

*California Law at the Intersection of Water Use and Land Planning:
A Report for the California Office of Planning and Research*



Michelle Firmacion & Ellis Raskin

Public Law and Policy Work Group

University of California, Hastings College of the Law

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I. EXECUTIVE SUMMARY

There are no laws in California that require coordination between land planners and water regulators. A local planning commission may approve a new subdivision even though there may not be enough water to supply the new development. Moreover, local water authorities and the Water Resources Control Board are under no obligation to provide water to developers if the developers do not hold title to a valid claim to water rights.

The following survey and report represents a first comprehensive attempt to surface laws that lie at the intersection of land management and water regulations, offering several recommendations for ways in which existing laws can be used to facilitate better coordination between land planners and water managers. These recommendations, contained in Chapters IV-VI, suggest:

- Redefining the “coordination” requirement of the conservation element in general plans to facilitate coordination;
- Applying the Groundwater Sustainability Management Act’s sustainability goals to facilitate coordination; and
- Utilizing well moratoria to facilitate coordination while limiting unsustainable growth.

This report also contains a summary of our methodology in Chapter II, a historical overview of the relationship between land use and water law in California in Chapter III, and a survey of existing laws and constitutional provisions that are relevant to both land use and water management in Chapters VII and VIII. We hope that this report will serve as a useful tool for lawmakers and regulators to help achieve water security and sustainability for future generations.

Michelle Firmacion and Ellis Raskin
Public Law and Policy Work Group
University of California, Hastings College of the Law

II. SUMMARY OF METHODOLOGY

The goal of this report is to provide a preliminary summary of California laws and regulations at the intersection between land planning and water use. We began our inquiry by surveying existing laws relating to land use and water management. During this process, we specifically sought out water laws that could be used to shape land use development and conversely, land use laws that could be deployed by planners to ensure the sustainability of California's water supply for future generations.

We also began our research by surveying existing scholarship about the relationship between land planning and water management. We soon discovered that many millions of pages have been written about water law, and millions more about land use law. However, little has been said about the ways in which existing laws can be used to align the efforts of land planners and water regulators.¹

Authors who have discussed this area of the law offer several interesting and compelling solutions. For example, some scholars have written about laws that require guaranteed water supplies before new developments can be approved,² some scholars have written about the need for a water element in general plans,³ some scholars have written about the relationship between groundwater management and land planning,⁴ and some

¹ For a historical overview of the relationship between these two disciplines, see Sarah Bates, *Bridging the Governance Gap: Emerging Strategies to Integrate Water and Land Use Planning*, 52 Nat. Resources J. 61 (2012).

² Lincoln L. Davies, *Assured Water Supply Laws in the Sustainability Context*, 4 Golden Gate U. Envtl. L.J. 167 (2010); Ellen Hanak, *Show Me the Water Plan: Urban Water Management Plans and California's Water Supply Adequacy Laws*, 4 Golden Gate U. Envtl. L.J. 69 (2010); Lincoln L. Davies, *Just A Big, "Hot Fuss"? Assessing the Value of Connecting Suburban Sprawl, Land Use, and Water Rights Through Assured Supply Laws*, 34 Ecology L.Q. 1217 (2007).

³ See Ryan Waterman, *Addressing California's Uncertain Water Future by Coordinating Long-Term Land Use and Water Planning: Is A Water Element in the General Plan the Next Step?*, 31 Ecology L.Q. 117 (2004).

⁴ See Janet Choy, *Before the Well Runs Dry: Improving the Linkage Between Groundwater and Land Use Planning*, by Water in the West (Stanford Woods Institute for the Environment & The Bill Lane Center for the American West) (April 2014).

scholars have written about the role that CEQA can play in aligning land planning and water management.⁵ This scholarship helped inform our own suggestions for ways in which existing laws can be used to coordinate the efforts of land planners and water managers.

After surveying existing literature as well as California statutes and cases relating to both water and land use, we identified statutes that we believed would be most useful for facilitating alignment between land managers and water regulators. We also included a brief summary of Article X, Section 2 of the California Constitution because it has served as a guiding principle for many land use and water management decisions over the last eight decades. This report does not contain an exhaustive list of every statute pertaining to water or land use law, but it is the first comprehensive survey of laws that lie at the intersection between land management and water regulation. Our survey also outlines the effects of these statutes and constitutional provisions on the development of public policy.

The statutes contained in this report are limited to California laws, and this report does not include federal laws that potentially lie at the intersection between water law and land use law (e.g. the National Environmental Protection Act or the Federal Public Trust Doctrine). Nor does this report include laws that regulate the discharge of pollutants into public waters (e.g. the Porter-Cologne Water Quality Control Act or the federal Clean Water Act).

We also included a summary of the historical development of water rights law in California. This historical summary emphasizes the ways in which trends in land development and land use law have influenced water law in California. By understanding the relationship between these two areas of the law, we hope that readers will understand existing common law (*i.e.*, non-statutory) water rights doctrines as well as the ways in which historic trends may lead to better coordination in the future.

Through our investigations, we discovered that land development always implicates water resource management. Land planners must always consider the ways in which future

⁵ See James G. Moose, *The Relationship Between Water Supply and Land Use Planning: Leading Cases Under the California Environmental Quality Act*, 4 Golden Gate U. Envtl. L.J. 27 (2010).

growth and development will impact the distribution and sustainability of water supplies. Likewise, both land planners and water managers must balance the economic, social, and aesthetic needs of humans against the need to preserve resilient and sustainable ecological resources. Therefore, this report outlines the ways in which California's constitution, statutes, and common law balance these competing interests through various laws that specify the ways in which land planners can use water resources.

III. A BRIEF HISTORY OF COORDINATION BETWEEN WATER RIGHTS AND LAND PLANNING IN CALIFORNIA'S LEGAL HISTORY

A. Introduction

Throughout the history of California, water laws have been shaped and fashioned by land use practices and the needs of landowners. Spanish missions, the Gold Rush, and rapid developmental sprawl have all influenced water policy in unique ways. California's first legislators assigned senior water rights to individuals who owned land adjacent to surface water. However, the need for water in land that was far from rivers and streams led to a system where landowners assert water rights by being the first to divert water from a source.

This chapter of our report outlines the history of the relationship between land use practices in California and California water law. It is impossible to capture the full complexity of California's colorful history in a few brief pages; indeed, this is by no means a complete or comprehensive account. However, the goal of this section is to provide an overview of the water laws that currently exist in California, the historical events that led to their development, and potential trends for the future.

B. Spanish and Mexican California: Pueblo Water Rights

When Spanish missionaries first arrived in Alta California, they encountered a dry, arid landscape prone to droughts and flash floods.⁶ Their experiences with this environment shaped the ways in which water was allocated and regulated.⁷ During this period, the Spanish Crown and the Mexican government would often deny requests for land grants if

⁶ See Kate A. Berry, *Values, Ideologies, and Equity in Water Distribution: Historical Perspectives from Coastal California, United States*, in *Searching for Equity: Conceptions of Justice and Equity in Peasant Irrigation*, (Rutgerd Boelens & Gloria Davila, eds.) (1998).

⁷ Kate A. Berry, *Water Use and Cultural Conflict in 19th Century Northwestern New Spain and Mexico*, 40 *Nat. Resources J.* 759, 765-66 (2000) ("When the missionaries arrived in Alta California, access to water frequently took precedent over access to land, similar to their settlement of other parts of northwestern New Spain.").

there was not enough water available to support the land.⁸ Once land was granted, landowners were required to build infrastructure necessary for irrigation within one year's time, and all citizens had a common obligation to repair ditches, drains, and reservoirs.⁹

During the Spanish and Mexican periods in California's history, water rights were tied directly to the needs of individuals living within boundaries of municipalities, or "pueblos" as they were known at the time. In 1789, the Spanish Crown instituted the "Plan of Pictic"¹⁰ to ensure that pueblos would have enough water for their residents.¹¹ The plan stated that pueblos had an inherent, superior right to water that flowed through land controlled by the pueblo, and municipal officials distributed water according to the needs of the citizens.¹² Under this system, the amount of water that a pueblo was allowed to take expanded over time according to the expanding needs of a growing population, such that the pueblo could always have the right to take water within the pueblo's territory, as long as there was sufficient supply to support the expanding community.¹³

Laws that regulated land development in the early nineteenth century also considered the availability of water supplies. In 1824, Mexico passed the Law of Colonization to facilitate the settlement of sparsely populated Alta California by allowing foreigners to settle in the northern frontier.¹⁴ However, lawmakers knew that water resources were scarce, and they were careful to limit unsustainable growth. Land grantees could receive only one league of irrigable land, but they could receive up to four leagues of land that could be cultivated in dry conditions and up to six leagues of grazing land.¹⁵

⁸ Michael C. Meyer, *Water in the Hispanic Southwest: A Social and Legal History, 1550-1850*, at 3-9 (1984).

⁹ Kate A. Berry, *Water Use and Cultural Conflict in 19th Century Northwestern New Spain and Mexico*, 40 *Nat. Resources J.* 759, 766 (2000)

¹⁰ Some sources refer to the Plan as the "Plan of Pitic." See, e.g., Eric B. Kunkel, *The Spanish Law of Waters in the United States: From Alfonso the Wise to the Present Day*, 32 *McGeorge L. Rev.* 341, 357 (2001).

¹¹ Peter L. Reich, *Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850*, 69 *Wash. L. Rev.* 869, 886 (1994).

¹² See Peter L. Reich, *Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850*, 69 *Wash. L. Rev.* 869, 871 (1994) (describing this system of distribution as a "communal water system").

¹³ Wells A. Hutchins, *Pueblo Water Rights in the West*, 38 *Tex. L. Rev.* 748, 761 (1960) ("[I]n the process of growth and expansion, the founders of the pueblo carried with them the torch of priority so long as there was water to supply the lifeblood of the expanded community.").

¹⁴ David J. Weber, *The Mexican frontier, 1821-1846: the American Southwest under Mexico*, University of New Mexico Press (1982).

¹⁵ Kate A. Berry, *Water Use and Cultural Conflict in 19th Century Northwestern New Spain and Mexico*, 40 *Nat. Resources J.* 759, 771-72 (2000).

The legacy of pueblo water rights still lives on in California.¹⁶ Cities and towns that can trace their origin back to a Spanish or Mexican pueblo have paramount rights to the waters of natural watercourses and interconnected groundwater basins within their municipal boundaries.¹⁷ In the year 2000, the Supreme Court reaffirmed in *City of Barstow v. Mojave Water Agency* that “[p]ueblo water rights apply to the municipal successors of the Spanish and Mexican pueblos.”¹⁸ These cities may claim all water necessary for growth and development to which they are entitled under a pueblo right, notwithstanding competing claims from other users.¹⁹ Pueblo rights holders are also exempt from certain permitting and fee requirements for the use of water within municipal boundaries.²⁰ Today, the legacy of pueblo rights is evidence of the enduring value of water resources discovered by the first settlers in California. They are also evidence that Californians have always been acutely aware of the limited nature of water in our state and the need to create laws that ensure sustainable use for future generations.

C. The Dawn of Statehood: Adopting the Common Law of England and Riparian Water Rights

Much of California’s early history was shaped by the Gold Rush, and the history of California water law is no exception. In the early days of statehood, settlers and miners resolved competing claims to water according to local customs.²¹ Water laws were still

¹⁶ Existing water rights in Alta California were preserved in the Treaty of Guadalupe Hidalgo, which provided that existing property rights “shall be inviolably respected.” Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., art. 8, 9 Stat. 922, 929-30 (1851).

¹⁷ For a discussion of the development of pueblo rights in California, see *City of Los Angeles v. City of San Fernando*, 14 Cal. 3d 199, 210 (1975). However, the Supreme Court also held that pueblo rights do not extend to groundwater basins that are not hydrologically connected to surface waters within the municipal boundaries of pueblo. *Id.* at p. 251-52.

¹⁸ *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1256 n.11 (2000).

¹⁹ John H. Minan, *The San Diego River: A Natural, Historic, and Recreational Resource*, 41 San Diego L. Rev. 1139, 1176 n.24 (2004).

²⁰ *California Farm Bureau Fed’n v. State Water Res. Control Bd.*, 51 Cal. 4th 421, 431, 247 P.3d 112, 119 (2011), *as modified* (Apr. 20, 2011).

²¹ Roderick E. Walston, *California Water Law: Historical Origins to the Present*, 29 Whittier L. Rev. 765, 765-67 (2008); *see also Jennison v. Kirk*, 98 U.S. 453, 460-61 (1878) (recognizing the use of local customs of miners in adjudicating water disputes in California). By the 1860s, most gold near the surface of streambeds had been mined, so gold miners used

relatively undefined during this period, and courts would often defer to local customs and the needs of miners.²² In general, the miners utilized a “first in time, first in right” system, but multiple miners could take water from a river or stream if the subsequent use did not harm the original rights holder.²³

Although American settlers preserved the pueblo rights and often deferred to mining customs, they also formally adopted the riparian system of water laws popular in the eastern United States, a system that was familiar and well known to many of the state’s first legislators.²⁴ When California entered the Union in 1850, the Legislature formally adopted the common law of England as the system of law for California, which recognized a system of riparian water rights.²⁵ Under the riparian rights system, landowners have the right to the reasonable use of water that flows across or adjacent to their land.²⁶ Riparian rights are premised upon “parity rather than priority;” all riparian users share equally in the water source, and no one user has priority over another.²⁷ Even if riparian rights remain dormant and unused, riparian landowners still retain a right to use water from riparian sources.²⁸

The Gold Rush era was also a period of dramatic transformation for land use practices in California. Extreme urban growth facilitated a rapid shift from a patchwork of rural farming communities to boomtowns that served as centers of commerce for the state’s

hydraulic blasting to find new sources of gold in hillsides in the Sierra Nevada mountains. John G. Francis & Leslie Francis, *Land Wars: The Politics of Property and Community* (Lynne Rienner Publishers) (2003) at p. 106.

²² Joseph W. Dellapenna, *Adapting Riparian Rights to the Twenty-First Century*, 106 W. Va. L. Rev. 539, 593 n.133 (2004) (“While early statutes in several states, including California, preserved the Spanish-Mexican irrigation law, such rights were always subordinated to the needs of miners.”).

²³ *Jennison v. Kirk*, 98 U.S. 453, 461 (1878) (“[b]y the customary law of miners in California, as we understand it, the owner of a mining claim and the owner of a water-right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right”).

²⁴ Mark T. Kanazawa, *Efficiency in Western Water Law: The Development of the California Doctrine, 1850-1911*, 27 J. Legal Stud. 159, 162-65 (1998)

²⁵ *Id.* at p. 162.

²⁶ Roderick E. Walston, *California Water Law: Historical Origins to the Present*, 29 Whittier L. Rev. 765, 767 (2008).

²⁷ *Id.* (discussing the manner in which riparian users share equally).

²⁸ *In re Waters of Long Valley Creek Stream Sys.*, 25 Cal. 3d 339, 347 (1979) (“a dormant riparian right is paramount to active appropriate rights”).

changing economy.²⁹ A rapid influx of settlers and prospectors meant that real estate claims were often disputed, and squatters often camped on any available land.³⁰ The violent ethos of the Wild West was demonstrated through land use conflicts during this era: the sudden and massive need for water often led to bloody and fierce conflicts for riparian land.³¹

Lawmakers quickly discovered several reasons why riparian rights alone were inadequate to protect water claims in California. First, because riparian rights do not assign a fixed quantity of water to which rights holders are entitled, riparian rights did not provide guarantees of certainty that riparian users would only take as much as they need.³² Second, settlers would often fight for land that was adjacent to available water supplies.³³ Third, water was needed at mines that were far from rivers and streams.³⁴ Consequently, California developed a dual system of water rights for surface waters where the state would recognize both riparian rights as well as rights according to prior appropriation: the first in time, first in right system.³⁵

Despite the fact that riparian rights were ill suited for California's environment, courts still recognize validity of riparian rights today.³⁶ Because many landowners retain water

²⁹ For an overview of California's changing land use practices during the mid-nineteenth century, see Peter L. Reich, *Dismantling the Pueblo: Hispanic Municipal Land Rights in California Since 1850*, 45 Am. J. Legal Hist. 353, 369-70 (2001). Reich argues that this period of transformation resulted in the "privatization of the urban commons" and the "impoverishment of public space." *Id.* at p. 370.

³⁰ Gordon Morris Bakken, *Practicing Law in Frontier California* (University of Nebraska Press) at 72-73 (2006).

³¹ Joseph W. Dellapenna, *Riparian Rights in the West*, 43 Okla. L. Rev. 51, 56 (1990) (describing tumultuous conflicts during the Gold Rush).

³² Samantha K. Olson & Erin K.L. Mahaney, *Searching for Certainty in A State of Flux: How Administrative Procedures Help Provide Stability in Water Rights Law*, 36 McGeorge L. Rev. 73, 76-77 (2005).

³³ Joseph W. Dellapenna, *Riparian Rights in the West*, 43 Okla. L. Rev. 51, 56 (1990).

³⁴ For an early perspective on the practices and consequences of hydraulic mining in California, see Samuel Knight, *Federal Control of Hydraulic Mining*, 7 Yale L.J. 385 (1898).

³⁵ Samantha K. Olson & Erin K.L. Mahaney, *Searching for Certainty in A State of Flux: How Administrative Procedures Help Provide Stability in Water Rights Law*, 36 McGeorge L. Rev. 73, 76 (2005).

³⁶ Joseph W. Dellapenna, *The Evolution of Riparianism in the United States*, 95 Marq. L. Rev. 53, 81 (2011) ("[r]iparian rights continue to have considerable importance in California").

rights through unexercised, dormant riparian claims, California has never been able to quantify or adjudicate specific water rights for all landowners.³⁷ However, the State Constitution now limits riparian users to the extent that they may only take water for reasonable and beneficial uses, and riparian users may not divert water for unreasonable purposes or through unreasonably wasteful methods of diversion.³⁸

D. The Emergence of the Dual System: Rights by Appropriation

By the late nineteenth century, courts and legislators realized that that the state needed a way to protect the water rights of citizens who did not own land adjacent to rivers and streams.³⁹ Consequently, California adopted laws that allowed landowners to perfect a claim to water through “prior appropriation.” In this system, the right to take water is created when a user (known as an “appropriator”) diverts water for a beneficial purpose,⁴⁰ even if they do not own land adjacent to the water.⁴¹ Unlike riparian rights, which provide users an equal share of water from riparian rivers and streams, appropriative rights establish a system of priority where the first appropriator has a superior claim to all subsequent appropriators.⁴² Furthermore, appropriators permanently lose their rights if they cease to divert water from the source.⁴³

³⁷ Joseph W. Dellapenna, *Riparian Rights in the West*, 43 Okla. L. Rev. 51, 69 (1990).

³⁸ Cal. Const. art. X, § 2; see also *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 369, 40 P.2d 486, 492 (1935) (enjoining unreasonable uses under the California Constitution); Marcia J. Steinberg & Michael Schoenleber, *Salinity Control and the Riparian Right*, 19 Pac. L.J. 1143, 1145-46 (1988) (discussing negative effects on water quality as an unreasonable use).

³⁹ See *infra*, part III; Roderick E. Walston, *California Water Law: Historical Origins to the Present*, 29 Whittier L. Rev. 765, 768 (2008) (“The riparian doctrine was poorly-suited to the needs of the early miners who hastened westward in search of gold and silver.”).

⁴⁰ There is no clear definition of whether a specific use is “beneficial” under California law – it is necessarily a fact specific inquiry – but the California Water Code states that “beneficial use” includes “use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan.” Cal. Water Code § 1257.

⁴¹ For a brief history of appropriative rights, see *People v. Shirokow*, 26 Cal. 3d 301, 307-08, (1980).

⁴² Roderick E. Walston, *California Water Law: Historical Origins to the Present*, 29 Whittier L. Rev. 765, 768 (2008).

⁴³ *Pleasant Valley Canal Co. v. Borrer*, 61 Cal. App. 4th 742, 753 (1998) (“[t]he right could be lost by disuse”).

To some extent, miners' customs were the first system of appropriative rights, where a citizen could perfect a claim to water simply by diverting it for reasonable use.⁴⁴ It did not take long for the legislature to adopt this system as the official law of the land. In 1872, legislators formally codified rules for appropriation where users could initiate appropriation simply by posting and recording notice of the diversion.⁴⁵ Because the law of riparian rights was not well developed in early California, many people simply assumed that California had abandoned the doctrine entirely after the 1872 legislation went into effect.⁴⁶ However, the Supreme Court affirmed in 1886 that common law riparian rights were still the law of the land, and that riparian claims to water were, in fact, *superior* to claims made by appropriators.⁴⁷ Although most other western states have now abandoned riparian rights, this dual system of riparian and appropriative rights persists in California to this day.⁴⁸

E. Master Plans, Suburban Sprawl, and the Emergence of Rights by Adverse Possession

By the turn of the Twentieth Century, California's population continued to grow at a rapid pace, and many lawmakers were inspired by the ethos of the progressive movement to implement more control over business and industry.⁴⁹ In 1913, the legislature passed the California Water Commission Act, which set forth permitting requirements for future

⁴⁴ *People v. Shirokow*, 26 Cal. 3d 301, 308, 605 P.2d 859, 864 (1980) ("it was initially the law in this state that a person could appropriate water merely by diverting it and putting it to use").

⁴⁵ Former Cal. Civ. Code §§ 410-1422. Six years earlier, the Federal Government had recognized of miners' appropriative claims in the Federal Mining Act of 1866. See *Pleasant Valley Canal Co. v. Borrer*, 61 Cal. App. 4th 742, 752 (1998).

⁴⁶ *Pleasant Valley Canal Co. v. Borrer*, 61 Cal. App. 4th 742, 752-53 (1998) ("The inattention given in these early years to the riparian doctrine, together with a belief riparianism was not suited to the state's arid climate, led many people to conclude California had arrived at a purely appropriative system of water rights.").

⁴⁷ *Lux v. Haggin* 69 Cal. 255 (1886).

⁴⁸ Roderick E. Walston, *California Water Law: Historical Origins to the Present*, 29 Whittier L. Rev. 765, 769 (2008); see also *In re Water of Hallett Creek Stream Sys.*, 44 Cal. 3d 448, 454 (1988) (describing the dual system of rights).

⁴⁹ For a history of progressive sentiments in California at the turn of the Twentieth Century, see Kevin Starr, *Inventing the Dream: California Through the Progressive Era* (Oxford University Press) (1985).

diversions of water in the state.⁵⁰ The Act also established the predecessor agency that is now the State Water Resources Control Board to oversee this permitting scheme.⁵¹ However, water users that diverted water prior to the Act's implementation in 1914 were exempt from this permitting requirement, and existing pre-1914 appropriators (including the city of San Francisco for diversions into the Hetch Hetchy reservoir) remain exempt from permitting requirements to the present day.⁵²

In the middle of the twentieth century, land use patterns shifted dramatically as the state's population rapidly expanded.⁵³ At this time, land planners began to use land-planning strategies such as zoning and general plans to ensure that future growth fit into a comprehensive plan.⁵⁴ By utilizing comprehensive zoning ordinances, local planning commissions were required to consider the general welfare of the region in which the development would be located.⁵⁵ Moreover, by 1971, all counties and most cities were required to conform zoning ordinances with general plans.⁵⁶

During this period of expansion, developers found that water resources were scarce, so some landowners began to claim water through "prescription" (also known as "adverse possession"). Under this system, water users could perfect a claim to water rights through the open and notorious adverse use of water that would otherwise belong to a riparian or overlying rights holder.⁵⁷ This adverse use of water must remain uninterrupted for a minimum of five years before rights vest with the water user.⁵⁸

⁵⁰ Water Commission Act, 1913 Cal. Stats. ch. 586, at 1012.

⁵¹ *Id.*

⁵² See Richard P. Shanahan, *The Application of California Riparian Water Rights Doctrine to Federal Lands in the Mono Lake Basin*, 34 Hastings L.J. 1293, 1305-06 (1983).

⁵³ For a discussion of the relationship between radical population expansion and limited water supplies in California and the American West, see Marc Reisner, *Cadillac Desert: The American West and Its Disappearing Water* (Penguin Press) (1993).

⁵⁴ For a discussion of the history of California's zoning laws, see Mark August Nitikman, *Instant Planning-Land Use Regulation by Initiative in California*, 61 S. Cal. L. Rev. 497, 501-02 (1988).

⁵⁵ See *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 608-09, (1976) (discussing requirements that an ordinance must be consistent with "regional welfare").

⁵⁶ Mark August Nitikman, *Instant Planning-Land Use Regulation by Initiative in California*, 61 S. Cal. L. Rev. 497, 502 (1988).

⁵⁷ See Cal. Civ. Code § 1007; Cal. Code Civ. Proc. § 321; *Peck v. Howard*, 73 Cal. App. 2d 308 (1946); *Application of the Doctrine of Intervening Public Use in Water Litigation*, 13 Stan. L. Rev. 180, 184 (1960).

⁵⁸ *Application of the Doctrine of Intervening Public Use in Water Litigation*, 13 Stan. L. Rev. 180, 184 (1960).

Frequent, unchecked use of prescription often led to overdraft in areas where demand was high and resources were limited.⁵⁹ These conflicts inevitably led to uncertainty with regard to the availability of water and hindered the ability to plan effectively for the future.⁶⁰ Courts were forced to find new ways to resolve these conflicts. For example, in 1949, the Supreme Court resolved a dispute involving overdraft caused by competing prescriptive uses in the San Gabriel Valley by apportioning water rights in an equitable fashion among the competing users.⁶¹

In 1980, the California Conservation Commission recommended that the state abolish prescriptive rights entirely,⁶² and prescriptive rights have fallen out of favor with courts, scholars, and lawmakers in recent decades.⁶³ Soon after the Commission released its report, the Supreme Court held in *People v. Shirokow* that prescriptive rights still exist, but that they are subordinate to the regulatory authority of the state.⁶⁴ This case reinforced the notion that there is a need for comprehensive regulation among landowners that draw from our state's fragile water supplies, and that land developers who take water without a permit do so at their own risk. Prescriptive rights were limited once again in the year 2000, when the Supreme Court held in *City of Barstow v. Mojave Water Agency* that the equitable apportionment of prescriptive rights could not displace the priority of pre-existing water users.⁶⁵ Moreover, in California's new Groundwater Sustainability Management Act,⁶⁶ the legislature specified that groundwater extraction that occurs between January 1, 2015 and the date of adoption of a groundwater sustainability plan cannot be used to establish (or defend against) a claim of prescription in areas where water

⁵⁹ Kelley J. Hart, *The Mojave Desert As Grounds for Change: Clarifying Property Rights in California's Groundwater to Make Extraction Sustainable Statewide*, 9 Hastings W.-N.W. J. Env'tl. L. & Pol'y 31, 36 (2002) (citing examples of conflicts caused by overdraft).

⁶⁰ Nirav K. Desai, *Up A Creek: An Introduction to the Commission's Final Report Discussion of Uncertainty in California Water Rights Law*, 36 McGeorge L. Rev. 29, 39 (2005).

⁶¹ *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908 (1949).

⁶² Nirav K. Desai, *Up A Creek: An Introduction to the Commission's Final Report Discussion of Uncertainty in California Water Rights Law*, 36 McGeorge L. Rev. 29, 39 (2005).

⁶³ *Cf. Brewer v. Murphy*, 161 Cal. App. 4th 928, 940 (2008) (recognizing a claim that was established through prescription).

⁶⁴ *People v. Shirokow*, 26 Cal. 3d 301 (1980).

⁶⁵ *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224 (2000); see also Kelley J. Hart, *The Mojave Desert As Grounds for Change: Clarifying Property Rights in California's Groundwater to Make Extraction Sustainable Statewide*, 9 Hastings W.-N.W. J. Env'tl. L. & Pol'y 31, 49 (2002).

⁶⁶ Cal. Water Code § 10720, *et seq.*

is in short supply.⁶⁷ This trend indicates that prescription will be less and less common in coming years, and the doctrine may soon disappear entirely.

F. The History of Groundwater Rights

Californians have always relied on groundwater, especially in times when surface rivers and streams run dry, but relatively few laws exist to regulate groundwater diversions.⁶⁸ Even though groundwater extraction often affects interconnected surface waters, lawmakers have generally opposed regulations for groundwater because subterranean resources serve as a “backup” in times of shortage, and courts have generally responded well when groundwater resources reach critically low levels.⁶⁹

In California, existing groundwater laws apply only to subterranean “percolating waters.”⁷⁰ Early English common law groundwater adjudications held that an overlying landowner has an absolute right to pump groundwater for their land.⁷¹ However, in *Katz v. Walkinshaw*, the Supreme Court rejected the absolute ownership rule and held that groundwater is governed by the doctrine of correlative rights.⁷² This system parallels California’s surface water laws, where each overlying landowner has correlative rights with all other overlying owners to a reasonable share of the “safe yield” of the aquifer.

Nearly a half-century later, in *Pasadena v. Alhambra*, the California Supreme Court held that groundwater is governed by Article X, Section 2 of the California Constitution, and proper overlying use should promote beneficial uses.⁷³ In *Pasadena*, the Court upheld a

⁶⁷ See § 10720.5(a).

⁶⁸ Joseph L. Sax, *We Don’t Do Groundwater: A Morsel of California Legal History*, 6 U. Denv. Water L. Rev. 269, 270 (2003) (“while California extensively regulates surface water by an administrative permit system, groundwater is effectively unregulated”).

⁶⁹ *Id.* at pp. 270-71.

⁷⁰ See Cal. Water Code § 1200; *Hooker v. City of Los Angeles*, 188 U.S. 314 (1903); *City of Los Angeles v. Pomeroy*, 124 Cal. 597 (1899); *N. Gualala Water Co. v. State Water Res. Control Bd.*, 139 Cal. App. 4th 1577 (2006), *as modified on denial of reh’g* (June 16, 2006).

⁷¹ See, e.g., *Acton v. Blundell* 12 Mees. & W. 324 (Eng. Rep. 1843).

⁷² *Katz v. Walkinshaw*, 141 Cal. 116 (1903).

⁷³ *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908 (1949).

distribution of groundwater between competing users where water was allocated through a “mutuality of prescription.”⁷⁴

By the late twentieth century, courts began to impose stricter limitations on unmonitored groundwater diversions out of a fear that groundwater basins would soon run dry. In 1975, in *City of Los Angeles v. City of San Fernando*, the Supreme Court declined to extend prescriptive rights in a groundwater dispute between municipalities, and instead held that prescriptive rights cannot be applied against a municipality without that municipality’s consent.⁷⁵ The Court also introduced the concept of “temporary surplus” and redefined the concept of “safe yield,” holding that there is a presumption of overdraft when a water table is lowered without being monitored.⁷⁶

The most recent explication of groundwater rights from the Supreme Court came in *City of Barstow v. Mojave Water Agency*, where the Court affirmed that groundwater rights should be granted according to priority of rights, rather than through an equitable apportionment between existing users.⁷⁷ Although the Court affirmed that groundwater must be used reasonably, the Court did not explicitly rule whether overlying users retain unutilized, dormant rights. However, the Sixth District Court of Appeal recently held that vested, overlying groundwater rights cannot be lost through nonuse.⁷⁸

In 2014, legislators approved the Sustainable Groundwater Management Act to preserve the future health of California’s groundwater resources by limiting unsustainable uses in areas at risk for overdraft.⁷⁹ Regulators will no longer issue permits when extraction threatens the sustainability of groundwater basins.⁸⁰ Land planners and water regulators must now consider the long-term implications of groundwater extraction and the potential consequences of unsustainable development.

⁷⁴ See *supra*, part V (discussing limitations on prescriptive diversions).

⁷⁵ *City of Los Angeles v. City of San Fernando*, 14 Cal. 3d 199 (1975) (citing Cal. Civ. Code § 1007).

⁷⁶ *Id.*

⁷⁷ *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1256, 5 P.3d 853, 873 n.11 (2000). The Court specifically rejected a utilitarian division of rights like the Court did in *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908 (1949).

⁷⁸ *City of Santa Maria v. Adam*, 211 Cal. App. 4th 266, 295 (2012), *as modified on denial of reh’g* (Dec. 21, 2012) (“a vested property right cannot be lost by the failure to use it”). However, groundwater rights claimed through prescription *can* be lost through disuse. *Id.*

⁷⁹ See SB 1168, SB 1319, and AB 1739, codified at Cal. Water Code § 10720, *et seq.*

⁸⁰ *Id.*

G. Looking Toward the Future, Beyond the Arid Horizon

After yet another rainless winter, Californians must confront the fact that drought might be the new normal.⁸¹ In fact, new water rationing measures will likely have a dramatic impact on the way we use water. The Water Resources Control Board has already adopted mandatory twenty five percent rationing, and Governor Brown's executive order has been a rallying cry for ecological awareness.⁸² However, as California's population continues to grow, heightened demand will continue to increase the strain on our state's limited resources.

Although California has taken some steps to align land planning with water management, these two areas of regulation remain disconnected in many respects. There are no laws in California that prohibit new development where water is not available to support further growth. In 2001, California approved "show me the water laws"⁸³ that require developers to conduct a "water supply assessment" before building large-scale developments, but these laws do not empower water regulators to stop projects from being completed.⁸⁴ Regulators can review assessments for completeness, but they cannot review assessments for quality.⁸⁵ Consequently, the efforts of land planners and water regulators remain dissonant.⁸⁶ Nor is there any statewide coordination between local water authorities.⁸⁷ The effect of this dissonance on our state's water security remains to be seen, but history has shown that the needs of landowners often dictate water policy.

⁸¹ Some scholars caution that our current drought could last for several centuries. See Thomas M. Kostigan, National Geographic, *Could California's Drought Last 200 Years?* (Feb. 13, 2014). Kostigan cites paleoclimatologists who have found evidence of a century-long drought during the medieval period in California.

⁸² For information about emergency orders and legislation relating to the drought, see Governor's Drought Task Force, *California Drought*, available at <http://ca.gov/drought/>.

⁸³ S.B. 221, ch. 642, 2001 Cal. Stats. 88; S.B. 610, ch. 643, 2001 Cal. Stats. 94.

⁸⁴ Ellen Hanak, *Show Me the Water Plan: Urban Water Management Plans and California's Water Supply Adequacy Laws*, 4 Golden Gate U. Envtl. L.J. 69, 71-72 (2010).

⁸⁵ *Id.*

⁸⁶ See generally Jamey Volker, *Water Supplies Finally Take Center Stage in the Land Use Planning Arena*, 35 Ecology L.Q. 573 (2008) (discussing role of water supply assessments in CEQA review process).

⁸⁷ Ryan Waterman, *Addressing California's Uncertain Water Future by Coordinating Long-Term Land Use and Water Planning: Is A Water Element in the General Plan the Next Step?*,

31 Ecology L.Q. 117, 195 (2004) (discussing potential for synergy between regulators at local and statewide levels).

IV. REDEFINING THE “COORDINATION” REQUIREMENT OF THE CONSERVATION ELEMENT OF THE GENERAL PLAN TO STRENGTHEN THE ROLE OF PUBLIC WATER AGENCIES IN LAND USE PLANNING

California Government Code section 65302(d)(1) provides:

A conservation element for the conservation, development, and utilization of natural resources including water and its hydraulic force, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources. The conservation element shall consider the effect of development within the jurisdiction, as described in the land use element, on natural resources located on public lands, including military installations. *That portion of the conservation element including waters shall be developed in **coordination** with any countywide water agency and with all district and city agencies, including flood management, water conservation, or groundwater agencies that have developed, served, controlled, managed, or conserved water of any type for any purpose in the county or city for which the plan is prepared. **Coordination** shall include the discussion and evaluation of any water supply and demand information described in Section 65352.5, if that information has been submitted by the water agency to the city or county.* (Emphasis added).

A. Introduction

A general plan’s discussion of water, as part of the conservation element, presents an opportunity for land use planners and water agencies to improve the alignment of development with the reality of California’s threatened water supply. But what is meant by requiring cities and counties to “coordinate” with public water agencies when developing the conservation element of a general plan? Does merely consulting with public water agencies satisfy the coordination requirement even if the city or county ultimately rejects the input from such agencies? What do the courts say? This module

discusses some general principles that will help cities and counties understand what the statute, as currently defined and interpreted, requires of them in any given situation. Also, this module notes how one county, though not in any reference to section 65302(d)(1), has embedded coordination in its general plan to afford public water agencies greater influence in the context of land use planning.

B. Judicial Interpretation of the Word “Coordination” as Used by General Plans

It should be noted at the outset that the coordination requirement of section 65302(d)(1) is not defined anywhere in the Government Code, and the available legislative history materials offer nothing in the way of understanding what the Legislature could have intended by this requirement. Further, there have been no reported legal challenges to general plans on the grounds that the water portion of the conservation element did not comply with the coordination requirement of Government Code 65302(d)(1). As such, courts have not had the opportunity to interpret the coordination requirement in the context with which we are here interested. The case discussed below, however, addressed the same question we hope to answer in the context of the natural resources element of a city’s general plan. That question is: If a general plan that has been adopted requires that certain aspects of proposed projects be coordinated by the city or county with other agencies, what satisfies the obligation to “coordinate”?

In *California Native Plant Society v. City of Rancho Cordova* 172 Cal.App.4th 603, 640-42 (2009), the Court of Appeal distinguished between the words “coordination” and “consultation” as used in a city’s natural resources element of its general plan. In *Native Plant Society*, the city’s general plan provided that:

“For those areas in which special-status species are found . . . the City *shall* require mitigation of impacts to those species . . . Mitigation *shall* be designed by the City *in coordination with* the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG)”

The Native Plant Society challenged the city’s approval of a project, claiming the city did not consult with the USFWS and CDFG on the area of mitigation as required by the general plan. According to the Native Plant Society, the city did not coordinate with

USFWS and CDFG because the city approved the project despite the repeated objections from the USFWS and CDFG.

On the other hand, the city argued that the word “coordinate” means “to negotiate with others in order to work together effectively,” and “[t]he city satisfied its obligation of trying to work together with [USFWS and CDFG]” by “solicit[ing], carefully consider[ing], and respond[ing] to comments from [USFWS and CDFG].” The city argued that the USFWS had been consulted and that their views were made known during the EIR process.

According to the court, a requirement to “consult” could be satisfied by simply soliciting and considering the comments of USFWS and CDFG. A requirement to “coordinate,” on the other hand, cannot be satisfied by merely soliciting and rejecting the input of such agencies. While the court rejected the interpretation that the “coordination” requirement suggests cities must “subordinate” themselves to state and federal agencies by implementing their comments, the court stated that “‘coordination’ implies some measure of cooperation that is not achieved merely by asking for and considering input or *trying* to work together.” Because it found the city’s interpretation of the word “coordination” to be inaccurate, the court concluded that the city’s approval of the project failed to satisfy the requirements of its general plan.¹

The court in *Native Plant Society* did not define the “coordination” requirement in exact terms, but stated that it required something more than mere “consultation” and something less than “subordination” to public agencies. Because the “coordination” requirement is still left undefined, cities and counties have great control over how much (or how little) coordination they want to engage in with public agencies when drafting general plans.

C. Judicial Review of General Plans

As mentioned above, there have been no reported legal challenges to general plans on the grounds that there was insufficient compliance with Government Code 65302(d)(1). There have been countless challenges to general plans based on their deficiencies of other

¹ *California Native Plant Society v. City of Rancho Cordova*, 172 Cal.App.4th 603, 640-42 (2009).

elements (i.e. housing element) from which we can extract the following general rules, however. These rules include:

a) A general plan that “substantially complies” with the requirements of Government Code sections 65300 to 65307 is legally sufficient;²

b) Substantial compliance means actual compliance, but only with respect to the substance in light of the objective of the statute. “Mere technical imperfections of form” will not defeat a proposed general plan;³

c) The adoption or amendment of a general plan is presumed valid because it is a legislative act. “A court cannot inquire into the wisdom of a legislative act or review the merits of a local government’s policy decisions;”⁴ and

d) Judicial review of a legislative act is limited to determining whether the public agency’s action was “arbitrary, capricious, entirely without evidentiary support, or procedurally unfair.”⁵

From these rules we can infer a single general rule: notwithstanding the deferential nature of judicial review afforded to general plans, courts require actual compliance with the requirements of Government Code sections 65300 to 65307.

For example, in *Camp v. Board of Supervisors* 123 Cal.App.3d 334 (1981), the Court of Appeal held that a county’s general plan was deficient for failing to discuss the standards enumerated in Section 41134 of the Health and Safety Code, and was therefore not “developed pursuant to regulations established under Section 41134 of the Health and

² Cal. Gov. Code § 65751.

³ *Camp v. Board of Supervisors*, 123 Cal.App.3d 334, 348 (1981).

⁴ See Cal. Gov. Code § 65301.5; *Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511, 522 (1980); *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 118 (1973).

⁵ *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept.*, 175 Cal.App.3d 298, 302 (1985).

Safety Code,” as required by the 1978 version of Government Code section 65302(c). Similarly, in *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, the Court of Appeal held that a city’s general plan was deficient because its natural resources element did not contain mitigation efforts designed “*in coordination with* the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG)” as required by the statute.

On the other hand, in *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept.* (1985) 175 Cal.App.3d 298, the Court of Appeal held that a city’s affordable housing development program in a housing element substantially complied with the requirement contained in section 65583(c)(2) to establish a program that assists in the development of low-income housing. According to the court, the fact that the city could have included more detail and adopted more effective programs would be to improperly review the merits program. Thus, since the court found substantial compliance with the statute, it did not disturb the validity of the general plan.

In view of the foregoing discussion, cities and counties must actually coordinate the development of the conservation element of its general plans with public water agencies. If a city or county is able to demonstrate at least some level of coordination between public water agencies, it will be difficult to demonstrate that the city or county’s actions were “arbitrary, capricious, entirely without evidentiary support, or procedurally unfair, and “the fact that more “coordination” could be had will likely not cause a general plan to be overturned.

D. Sonoma County General Plan: A Model for Translating the Requirement to “Coordinate” into a Requirement to “Cooperate”

The 2020 Sonoma County General Plan, adopted in 2008, includes a water resources element that requires the county to “work with” and “cooperate” with public water agencies and other interested parties to accomplish the various goals enumerated in the general plan. The water resources element uses the phrase “work with” 16 times and “cooperate” (and variations of the word) 12 times, while “coordinate” is used only twice. To be sure, the Sonoma County General Plan does not even refer to the “coordination” requirement in section 65302(d)(1), but it is a good example of how one county has chosen to articulate the principle of collaboration into its general plan. Below are some excerpts from Sonoma County’s general plan:

- “Work with the Regional Water Quality Control Boards (RWQCB) and interested parties in the development and implementation of RWQCB requirements;”

- “Work cooperatively with the RWQCBs to manage the quality and quantity of stormwater runoff from new development and redevelopment . . . ;”

- “Work closely with the RWQCBs, incorporated cities, public water suppliers, and other interested parties in the development and implementation of water quality plans and measures;”

- “In cooperation with SCWA, DWR and other public agencies, support the establishment and maintenance of a groundwater data base . . . ;”

- “Work with public water suppliers in the development and implementation of long term plans for water supply, storage, and delivery . . . ;”

- “Assist public water suppliers in assuring that proposed water supplies and facilities are consistent with adopted general plans . . . ;”

- “Cooperate with public water suppliers in the planning, development and construction of the storage and transmission facilities needed to supply water pursuant to adopted General Plan policies”

Comparing these provisions with the information-sharing requirements of Government Code Section 65352.5 (A.B. 455) and Water Code Section 10910 (S.B. 901), it is clear that Sonoma County’s general plan substantially enhanced the “coordination” requirement embodied in these statutes to require a measure of cooperation between the county and water agencies. It is important to note, however, that the general plan does not explain how the county will respond to situations in which no agreement or compromise can be reached with water agencies or other interested parties. Nevertheless, Sonoma County’s general plan serves as a model for interpreting the coordination requirement in a manner that empowers public water agencies to oppose land use planning that unreasonably threatens water resources.

In a Nutshell:

Government Code Section 65302(d)(1) requires cities and counties to develop the water section of the conservation element in its general plan in coordination with public water agencies. Although courts have not had the opportunity to interpret the “coordination” requirement in the context of section of 65302(d)(1), the Court of Appeal, in *California Native Plant Society v. City of Rancho Cordova* 172 Cal.App.4th 603 (2009), interprets the word “coordination” as used in general plans to mean something that is more than mere solicitation and rejection of input from public agencies. Although courts will require that cities or counties actually “coordinate” with public water systems, courts are unlikely to disturb the validity of general plans on a claim that the city or county simply did not coordinate *enough*. Finally, at least one county has adopted an interpretation of the “coordination” requirement that encourages a higher degree of cooperation with public water agencies, as was contemplated by the court in *California Native Plant Society v. City of Rancho Cordova*.

V. THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT'S SUSTAINABILITY GOALS: OPPORTUNITIES FOR ALIGNMENT BETWEEN LAND MANAGERS AND WATER REGULATORS

A. Introduction

In 2014, California's legislature approved sweeping changes to our state's groundwater laws. The Sustainable Groundwater Management Act¹ limits unsustainable uses of groundwater and requires water regulators to publish sustainability plans in areas of scarcity. Water regulators may no longer issue permits for groundwater extraction when that extraction threatens the sustainability of groundwater basins that are at risk of running dry. Consequently, land managers will now need to coordinate with water regulators to ensure that permits are available when new land development relies on groundwater sources.

As the effects of climate change intensify, surface water is likely to become much scarcer, and Californians are likely to rely on groundwater as the primary source of water in our state.² Consequently, it is essential for land managers to align their efforts with water managers to ensure that (i) groundwater is available for future development, and (ii) existing land uses do not threaten the sustainability of groundwater basins.³ The Sustainable Groundwater Management Act helps achieve these goals by ensuring that groundwater resources remain available for future generations of Californians.

¹ SB 1168, SB 1319, and AB 1739, codified at Cal. Water Code § 10720, *et seq.* All further section references are to the Water Code unless otherwise noted.

² For a worst-case-scenario description of the effects of climate change on California's water resources, *see* Glen Martin, *The Great Thirst*, San Francisco Chronicle Magazine (February 27, 2007).

³ For a description of conflicts between competing uses of groundwater, *see* Erica Gies, *California's Underground Water War*, The Atlantic (August 28, 2014).

B. The Act's Sustainability Goals

The Sustainable Groundwater Management Act codifies the aspirational goal of “preserv[ing] the security of water rights” for all Californians through the implementation of sustainability plans for groundwater resources.⁴ Essentially, the Act prohibits water regulators from issuing permits for groundwater extraction in areas in danger of overdraft,⁵ and the Act empowers the Water Resources Control Board to intervene when local agencies fail to implement sustainability plans.⁶ Additionally, the Water Resources Control Board may issue cease and desist orders for extractions in violation of sustainability plans.⁷

By focusing on the future welfare of our state’s water supplies, this legislation embodies longstanding utilitarian themes that have always existed in California Water Law.⁸ Indeed, the California Supreme Court has steadfastly restricted inherently wasteful uses of water.⁹ In the context of groundwater, California law already presumes that the unsustainable overdraft of groundwater is an unreasonable use.¹⁰ However, this new legislation goes one step further and requires agencies to establish sustainability goals *before* issuing permits for the extraction of groundwater.¹¹

Prior to the 2014 amendments, the California Water Code did not require local agencies that regulated extraction in land overlying groundwater basins to adopt or implement a groundwater management plan.¹² The Act now identifies groundwater basins as low, medium, or high priority according to the risk of overdraft, and agencies in medium and high priority basins are required to develop sustainability plans for those regions.¹³ The act specifically requires medium and high priority basins to *draft* groundwater

⁴ See § 10720.1.

⁵ § 10726.4(a)(2).

⁶ See § 10735 *et seq.*

⁷ See § 1831(d)(5).

⁸ See Brian E. Gray, *In Search Of Bigfoot: The Common Law Origins of Article X, Section 2 of the California Constitution*, 17 Hastings Const. L. Q. 225 (1989).

⁹ See, e.g., *Joslin v. Marin Municipal Water District*, 67 Cal.2d 132 (1967).

¹⁰ *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224 (2000); *City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199 (1975).

¹¹ See § 10727(a).

¹² § 10750.4.

¹³ § 10722.

sustainability plans by the year 2022 and groundwater sustainability agencies must *implement* groundwater sustainability plans by other predetermined deadlines.¹⁴

The Act also gives local water authorities the power to suspend existing permits for groundwater extraction when pumping threatens the sustainability of the basin. Agencies may “control groundwater extraction by regulating, limiting, or suspending extractions from individual groundwater wells or extractions from groundwater wells in the aggregate.”¹⁵ However, these new regulations are not a significant departure from existing California water law jurisprudence. Courts have always held that extremely wasteful uses of water are unreasonable, and therefore unlawful.¹⁶ However, judicial remedies are *ex post facto* solutions that are only available once unreasonable extractions have already occurred. The Sustainability Act allows local water authorities to limit wasteful extractions *before* they occur. Furthermore, land managers will need to coordinate with water regulators to ensure that existing uses are, in fact, sustainable.

The Act also provides procedures for intervention by the State Water Resources Control Board (“SWRCB”) in “probationary basins” when groundwater sustainability agencies fail to adopt or implement sustainability plans for those areas.¹⁷ The SWRCB may intervene in cases where plans are inadequate, or when the implementation of a plan would fail to meet sustainability goals.¹⁸ These provisions also allow the SWRCB to issue cease and desist orders for extractions of water in violation of the Act.¹⁹ Once again, this new legislation is not a significant departure from existing California law in this area. Courts in this state have always upheld the broad authority of agencies (especially the SWRCB) to intervene when water resources are being mismanaged, or when it is necessary to resolve disputes among users.²⁰ However, this could serve as a powerful incentive for

¹⁴ See §§ 10720.7, 10723.2. Interestingly, the plans must consider the needs of “disadvantaged communities,” among others, when setting goals for extracting groundwater.

¹⁵ § 10726.4(a)(2)

¹⁶ See e.g., *Peabody v. City of Vallejo*, 2 Cal.2d 351 (1935); *Erickson v. Queen Valley Ranch*, 22 Cal.App.3d 578 (1971) (holding that an 83% carriage loss while transporting water was an unreasonably wasteful practice).

¹⁷ See § 10735 *et seq.*

¹⁸ *Id.*

¹⁹ See § 1831(d)(5).

²⁰ For example, in *People ex rel. SWRCB v. Forni*, 54 Cal.App.3d 743 (1976), the California Court of Appeal upheld the SWRCB’s broad regulatory authority under section 275 of the California Water Code to restrict unreasonable uses of water. Likewise, in *Environmental Defense Fund v. East Bay Municipal Utility District*, 26 Cal.3d 183 (1980), the California Supreme Court held that the SWRCB had authority to force the Utility District to stop unreasonable diversions of water that had adverse effects on water quality.

planning commissions to align their efforts with water managers to ensure sustainable use.

After January 31, 2022, a basin can be classified as probationary if *both* the sustainability plan (or its implementation) is inadequate *and* the basin is in a condition of long term overdraft or where continued extractions would deplete interconnected surface waters.²¹ However, the Act also states that certain medium or high priority basins can be classified as probationary basins if after January 31, 2025, groundwater extractions from that basin would result in the depletion of interconnected surface waters.²² Consequently, land managers and water regulators can use these portions of the Act to protect existing surface waters for land uses that rely upon these resources

In addition to the new regulations on the manner in which water is extracted from the ground and the new provisions regarding state intervention, the Act also modifies the Water Code's fee schedule.²³ The changes include new fees for participating in adjudicative proceedings and fees for filing reports pursuant to section 5200 of the Water Code.²⁴ Furthermore, groundwater sustainability agencies may now impose fees for groundwater extraction, and the agencies may provide funds for activities conducted under section 10750 of the Water Code.²⁵

C. Implications for Future Land Development

The Sustainable Groundwater Management Act will have profound implications for future development. Instead of looking at whether resources exist *at the moment*, planning commissions and other land use authorities will need to consider whether development will affect the *future* sustainability of available resources. These land managers will need to work closely with local water agencies to ensure that existing uses and future developments will satisfy the guidelines for acceptable use promulgated through sustainability plans.

²¹ § 10735.2(a)(5).

²² § 10735.2(a)(5).

²³ See §§ 1529.5, 1530.

²⁴ See § 1529.5(b).

²⁵ See § 10730 *et seq.*

Ultimately, the Act still recognizes the “first come first served” model of water rights for groundwater basins. The Act does not disturb the fundamental holding of *City of Barstow v. Mojave Water Agency*,²⁶ that groundwater should be distributed according to the priority of rights of those who extract the water.²⁷ The rights of proper overlying users are still paramount above those who do not own land overlying the basin.²⁸ Non-overlying permit holders (also called “appropriators”) must yield to overlying users in the event of a shortage, unless the appropriator has gained prescriptive rights through the adverse, open, and hostile taking of non-surplus water (“adverse possession” or “prescription”).²⁹

With regard to prescriptive rights, the act *does* change the law to the extent that groundwater extraction between January 1, 2015 and the date of adoption of a groundwater sustainability plan cannot be used to establish (or defend against) a claim of prescription in medium and high priority basins.³⁰ This limitation on the use of prescription takes a step back from the holding in *City of Barstow v. Mojave Water Agency*, where the California Supreme Court ruled that overlying uses are paramount, unless an appropriator has gained prescriptive rights through the taking of non-surplus waters.³¹ Now, the legislature has essentially eliminated the possibility of new prescriptive rights in areas of shortage until sustainability plans are put in place.³² This will likely have a chilling effect on new development in the interim period before the adoption of sustainability plans. Additionally, developers will likely focus efforts in areas overlying well-maintained groundwater basins to ensure the viability of water rights.

²⁶ 23 Cal.4th 1224 (2000).

²⁷ Of course, all water extraction is only permitted to the extent that the use of water is not unreasonable, consonant with Article X, section 2 of the California Constitution.

²⁸ § 10750.4.

²⁹ See § 10720.5(b) (stating that the Act does not alter or determine surface or groundwater rights under common law or any other portion of law).

³⁰ See § 10720.5(a).

³¹ 23 Cal.4th at 1241 (citing *Hi-Desert Cnty. Water Dist. v. Blue Skies Country Club, Inc.*, 23 Cal.App.4th 1723, 1731 (1994)).

³² See § 10720.5.

In a Nutshell:

The Sustainable Groundwater Management Act will have profound implications for future land development in California. Now, permits will only be available for groundwater in at-risk basins when new uses do not threaten the sustainability of existing groundwater resources. Land managers and water regulators will need to work together to ensure that water supplies from groundwater basins remain available for existing and future uses. Consequently, there will likely be greater alignment between local water authorities and planning commissions as they coordinate land uses with sustainability goals.

VI. ALL'S WELL THAT ENDS WELLS:¹ ARGUMENTS FOR AND AGAINST IMPOSING MORATORIA ON NEW WELLS

A. Introduction

The new groundwater legislation (Sustainable Groundwater Management Act of 2014, S.B. 1168)² may have taken effect on January 1, 2015, but the section of the Act requiring localities to complete groundwater sustainability plans (GSPs) will not be implemented until 2020 for basins in a critical condition of overdraft.³ In fact, for all other basins, the deadline comes two years later.⁴ In light of a recent study conducted by a senior NASA scientist that states that California has approximately one-year's supply of water left, the adoption of GSPs may be too late.⁵ Thus, a growing number of localities have already begun to adopt new regulations aimed at controlling groundwater levels.

One emerging trend is to limit groundwater pumping in particular through the imposition of moratoria on applications for new wells. Ventura County adopted an ordinance with the sole purpose of prohibiting new water well permits.⁶ San Luis Obispo County adopted an ordinance that prohibits new water well permits, but that also imposes a much broader moratorium prohibiting new or expanded irrigated crop production and new development dependent on wells.⁷ Several other counties have only begun to consider similar ordinances, but have not yet adopted them (e.g. Fresno, Stanislaus, and Santa Barbara). Using the Ventura County and San Luis Obispo County ordinances as examples, this module discusses how a temporary ban on groundwater permits is a measure that can effectively prevent excessive groundwater pumping. Additionally, this module explains

¹ This title came from an article written by Nick Welsh on November 26, 2014 for the *Santa Barbara Independent*.

² Codified at California Water Code §§ 10720 *et seq.*

³ Cal. Water Code § 10720.7(a)(1).

⁴ Cal. Water Code § 10720.7(a)(2).

⁵ Amanda Holpuch, *Drought-Stricken California Only Has One Year of Water Left, NASA Scientist Warns*, The Guardian (March 16, 2015), available at <http://www.theguardian.com/us-news/2015/mar/16/california-water-drought-nasa-warning>.

⁶ See Ventura County Ordinance No. 4466.

⁷ See San Luis Obispo County Ordinance No. 3246

how the imposition of moratoria on new wells is a lawful governmental action, but one that should not be exempt from CEQA review.

B. Common Features of Moratoria on New Wells

Both Ventura County and San Luis Obispo County passed ordinances to temporarily ban applications for new groundwater wells. Ventura County Ordinance No. 4466 was adopted in October 2014 and will remain in effect until it is amended or repealed by the Board of Supervisors.⁸ San Luis Obispo County Ordinance No. 3246 was adopted in August 2013 and remained valid for only 45 days,⁹ but was followed by Ordinance No. 3247, which extended the moratoria through August 2015.¹⁰ The following are some of the common features of these ordinances:

- Both were adopted as urgency ordinances intended to stabilize groundwater levels until groundwater sustainability plans (“GSPs”) take effect pursuant to state legislation;¹¹
- Both were exempt from CEQA;¹²
- Both permit owners to repair or make minor modifications to existing wells;¹³
- Both provide mechanisms for case-by-case exceptions (i.e. overriding public need);¹⁴ and
- Both apply to predominantly agricultural and rural areas.¹⁵

⁸ Ventura County Ordinance No. 4466 §§ 5-6.

⁹ San Luis Obispo County Ordinance No. 3246 § 10.

¹⁰ See San Luis Obispo County Ordinance No. 3247 §§ 2-3.

¹¹ See San Luis Obispo County Ordinance No. 3247 § 1-G; Ventura County Ordinance No. 4466 § 1-B-1-a.

¹² See San Luis Obispo County Ordinance No. 3246 § 1-A; Ventura County Ordinance No. 4466 § 1-A.

¹³ See San Luis Obispo County Ordinance No. 3247 §§ 3-I, 5-A; Ventura County Ordinance No. 4466 § 4826.2(A).

¹⁴ See San Luis Obispo County Ordinance No. 3247 § 6; Ventura County Ordinance No. 4466 § 4826.2.

¹⁵ See San Luis Obispo County Ordinance No. 3247 § 2; Ventura County Ordinance No. 4466 § 2.

C. Purposes of Moratoria on New Wells

In a large number of groundwater basins, water levels are consistently and substantially decreasing. In some groundwater basins, water levels are even below sea level.¹⁶ Despite these drought conditions, requests for permits to dig new wells have soared in some counties over the last year. For example, Stanislaus County handed out 390 drilling permits from January to September 2014, 215 more than the number of permits issued in 2013 for that same period, while the number of new wells permitted in Ventura County during the first 9 months of 2014 already exceeded by 50% the average number of wells permitted during the three prior years.¹⁷ Furthermore, approximately 25% of the state's high and medium priority basins are not fully monitored under the California Statewide Groundwater Elevation Monitoring Program.¹⁸ As a result, a significant number of domestic wells are either going dry or being contaminated due to saltwater intrusion, directly affecting the lives of thousands of residential homeowners.¹⁹

Both the Ventura County and San Luis Obispo County ordinances are responses to growing concerns with regard to groundwater levels in their respective areas.²⁰ The San Luis Obispo County ordinance contains a broad statement of purpose:

In order to address these urgent water needs within the Paso Robles

¹⁶ Marissa Wenzke, *Running on Empty: Ventura County Puts Curbs on Water Well Drilling*, Pacific Coast Business Times (Nov. 21, 2014), available at <http://www.pacbiztimes.com/2014/11/21/running-on-empty-ventura-county-puts-curbs-on-water-well-drilling/#sthash.4EibvIxm.dpuf>.

¹⁷ J.N. Sbranti, *Well-Drilling Moratorium Sought by Some Stanislaus Supervisors*, Modesto Bee (Sept. 24, 2014), available at <http://www.modbee.com/news/local/article3173136.html#storylink=cpy>; Ventura County Ordinance No. 4466 § 1-B-2-g.

¹⁸ *Udated Report: Groundwater Resources Depleted by Drought*, California Department of Water Resources, December 2, 2014.

¹⁹ J.N. Sbranti, *Homeowners Go Dry as Farmers Get Permits to Drill Hundreds of New Wells*, Modesto Bee (June 28, 2014), available at <http://www.modbee.com/news/local/article3167097.html>; heather Hacking, *Drought Task Force Hears List of Water Problems in Glenn County*, Chico Enterprise-Record (Sept. 11, 2014), available at <http://www.chicoer.com/general-news/20140911/drought-task-force-hears-list-of-water-problems-in-glenn-county/1>.

²⁰ See San Luis Obispo County Ordinance No. 3246 §§ 1 - B-I; Ventura County Ordinance No. 4466 § 1-B-2.

Groundwater Basin, the County is contemplating amendments to its general plan and/or zoning ordinance and intends to study those potential amendments within a reasonable time. In the meantime, the approval of . . . well permits, or any other applicable entitlement for use . . . would threaten the public health, safety, and welfare by exacerbating the declining water levels of the Basin and contributing the failure of additional residential and agricultural wells. This urgency and interim zoning ordinance will allow County staff time to complete necessary studies and reports for the contemplated amendments to its general plan and/or zoning ordinance while preserving the resources of the Basin.²¹

The Ventura County ordinance lists more specific objectives:

- To stabilize groundwater extractions until appropriate regulatory oversight, as recently designated by the state, can take place;
- To protect current communities, growers and other users, who are reliant on groundwater, from the adverse consequences that can result from a rush of new pumpers permanently impacting their ability to obtain needed water;
- To decrease the possibility that groundwater supplies will be exhausted during this extended drought and before groundwater sustainability plans; and
- To conserve critical and dwindling water supplies during a severe statewide and local drought so that there will be adequate supplies for health, safety, and welfare.²²

In light of the above objectives, a moratorium on new wells could be an effective measure to curtail the consumption of groundwater while local governments and public agencies are studying potential amendments to existing law. A temporary ban on a particular water use, in this case groundwater extraction from wells, can also restrain water users from excessive water consumption and storage in anticipation of GSPs.

²¹ San Luis Obispo County Ordinance No. 3246 § 1-I.

²² Ventura County Ordinance No. 4466 § 1-B-1.

D. Legality of Moratoria on New Well Permits

Ever since various counties throughout California began considering bans on applications for new well permits, there has been much debate about the legality of this type of governmental action. As discussed below, the imposition of ordinances prohibiting new water well permits is a valid exercise of the police powers of local government and does not constitute an unlawful taking. These types of ordinances, however, should not be exempt from CEQA because they carry potential adverse effects on the environment.

1. The imposition of ordinances prohibiting new water well permits is within the police powers of local government

Some people opposed the imposition of Ventura County Ordinance No. 4466 and San Luis Obispo Ordinance No. 3246 on the ground that such governmental action is not within the authority of local government. As discussed below, the imposition of an ordinance prohibiting new water well permits are in fact authorized under the police powers of local government.

In *Baldwin v. County of Tehama* 31 Cal.App.4th 166 (1994), the Court of Appeal addressed the question of whether a county ordinance imposing limits on groundwater permits was preempted by state law regulation of groundwater. The ordinance at issue in *Baldwin* required a permit to extract groundwater for the purpose of use on land other than where the extraction occurs. Under the ordinance, such a permit would be denied if the board of supervisors finds that the proposed extraction would result in certain specified adverse effects (i.e. overdraft, saltwater intrusion). The ordinance also prohibited the operation of any well in the county that caused a cone of depression in the water table beyond the boundaries of the parcel of the well's location.

In concluding that the ordinance was valid, the Court of Appeal noted that the California Constitution permits a city or county to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with the general laws.”²³ Thus, the court concluded that groundwater regulation is within the county police power, and that the Tehama ordinance may be enacted *unless it conflicted with state law*, which

²³ Cal. Const. art. XI, § 7; *Baldwin v. County of Tehama*, 31 Cal.App.4th 166, 173 (1994).

the court found it did not.²⁴ *Baldwin* remains good law for the proposition that “[l]ocal communities in California have great authority to regulate groundwater use in the persistent absence of statewide regulation,”²⁵ and that ordinances regulating groundwater are within the police powers of local government.

Under *Baldwin*, the Ventura County and San Luis Obispo County ordinances temporarily banning new water wells are valid exercises of the police powers of local government because they do not conflict with any existing state law, including the recently enacted Sustainable Groundwater Management Act. To be sure, the Act does appear to create a new regulatory structure that would occupy the field of groundwater regulation. But the Act provides for the formation of groundwater sustainability agencies that will have the power “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*, or otherwise establishing groundwater extraction allocations”²⁶ In other words, the Act expressly authorizes local agencies to impose certain limitations on groundwater use, including regulating the construction of new groundwater wells. Thus, the Ventura County and San Luis Obispo County ordinances are consistent with the Act, not in conflict with it, and are thus valid exercises of local governmental power.

One point of caution on a moratorium on new water wells has to do with the issue of whether it is permissible to limit an overlying owner’s future unexercised groundwater rights. In *Wright v. Goleta Water District* 174 Cal.App.3d 74 (1985), the Court of Appeal held that an overlying owner’s future unexercised groundwater rights cannot be limited or defined. *Wright*, however, has never been cited in a case for this proposition. In fact, in *City of Barstow v. Mojave Water Agency* 23 Cal.4th 1224 (2000), the California Supreme Court stated in dictum that dormant overlying rights may be subject to limitations as long as owners are afforded the necessary due process protections in the Water Code. Notwithstanding this dictum, ordinances prohibiting new water well permits would be more likely to withstand a legal challenge on the issue of “springing” dormant rights if

²⁴ Since it was not claimed that the ordinance conflicted with state law, and since broad statements of statewide policy concerning groundwater do not indicate that the area of groundwater has been exclusively committed to state law, the court found that the ordinance was in fact not in conflict with state law, and therefore valid. *Baldwin*, 31 Cal.App.4th at 173-76.

²⁵ A. Dan Tarlock, *Law of Water Rights and Resources* § 5:53.

²⁶ Cal. Water Code § 10726.4(a)(2).

they conform to all relevant due process requirements.

2. Ordinances restricting groundwater pumping on private property that do not deprive property owners of all economically beneficial use are not governmental takings requiring just compensation

The state and federal Constitutions prohibit the government from taking private property for public use without providing just compensation.²⁷ As discussed below, ordinances that restrict groundwater pumping on private property that do not deprive property owners of all economically beneficial use of their property, such as Ventura County Ordinance No. 4466 and San Luis Obispo County Ordinance No. 3246, are not governmental takings requiring just compensation.

In *Allegretti & Co. v. County of Imperial* 138 Cal.App.4th 1261 (2006), the Court of Appeal addressed the question of whether a county ordinance that imposed limits on well permits constituted a physical, regulatory, or temporary taking of “water rights.” Imperial County adopted an ordinance limiting the amount of water that can be extracted from an aquifer underlying one’s property to no more than 12,000 acre-feet per year. Allegretti challenged the ordinance, claiming the ordinance constituted a taking under the Fifth Amendment requiring just compensation. The court concluded that Imperial County’s issuance of well permits with restrictions did not constitute a physical, regulatory, or temporary taking requiring just compensation.

First, the court analyzed whether the ordinance constituted a *physical taking* of “water rights.”²⁸ According to the United States Supreme Court, in *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982), compensable permanent physical takings occur where “real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it.” But the Supreme Court also found in *Dugan v. Rank* 372 U.S. 609, 614 (1963) that a physical taking occurred where the government diverted water and decreased the amount of water accessible to the owner by impounding water at a nearby dam.²⁹ Ultimately, the *Alegretti* court found that the permit condition limiting the total quantity of groundwater available for Alegretti’s use is a “passive restriction” that merely required water users to leave water

²⁷ Cal. Const. art. I § 19; U.S. Const. amend. V.

²⁸ *Allegretti & Co. v. County of Imperial*, 138 Cal.App.4th 1261, 1271 (2006).

²⁹ *Id.* at 1273.

in its source, distinguishable from governmental actions that physically divert water such as when water is impounded at a dam. Because it found there was no “actual physical occupation or physical invasion” of a property interest, the court held that the ordinance did not constitute a categorical physical taking.³⁰

Similarly, Ventura County Ordinance No. 4466 and San Luis Obispo County Ordinance No. 3246 are “passive restrictions” that merely prevent water users from constructing new groundwater wells. These ordinances create no “actual physical occupation or physical invasion,” and any claim that these ordinances constitute physical takings would fail pursuant to *Alegretti*.

Second, the court analyzed whether the ordinance constituted a *regulatory taking* of “water rights.”³¹ The court adopted the same analysis for regulatory takings applicable to real property. The court stated, “[w]hen government regulation completely deprives an owner of ‘*all* economically beneficial use’ of its land, a taking is established and just compensation is due.”³² *Alegretti* admitted that he was able to irrigate and farm a portion of his property despite the permit restrictions. *Alegretti* argued, however, that his productive use of his farm had been diminished by the ordinance because he would be able to pump more water and farm more land but for the well permit restrictions. The court rejected *Alegretti*’s argument, noting that *Alegretti* had to have been deprived of *all* economically beneficial use of his land in order for the county ordinance to constitute a compensable regulatory taking. Because the permit restrictions did not so deprive *Alegretti*, the county’s actions did not constitute a taking.

Although Ventura County Ordinance No. 4466 and San Luis Obispo County Ordinance No. 3246 prohibits the construction of new groundwater wells, they do not prevent water users from repairing or modifying existing wells or from obtaining water from any other source. In a majority of cases, then, the permit restrictions will not deprive property owners of all economically beneficial use of their property, and thus cannot be deemed to be regulatory takings requiring compensation. Perhaps in contemplating that there may

³⁰ *Id.* at 1275. The California Supreme Court also held in *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132 (1967) that takings do not occur when government action stops the unreasonable or wasteful use of water by a private citizen, because citizens do not have the right to use water in an unreasonable manner.

³¹ *Id.*

³² *Id.* at 1276 (citations omitted).

be instances where the inability to construct a new well may completely deprive a property owner of economic benefits from his property, the Ventura County Ordinance allows for a waiver of the permit prohibitions on case-by-case determination.³³

Lastly, the court analyzed whether the ordinance constituted a compensable *temporary taking* of “water rights” during the permit process and resulting litigation.³⁴ In *Landgate Inc. v. California Coastal Com.* 17 Cal.4th 1006 (1998), the California Supreme Court addressed the issue of whether a permit denial by the California Coastal Commission constituted a temporary taking or a noncompensable normal delay in development. The *Landgate* court held that no taking occurs if there is “sufficient connection between the land use regulation in question and a legitimate governmental purpose, so that the former may be said to substantially advance the latter.” In contrast, governmental actions that are “so unreasonable . . . as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it” will constitute a temporary taking requiring just compensation.³⁵ The *Alegretti* court found that the permit conditions at issue had an “objectively sufficient connection” to the valid governmental interest of preserving groundwater supply. Under *Landgate*, therefore, the court held there was no temporary taking requiring just compensation.³⁶

Ventura County Ordinance No. 4466 and San Luis Obispo County Ordinance No. 3246, prohibiting construction of new groundwater wells, also have an “objectively sufficient connection” to the counties’ interest of stabilizing groundwater levels until GSP can take effect.³⁷ Thus, under both *Alegretti* and *Landgate*, a court is not likely to find that these ordinances constituted temporary takings that violate the Fifth Amendment.

3. Ordinances imposing moratoria on new wells should *not* be exempt from CEQA

New regulations may be exempt from CEQA analysis when they are drafted to benefit the environment.³⁸ Courts have said, however, that “[e]ven a new regulation that strengthens some environmental requirements may not be entitled to an exemption if the new

³³ Ventura County Ordinance No. 4466 § 4826.3.

³⁴ *Id.* at 1281.

³⁵ *Landgate Inc. v. California Coastal Com.* 17 Cal.4th 1006, 1022 (1998).

³⁶ *Alegretti & Co. v. County of Imperial* 138 Cal.App.4th 1261, 1283 (2006).

³⁷ *See supra*, at part III.

³⁸ CEQA Guidelines section 15307 and 15308.

requirements could result in other potentially significant effects.”³⁹ As discussed below, ordinances imposing moratoria on new wells should not be exempt from CEQA review because of the potential for certain environmental consequences.

In *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* 9 Cal.App.4th 644 (1992), an air quality management agency adopted regulations limiting the amount of solvents contained in paint and other architectural coatings. The agency contended that the regulations, intended to decrease the emission of harmful substances to the air, were categorically exempt from CEQA because they established more stringent standards for substances contained in paint, and thus cannot be said to create an adverse change. The plaintiffs, paint manufacturers and users, presented evidence that the regulations would actually result in an increase in emission of harmful substances to the air. For example, the plaintiffs showed that because the proposed standards would produce lower quality products, users would have to apply more primers, sealers, and other products to achieve the same effect. Since the defendant agency failed to produce evidence of no adverse impact, the court concluded that the agency cannot say with certainty that “there is no possibility that the activity in question may have a significant effect on the environment,” and that CEQA review was required.⁴⁰

The Ventura County ordinance states it is exempt from CEQA requirements because “there is no possibility that it will have a significant effect on the environment.” In support, the ordinance states it contains regulations to protect groundwater resources, as well as restrictions intended to protect the environment and available resources. Further, the ordinance states that its urgency deems it exempt from CEQA analysis.⁴¹

Ordinances imposing moratoria on new wells, however, are likely to have adverse impacts on the environment that preclude the application of CEQA exemptions. The ordinance may increase reliance on imported water, which will have its own environmental consequences. It may also result in the loss or underutilization of farmland.

³⁹ *California Unions for Reliable Energy v. Mojave Desert Air Quality Management District* 178 Cal.App.4th 1225 (2009).

⁴⁰ CEQA Guidelines, § 15061, subd. (b)(3).

⁴¹ Marissa Wenzke, *Running on Empty: Ventura County Puts Curbs on Water Well Drilling*, Pacific Coast Business Times (Nov. 21, 2014), available at <http://www.pacbiztimes.com/2014/11/21/running-on-empty-ventura-county-puts-curbs-on-water-well-drilling/#sthash.4EibvIxm.dpuf>.

Apart from its potential impacts on the environment, a moratoria on new wells could also limit food production. If farmers are not able to pump enough groundwater, they cannot maximize their production capacities. Given California's rising population, a well permit moratorium is not a suitable water conservation measure. For these reasons, these types of ordinances should not be reviewed in accordance with CEQA principles.

In a Nutshell:

An emerging trend aimed at controlling groundwater levels while awaiting the adoption of GSPs is the imposition of moratoria on applications for new wells. A temporary ban on construction of new water wells could be an effective measure to curtail the consumption of groundwater because it will prevent excessive water consumption and storage by water users seeking to get ahead of the anticipated regulations. It is a valid exercise of the police powers of local government and does not constitute an unlawful taking. These types of ordinances, however, should not be exempt from CEQA because they carry potential adverse effects on the environment.

VII. CONSTITUTIONAL GUIDELINES

Reasonable Use:

Article X, Section 2

- **Overview:** Article X, Section 2 of the California Constitution (Cal. Const. art. X, § 2) states that water must be used reasonably and it must be used for beneficial purposes. This doctrine has had a profound impact on California’s water law jurisprudence, and courts have interpreted this section to mean that landowners have no right to water when it is used unreasonably, or for a purpose that conflicts with the greater needs of local communities.
- **Policy Implications:** Land managers and developers do not have the right to appropriate water when appropriations result in unreasonable uses or uses that do not benefit the public. This essentially means that land use authorities, including planning commissions, must work closely with water regulators to ensure that existing and future uses will remain reasonable and beneficial.

Key Cases

Peabody v. City of Vallejo, 2 Cal.2d 351 (1935): This case affirmed the validity of constitutional limits on water use in California. The California Supreme Court held that the limitations of Article X, Section 2 “now apply to every water right and every method of diversion The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.” Essentially, this case established that land planners must consider whether water uses are reasonable and whether they conflict with other needs in local communities.

Joslin v. Marin Municipal Water District, 67 Cal.2d 132 (1967): The Supreme Court held that no property rights exist in water when that water is used unreasonably. The Court held that a local water district could cut off the flow of water to a gravel quarry along a river to fill a reservoir upstream, because the quarry used unreasonably wasteful quantities of water when manufacturing gravel and the reservoir served an important public function.

Erickson v. Queen Valley Ranch, 22 Cal.App.3d 578 (1971): The Court of Appeal held that extreme waste of water is an unreasonable use. In this case, a farmer constructed a water transportation system to carry water to his fields. However, five sixths of the water was lost between the time the water was diverted from the stream to the time the water reached the fields. Even though this practice conformed with local custom, it was unreasonable under California's constitutional restrictions against unreasonable uses of water.

People ex rel. State Water Resources Control Board v. Forni, 54 Cal.App.3d 743 (1976): Holding that the State Water Resources Control Board has the authority to regulate unreasonable uses by enjoining diversions from a river during periods of extreme scarcity.

Environmental Defense Fund v. East Bay Municipal Utility District, 26 Cal.3d 183 (1980): Holding that it was unreasonable for the Utility District to divert water at the headwaters of a river to the extent that the diversion had adverse impacts on wildlife in lower portions of the river.

VIII. STATUTES AND REGULATIONS¹

A. WATER LAW

1. General State Powers over Water

- a. Water Shortage Emergency Act
California Water Code §§ 350 - 359.

Enacted: Stats.1953, c. 140, p. 906, § 1

- **Overview:** This section of the Water Code gives public utility districts the discretion to announce emergency shortage conditions, in which case they may adopt any regulations or restrictions on the use and delivery of water that they deem necessary to conserve the water supply. “Water shortage emergency condition” encompasses both an immediate emergency, where a district cannot meet its customer’s water needs, and a threatened water shortage, where a district determines that its water supply would not be able to meet future demand. *See, e.g., San Diego County Water Authority v. Metropolitan Water Dist. of Southern California*, 117 Cal.App.4th 13 (2004). Upon declaring emergency water shortage conditions, utility districts have denied applications for new or additional water service connections, and imposed rate structures increasing the cost of water for increased usage. *See, e.g., Building Industry Assn. v. Marin Mun. Water Dist.*, 235 Cal.App.3d 1641 (1991); *Brydon v. East Bay Mun. Utility Dist.*, 24 Cal.App.4th 178 (1994). Yet water districts cannot enact development moratoria based on unproven allegations of water shortages. *See, e.g., Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990) (utility district’s refusal to grant water connections constituted a regulatory taking of property).
- **Policy Implications:** Courts have afforded much deference to the decisions of public utility districts to implement moratoria and deny service. *See, e.g., Kawaoka v. City of Arroyo Grande* 17 F.3d 1227 (9th Cir. 1994) (city’s one-year development moratorium did not constitute a due process violation because city demonstrated

¹ Some information on the relevant statutes and regulations were derived from the following source: *Before the Well Runs Dry: Improving the Linkage Between Groundwater and Land Use Planning*, by Water in the West (Stanford Woods Institute for the Environment & The Bill Lane Center for the American West) (April 2014).

that it did not have adequate water supply for all pending development applications); *Getz v. Pebble Beach Community Service District*, 219 Cal.App.3d 229 (1990) (community service district's denial of a sewer connection permit was proper because senior housing units were not included in local land use plan). Thus, land use planners need to be well-informed of the local water district's estimates of current and future water supply and demand before proceeding with development.

2. Water Appropriation

a. Effect of Acceptance of Water Right Permit and License **California Water Code §§ 1392, 1629**

Enacted: Stats.1943, c. 368, p. 1621, § 1392

- **Overview:** A water right permit is an authorization to develop a water use project. A permittee who has used water beneficially and has complied with all of the conditions in his permit will be offered a water right license. A water right license confirms a licensee's right to appropriate water. These two statutes from the Water Code authorize the state to condemn (or recall from public use) water permits (§ 1392) and water licenses (§ 1629) for the price at which they were acquired.
- **Policy Implications:** These statutes were enacted during a time when there was much concern about private utilities monopolizing goods and services. Over time, however, private water companies were surpassed by public entities. Thus, these two statutes have remained largely unused. (There is only one reported case on the law. See *Central Delta Water Agency v. State Water Resources Control Bd.*, 124 Cal. App. 4th 245 (2004) (statute prohibiting water right permittee from demanding amount in excess of actual amount paid for permit applies to sale of water rights, and not to the sale of the water itself)). However, desperate times may call for desperate measures, and these statutes may be worth revisiting.

b. Appropriation of Water by California Department of Water Resources **California Water Code §§ 10500, et seq.**

Enacted: Stats.1943, c. 370, p. 1896

- **Overview:** This section of the Water Code codifies the permitting system for the private appropriation of water.
- **State Water Resources Control Board (Post 1914):** The Board issues permits and licenses for the appropriation of surface water. The Board also determines whether uses are reasonable and beneficial under Article X, section 2.
- **Note:** Pre-1914 appropriations and riparian rights are exempt from the permit system, to the extent that these uses are not unreasonable and to the extent that these uses do not harm water systems held in public trust.

3. Conservation, Development and Utilization of State Water Resources

a. California Water Plan

California Water Code §§ 10004 - 10013

Enacted: Stats.1959, c. 2053, p. 4748, § 2

Relevant Amendment: S.B. 1341 (1999-2000), Chapter 720 (Cal. Stat. 2000).

- **Overview:** Enacted in 1959, the California Water Plan represents the state’s coordinated plan for the conservation, development, and utilization of water resources. The Department of Water Resources is tasked to update the plan every five years. Prior to 2000, the updating of the plan focused solely on strategies relating to the use and development of water sources and facilities. In 2000, S.B. 1341 required the department, in connection with updating the plan, to conduct a study to determine the amount of water needed to meet future demand. S.B 1341 also required that the study be based on certain specified factors, including *“current and projected land use patterns, including the mix of residential, commercial, industrial, agricultural, and undeveloped lands.”* Interested entities throughout the state will be given an opportunity to review and comment on a preliminary draft of the department’s study.
- **Policy Implications:** The state has taken a step toward integrating water planning with land use by requiring the Department of Water Resources to consider land use patterns when updating the California Water Plan. Authorities for both land use and water have an opportunity to engage in dialogue since land

planners are able to review and comment on the department's estimates pertaining to land use patterns. Such dialogue between water and land use authorities allows both entities to make better informed decisions that can lead to more sustainable approaches in meeting their respective goals.

b. Urban Water Management Planning Act of 1983
California Water Code §§ 10610 - 10645

Enacted: Stats.1983, c. 1009, § 1

- **Overview:** This act requires urban water providers to submit an Urban Water Management Plan (UWMP) to the Department of Water Resources, with updates every five years. The purpose of having UWMPs is to support the long-term resource planning of urban water suppliers. The Act prescribes the specific contents of a UWMP. Today, UWMPs play an important role in CEQA review of proposed developments. CEQA requires that a public water system supplying water for a proposed project prepare a water assessment to determine whether there is adequate long-term water supply for the project without associated significant environmental impacts. If the projected water demand for a proposed project was accounted for in the most recent UWMP, the public water system may simply incorporate the information contained in the UWMP in preparing the water assessment. (*See* Water Code § 10910(c) and Public Resources Code § 21080.1).
- **Policy Implications:** Prior to CEQA, there was no proscribed mechanism to integrate UWMPs with land use decisions. This becomes evident when reading the Urban Water Management Planning Act in isolation, independent of the CEQA provisions. After the enactment of CEQA, however, UWMPs began to significantly affect land development projects. *See, e.g., California Oak Foundation v. City of Santa Clarita*, 133 Cal. App. 4th 1219, 1242 (2005) (court found analysis of perchlorate contamination in an EIR (environmental impact report) adequate even though the EIR did not mention perchlorate, since the EIR relied upon a UWMP that identified and assessed treatment options for the perchlorate contamination). Local land use planners and developers should ensure that the relevant UWMPs will support their proposed developments.

c. Agricultural Water Conservation and Management Act of 1992
California Water Code §§ 10520 - 10523

Enacted: A.B. 1160 (1991-1992), Chapter 184 (Cal. Stats. 1991).

- **Overview:** The Department of Water Resources has long been required by law to assist agricultural water suppliers in implementing efficient water management practices to improve the efficiency of water use. A.B. 1160, enacted in 1992, gave agricultural water suppliers the authority to implement water conservation programs that include several components specified by the Act. Such programs may concentrate on educating farmers on how to improve on-farm water management, or they may be geared towards making actual physical and structural improvements of on-farm water systems.
- **Policy Implications:** Implicit in these statutes is the notion that water resources are more effectively managed when land use considerations are made. These statutes recognize that agricultural lands, being a major component of land use in California, require more oversight from water management experts. By providing strict requirements for conservation among individuals who use land for agricultural purposes, these statutes can help minimize the environmental impacts of a major land use component.

d. Water Supply Planning to Support Existing and Planned Future Uses
California Water Code §§ 10910 - 10915

Enacted: S.B. 901 (1995-1996), Chapter 881 (Cal. Stats. 1995).

Relevant Amendment: S.B. 610 (2001-2002), Chapter 643 (Cal. Stats. 2001)

- **Overview:** This section of the Water Code requires developers to identify water sources and water infrastructure for projects under the jurisdiction of the California Environmental Quality Act. The purpose of a water supply assessment in the EIR is to assist local governments in deciding whether to approve a project. *See, e.g., Citizens for Responsible Equitable Environmental Development v. City of San Diego*, 196 Cal. App. 4th 515 (2011). An EIR for a land use plan does not need to demonstrate that the project is assured long-term future water supplies at the early stages of planning. *See, e.g. Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412 (2007).
- **Policy Implications:** This section of the Water Code helps ensure that future developments do not place undue burdens on shared resources, and helps ensure that developers do not take more than their fair share of water. Further, there is an abundance of case law addressing the question of what constitutes a sufficient water assessment in an EIR. Courts have had to analyze the sufficiency of a water assessment based on the particulars of a case. *See, e.g., Clover Valley Foundation*

v. City of Rocklin, 197 Cal. App. 4th 200 (2011) (EIR for subdivision project was adequate notwithstanding lack of discussion of possible replacement water sources, where it can be confidently determined that future water sources would be available); *Preserve Wild Santee v. City of Santee*, 210 Cal. App. 4th 260 (2012) (EIR for residential development was insufficient, where the EIR failed to analyze the impacts of obtaining water from an alternative water source, and the assessment only addressed 61 percent of the project’s estimated water demands). Land developers should have a firm understanding of what the law requires when preparing EIRs.

e. Integrated Regional Water Management Planning Act of 2002
California Water Code §§ 10530 - 10550

Enacted: S.B. 1 (2007-2008 Extraordinary Session), Chapter 1
(Cal. Stats. 2008).

- **Overview:** IRWMP is an optional regional planning process designed to harmonize the management of water quality, quantity and reliability. In accordance with an IRWMP, a regional project or program may be instituted to accomplish any one of a set of enumerated goals. One of these goals is the improvement of “resource stewardship,” including agricultural lands stewardship and urban land use management. Significantly, when determining how to apply funds that may become available for regional projects or programs, the department is required to give preference to proposals that effectively integrate water management with land use planning. *See also*, Public Resources Code § 75026.
- **Policy Implications:** The IRWMP is an example of a water conservation measure that only indirectly calls for the integration of water management with land use planning. For one thing, IRWMPs are voluntary. Further, the goal of improving agricultural or urban land use management is only one of any number of goals that a project under an IRWMP may choose to focus on. All other goals have little or nothing to do with land use planning (i.e. water recycling, desalination, improving drinking water treatment, etc.). The mere fact that preference for funding purposes is given to projects that consider integration of water management and land use planning does little to ensure the collaboration between water and land use authorities.

f. Sustainable Water Use and Demand Reductions
California Water Code §§ 10608-10608.64, 10631.5, 10800-10853

Enacted: S.B. 7 (2009-2010 7th Extraordinary Session), Chapter 4 (Cal. Stats. 2009).

- **Overview:** This section of the Water Code provides a comprehensive, mandatory plan of action for achieving a 20% reduction in urban per capita water use by 2020. Generally, these statues direct urban water retail water suppliers, agricultural water suppliers, and the Department of Water Resources to implement new management practices or approaches to promote efficient use of available water supplies. Only two provisions are directly related to land use planning. First, section 10608.48(c)(1) requires agricultural water suppliers to implement management practices that will “*facilitate alternative land use for lands with exceptionally high water duties,*” but only if the measures are cost effective and feasible. Second, section 10608.50(a)(6) permits the Department of Water Resources to “*expand technical and educational support for local land use and water management agencies*” as a means of promoting the implementation of IRWMPs.
- **Policy Implications:** Agricultural water suppliers are *not* required to adopt alternative land uses for lands with significantly high water consumption if it is not locally cost effective to do so. “Locally cost effective” means that local cost of implementing a particular measure is equal to or less than the value of the local benefits of implementing that measure. *See* Water Code § 10608.12(k). This provision means that as a policy matter, agricultural water suppliers are to prioritize cost over the impacts of agricultural land use on water supplies.
- **Policy Implications:** The act requires local land use authorities to consider GSPs in their land use and development decisions. A possible implication is that land use authorities may prioritize land uses according to a project’s reliance on groundwater. Kristen Castanos, *Will Recent Groundwater Law Impact California Development?*.

4. Groundwater Management

- a. Groundwater Management Act of 1992
California Water Code §§ 10750 -10755

Enacted: A.B. 3030 (1991-1992), Chapter 947 (Cal. Stats. 1992).

- **Overview:** In response to the Environmental Protection Agency’s Comprehensive State Groundwater Protection Programs, A.B. 3030 was enacted to provide local water agencies with increased management authority over groundwater resources. Local water agencies are permitted, but not required to, adopt a “groundwater management program,” a coordinated and ongoing activity undertaken for the benefit of a groundwater basin. Among the various components that *may* be included in a groundwater management plan, is “[t]he review of land use plans and coordination with land use planning agencies to assess activities which create a reasonable risk of groundwater contamination.” Water Code § 10753.8(l).
- **Policy Implications:** Although it encourages it, the Act does not create a requirement for local water agencies to coordinate with land use agencies. As such, there is no definite mechanism for guarding against land-based activities that have significant adverse effects on groundwater supply and/or quality.

b. Groundwater Monitoring

California Water Code §§ 10920 - 10936

Enacted: S.B. 6 (2009-2010 7th Extraordinary Session), Chapter 1 (Cal. Stats. 2009).

- **Overview:** This section imposes a statewide monitoring program to track seasonal and long-term trends in groundwater elevations in the state’s groundwater basins. Under the amendment, local monitoring entities and DWR would have to collaborate in disseminating groundwater elevation data in the California Statewide Groundwater Elevation Monitoring (CASGEM) database.
- **Policy Implications:** Future land development will not be possible without secure groundwater resources. This statute provides information to developers and land planners to let them know how much water is potentially available for future development.

c. Sustainable Groundwater Management Act of 2014

California Water Code §§ 10720 - 10736.6

Enacted: S.B. 1168 (2013-2014), Chapter 346 (Cal. Stats. 2014).

- **Overview:** Prior to the enactment of this act, the State of California had no standards for groundwater management. Local and regional agencies lacked

oversight capabilities, as well as the authority to enforce groundwater management. The purpose of the act is to remedy this shortcoming by providing local agencies with sustainable plans and guidelines for managing groundwater. SB 1168 will require groundwater basins to be managed under a Groundwater Sustainability Plan (GSP). AB 1739 and SB 1319 authorize the Department of Water Resources to ensure that GSPs conform to the requirements set forth in the act.

5. Miscellaneous

a. Disciplinary Actions for Licensed Contractors

California Business and Professions Code § 7110

Enacted: Stats.1939, c. 37, p. 393, § 1

- **Overview:** This section of the code states that violations of the California Water Code by licensed contractors for residential buildings or structures are a cause for disciplinary action.
- **Policy Implications:** Licensed contractors hired to repair or remodel residential structures, the performance of which would involve excavations, subsurface installations or other specified activities, must be aware of potential sanctions for violations of water regulations.

b. Joint Powers Agreements for Eastern San Joaquin Valley

California Government Code § 6533

Enacted: S.B. 833 (2003-2004), Chapter 740 (Cal. Stats. 2003).

- **Overview:** This section provides guidelines for how resource managers should collaborate to distribute water resources for land developers in the San Joaquin Valley.
- **Policy Implications:** Resource managers are required to collaborate to identify parcels of land that would benefit most from changes to current resource distributions.

3. *Promotion and Protection of Agricultural Industry*

California Food and Agricultural Code §§ 401 - 411

Enacted: Stats.1967, c. 15

Relevant Amendment: A.B. 2587 (2001-2002), Chapter 615 (Cal. Stats. 2002).

- **Overview:** The Department of Food and Agriculture shall provide the Department of Water Resources with estimates of the amount of food production, fiber, livestock, and other farm products. These estimates are based on specified factors, including on-farm water conservation measures and agricultural water needs based upon food security considerations. The Department of Food and Agriculture is required to provide their report to the Department of Water Resources for estimating related water usage, as well as to the Chairs of the Assembly Committee on Agriculture, the Assembly Committee on Water, Parks, and Wildlife, and the Senate Committee on Agriculture and Water Resources.
- **Policy Implications:** The intent behind A.B. 2587 is to ensure that the state will continue to produce enough food for the state, as well as for foreign countries dependent upon California for food. Although the bill was not motivated by water-related concerns, it does provide a means for ensuring the accuracy of reports prepared by DWR estimating the state's water needs because it gives them access to DFA information pertaining to agricultural water needs.

B. LAND USE

1. Subdivided Lands

- a. California Business and Professions Code §§ 11000, et seq.
Enacted: Stats.1943, c. 127, p. 862, § 1

Relevant Amendment: S.B. 221 (2001-2002), Chapter 642 (Cal. Stats. 2001).

- **Overview:** This section of the Business and Professions Code regulates transactions involving subdivided lands. Developers of subdivided lands must file a public report with the Department of Real Estate describing provisions for public utilities in the subdivision, including water. S.B. 221 (2001) amended existing law to specify that the requirement that developers describe water provisions for the subdivision will be satisfied by a written verification from the applicable public water system.
- **Policy Implications:** These statutes limit new developments when developers have not secured a source of water for the new development. For example, a land use agency approving a subdivision of more than 500 housing units will require a written verification from a water provider that a sufficient and reliable water supply is available.

2. Agricultural Lands

- a. California Land Conservation Act of 1965 / Williamson Act
California Government Code §§ 51200 - 51297.4

Enacted: Stats.1965, c. 1443, p. 3377, § 1

- **Overview:** The Williamson Act enables local governments to contract with private landowners to restrict the uses of agricultural land and other open spaces to farming and ranching uses. Under a Williamson contract, land uses that are incompatible with agricultural uses are prohibited. As originally enacted, “agricultural preserve” meant “an area devoted to agricultural *and compatible*

uses.” The Act defines a “compatible use” to include gas, electric, communication or water utility facilities. Because some jurisdictions were establishing agricultural preserves where only “compatible uses” were occurring, A.B. 1625 (1978) deleted “compatible use” from the definition of “agricultural preserve.” The result is that compatible uses, including water transmission facilities, will be allowed to exist within a preserve but cannot serve as the basis for establishing the preserve.

- **Policy Implications:** Through the Williamson Act, local governments are able to incorporate the conservation of open space and agricultural resources with their strategies for urban growth planning.

3. Planning and Zoning

a. General Plans for Land Development

California Government Code §§ 65302 - 65303.4

Enacted: Stats.1965, c. 1880, p. 4336, § 5

Relevant Amendment: S.B. 901 (1995-1996), Chapter 881 (Cal. Stats. 1995).

- **Overview:** Counties and cities must adopt “general plans” for the physical development of their counties or cities. The general plan contains, among other elements, a “conservation element” for the conservation, development and utilization of natural resources, including water. The law requires that the water portion of the conservation element be coordinated with water agencies. S.B. 901 added a requirement that the conservation element of a general plan include an assessment of water supply and demand. *See*, Government Code § 65302(d)(1).
- **Policy Implications:** Local governments must set long-terms goals for balancing future land development with the need to ensure equitable and efficient distributions of water resources.

b. Housing Elements

California Government Code §§ 65580 - 65589

Enacted: Stats.1980, c. 1143, p. 3697, § 3

Relevant Amendments: S.B. 1019 (1991-1992), Chapter 889 (Cal. Stats. 1991); S.B. 1087 (2005-2006), Chapter 727 (Cal. Stats. 2005).

- **Overview:** This section established the housing element for general plans, which assesses housing needs and an inventory of resources and constraints relevant to meeting those needs. S.B. 1019 (1991) imposed a requirement that the housing element be delivered to providers of water services or sewer services. This bill required these agencies to prioritize for the provision of water resources or services in a manner consistent with the allocated regional housing needs, as specified. S.B. 1087 (2005) added a requirement that the Public Utilities Commission adopt policies and procedures for use by water and sewer companies in a manner consistent with the housing element. The bill also prohibits water providers or providers of water services from denying services, or reducing the amount of services applied for, if a development includes “housing units affordable to lower income households,” unless certain specified findings are made. Finally, this bill requires that water use projections required by the Urban Water Management Act include the projected water use for single-family and multifamily residential housing for lower income households as identified in the housing element of any city, county, or city and county.
- **Policy Implications:** Under these statutes, approval of and provision of water to low-income housing projects is easier than for other types of developments. This is one way to address the problem of rising home prices.

c. Subdivision Map Act

California Government Code § 65867.5

Enacted: Stats.1979, c. 934, p. 3231, § 1

Relevant Amendment: S.B. 221 (2001-2002), Chapter 642 (Cal. Stats. 2001).

- **Overview:** Development agreements for proposed subdivisions must be consistent with general plans in order to be approved by a city or county. S.B. 221 added a requirement that development agreements for subdivisions of over 500 dwelling units include a written verification from a public water system that a sufficient water supply is available.
- **Policy Implications:** This section affirms the need to identify water supply *before* developing land.

d. Review and Approval of Future Development Projects
California Government Code §§ 65940 - 65945.7

Enacted: Stats.1977, c. 1200, p. 3993, § 1

- **Overview:** This section provides procedures for how future land development proposals should be reviewed and ultimately approved, including applicable notice and hearing requirements.
- **Policy Implications:** This section affirms the need to identify alternatives that have less significant impacts on local ecology through Environmental Impact Reports.

4. CEQA

a. California Environmental Quality Act (CEQA)
California Public Resources Code §§ 21000 - 21006

Enacted: Stats.1970, c. 1433, p. 2780, § 1

- **Overview:** This act specifies that agencies should not approve developments when there are “feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.” Cal. Pub. Res. Code § 21002. “The ultimate question under CEQA [] is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project.” *Vineyard*

Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal.4th 412, 434 (2007).

- **Policy Implications:** When evaluating feasible alternatives, developers must consider water conservation when drafting Environmental Impact Reports. *See, e.g., County of Inyo v. Yorty*, 32 Cal.App.3d 795 (1973). Environmental Impact Reports must also consider the possibility of permanent water shortages. *See, e.g., Planning and Conservation League v. Department of Water Resources*, 83 Cal.App.4th 892 (2000). Moreover, it is a duty of a land use agency to quantify the availability and quality of water available for the development being evaluated in an Environmental Impact Report. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412 (2007).