rights e.g. by declaring the nature of the water right, the extent of the right, by quantifying the right, or by adopting a physical solution
- GSA impartial groundwater yield study, paid for by all over basin, can be used in litigation to cut down on costs, reduce conflict over experts, and speed up adjudication process
- Adjudication statute requires discovery of information as component of initial phase
- Streamlined adjudication process strongly encourages stipulated judgements – an agreement or physical solution between parties (more than 50% of parties and more than 75% of production) which may settle case and/or shift burden to opposing parties



THE STATE'S ROLE UNDER THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT

Led by Nicole Kuenzi



THE STATE'S ROLE UNDER THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT

DEPARTMENT OF
WATER RESOURCES

AND

STATE WATER BOARD

DEPARTMENT OF WATER RESOURCES

- Regulatory agency
 - Reviews groundwater sustainability plans
 - Provides technical and funding support for GSAs
 - Assists GSAs in developing plans and understanding their basins



STATE WATER BOARD

- Enforcement and Intervention
 - Pumpers in basin but outside jurisdiction of GSA must report extraction data directly to SWB; Data can be used to inform possible future area plan
 - SWB can designate basin or portion of basin as “Probationary”
 - May create interim plans for probationary basins until local agency plan is in place and they regain control
 - Basin can be designated “Probationary” while it’s in adjudication; Processes can occur simultaneously
 - SWB may gather and create baseline yield information for basin and charge fees to do so
 - SWB prioritizes where to intervene based on available resources



Q & A



QUESTION #1



QUESTION #2



EXTEND MEETING



QUESTION #3



QUESTION #4



QUESTION #5



QUESTION #6



QUESTION #7



QUESTION #8



QUESTION #9



THANK YOU!

