Judicial Council *of* California

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PATRICIA GUERRERO
Chief Justice of California
Chair of the Judicial Council

MILLICENT TIDWELL
Acting Administrative Director

July 6, 2023

Hon. Thomas J. Umberg, Chair
Senate Judiciary Committee
1021 O Street, Suite 6530
Sacramento, California 95814

Subject: Assembly Bill 560 (Bennett), as amended June 26, 2023—Remove Opposition
Hearing: Senate Judiciary Committee—July 11, 2023

Dear Senator Umberg:

The Judicial Council is pleased to remove our opposition to Assembly Bill 560 as amended on June 26, 2023. The latest amendments address the separation of powers concerns that generated our opposition.

As amended, AB 560 would require the parties to the case, rather than the court, to submit a proposed settlement in a groundwater adjudication to the State Water Resources Control Board (SWRCB) for a non-binding advisory determination as to whether the judgment would substantially impair the ability of a groundwater sustainability agency, the Water Board, or the Department of Water Resources to achieve sustainable groundwater management in the basin. It would then require the SWCRB to provide its determination within 120 days, and for the parties to then file the determination with the court at the same time the proposed settlement is filed.

This process will accomplish the author's intent to avoid conflicts in groundwater management that may arise when a groundwater basin is simultaneously subject to (1) an adjudication process in the court system and (2) the development of a sustainable groundwater management plan through executive agencies without impinging on the independence of the judicial branch. As amended, the council has no position on AB 560.

For these reasons, the Judicial Council removes opposition to AB 560.

Should you have any questions or require additional information, please contact Tracy Kenny at 916-323-3121.

Sincerely,

Cory T. Jasperson
Director, Governmental Affairs

CTJ/TK/jh
cc: Members, Senate Judiciary Committee
Hon. Steve Bennett, Member of the Assembly, 38th District
Ms. Margie Estrada, Chief Counsel, Senate Judiciary Committee
Mr. Todd Moffitt, Consultant, Senate Republican Office of Policy and Budget
Ms. Jessica Devencenzi, Legislative Affairs Secretary, Office of the Governor
Ms. Millicent Tidwell, Acting Administrative Director, Judicial Council of California
Ms. Shelley Curran, Chief Policy & Research Officer, Judicial Council of California

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PATRICIA GUERRERO
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MILLICENT TIDWELL
Acting Administrative Director

June 16, 2023

Hon. David Min, Chair
Senate Natural Resources and Water Committee
1021 O Street, Ste 6710
Sacramento, California 95814

Subject: Assembly Bill 560 (Bennett), as amended June 14, 2023 – Oppose
Hearing: Senate Natural Resources & Water Committee – June 22, 2023

Dear Senator Min:

The Judicial Council regretfully opposes AB 560, which requires a judge to submit a proposed settlement in a groundwater adjudication to the State Water Resources Control Board (SWRCB) for an advisory judgment as to whether the judgment would substantially impair the ability of a groundwater sustainability agency, the Water Board, or the Department of Water Resources (DWR) to achieve sustainable groundwater management in the basin. The bill, even as amended to make the board's advisory judgment "non-binding" on the court, violates the separation of powers doctrine and impermissibly infringes on judicial independence.

We understand the author's intent is to avoid conflicts in groundwater management that may arise when a groundwater basin is simultaneously subject to (1) an adjudication process in the court system and (2) the development of a sustainable groundwater management plan through executive agencies. Because the two processes are independent of one another, the basin may end up being subject to two conflicting legal plans for protecting the groundwater supply.

AB 560 requires the judge overseeing the adjudication to submit a proposed settlement to the board for an advisory determination by the board to reconcile these two processes. In response to separation of powers concerns, the author amended the bill to clarify that the judge is not compelled to concur with the agency's opinion. However, this amendment does not lessen the infringement on the court's authority posed by the requirement that the court submit a proposed settlement in a specific case that has come before it, to an executive agency for review. In other words, the fact that the review is deemed "non-binding" is not enough to overcome the separations of powers concerns. If the legislation were to require the parties to the proposed

settlement to submit it to the board for the board to review before the parties file the proposed settlement with the court, that requirement would overcome our concerns about the separation of powers because the court's determination would not be subjugated or constrained by the agency's determination.

The council also has concerns that requiring review by the board without a specified timeline could cause judges to run afoul of Section 19 of Article VI of the California Constitution, which prohibits a judge from being paid if a matter "remains pending and undetermined for 90 days after it has been submitted for decision." We are pleased that the author has accepted amendments changing "proposed judgment" to "proposed settlement" to avoid triggering this 90-day timeline. However, while this amendment may prevent judges from having their pay withheld due to circumstances entirely beyond their control, the proposal still poses separations of powers concerns for the judicial branch. In addition, recent amendments adding new provisions again refer to the proposed judgment once again raising these concerns.

We have not yet had an opportunity to bring the most recent June 14th amendments to our subject matter advisory committees for review, however, we shared some initial staff feedback with the author. Proposed new 10737.8(b)(2)(B) requires that the Water Board, as part of its advisory determination regarding a proposed settlement, "shall include findings on … How the proposed judgment would affect small and disadvantaged groundwater users." Should this be "proposed settlement" instead of judgement to align with what's in (B)(1) … "the court shall refer a proposed settlement…to the board"? Also, nothing in AB 560, as amended, requires that the court do anything with respect to small and disadvantaged groundwater users, so it's unclear what the court is supposed to do with the Water Board's findings and conclusions about such users.

We also note that this is different from the approach that is in AB 779 as amended May 26, 2023. That bill originally proposed amending CCP section 850 to require that "The court shall take into account the needs of small farmers and disadvantaged communities when entering a judgment" (Note, AB 779 also includes definitions of "small farmers" and "disadvantaged communities"). In a meeting with legislative staff on that bill, we suggested that the court would not necessarily have information about these needs, that the parties would need to provide the court with relevant evidence. The May 26th amendments to AB 779 modified the proposed amendments to CCP 850 to require that the findings the court must make before entering judgment include that "The water use of small farmers and disadvantaged communities have been considered." This language would place the burden on the parties to show the court that the water use of these users has been considered.

AB 779, as amended, also takes a different approach to getting the court input from relevant state entities by encouraging the court to:

> "invite a representative from the department or the State Water Resources Control Board to a hearing where the representative may provide technical assistance or expert testimony regarding equitable and sustainable pumping allocations for the basin, sustainable groundwater management best practices and recommendations, and the water use of small farmers and disadvantaged communities and potential impacts on their needs"

This language also raises separation of powers concerns because it suggests that it is the responsibility of the court to solicit the input of the executive branch agency rather than placing that on the parties or requiring the agency to be a mandatory party to the proceedings.

For these reasons, the Judicial Council opposes AB 560.

Should you have any questions or require additional information, please contact Tracy Kenny at 916-323-3121.

Sincerely,

Cory T. Jasperson
Director, Governmental Affairs

CTJ/TK/jh

cc: Members, Senate Natural Resources and Water Committee
Hon. Steve Bennett, Member of the Assembly
Ms. Genevieve Wong, Principal Consultant, Senate Natural Resources Committee
Mr. Todd Moffitt, Consultant, Senate Republican Office of Policy and Budget
Ms. Jessica Devencenzi, Legislative Affairs Secretary, Office of the Governor
Ms. Millicent Tidwell, Acting Administrative Director, Judicial Council of California
Ms. Shelley Curran, Chief Policy & Research Officer, Judicial Council of California