

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2313 (Bloom)
Version: April 27, 2022
Hearing Date: June 28, 2022
Fiscal: Yes
Urgency: No
AM

SUBJECT

Water: judges and adjudications

DIGEST

This bill requires the Judicial Council to establish a program that provides training and education to judges in technical, scientific, legal, management, and infrastructure actions relating to water. The bill authorizes a party, within 30 days after at least one defendant or respondent has been served in an action relating to water, to file a notice for a case to be assigned to a judge who has participated in the training program, and authorizes the presiding judge to take certain actions on the motion, including requesting the Judicial Council to assign a judge from another county who has participated in the training program. The bill also requires Judicial Council to identify experts in water science or management, or research attorneys, who may be available to any judge adjudicating an action relating to water as an expert, as a research attorney, or to consult on contents of documents submitted by a party. The bill authorizes a judge to appoint a special master to assist the judge with an action relating to water, and requires the special master to make a draft report, as provided.

EXECUTIVE SUMMARY

The adjudication of water rights in the state can be complex and involve many parties and counterclaims. The bill seeks to enhance the effective adjudication of water rights cases by requiring the Judicial Council to establish a training program to educate judges in technical, scientific, legal, management, and infrastructure actions relating to water. The bill authorizes a party to file a notice for a case to be assigned to a judge who has participated in the training program, and specifies the actions a judge can take in response to that motion. The bill also requires Judicial Council to identify experts in water science or management, a special master, or research attorneys, who may be available to any judge adjudicating an action relating to water as an expert to consult on contents of documents, as provided.

The bill is author sponsored. It is supported by various municipalities and water agencies. The bill is opposed by the Judicial Council.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Declares that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare, and that the right to water or to the use or flow of water in or from any natural stream or water course in this state is and is to be limited to such water as is reasonably required for the beneficial use to be served, and such right does not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. (Cal. Const. art. X Sec. 2.)
- 2) Provides that whenever the terms stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such terms refer only to surface water, and to subterranean streams flowing through known and definite channels. (Wat. Code § 1200.)
- 3) Provides that water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the state. (Wat. Code § 1201.)
- 4) Permits, in an adjudication for the determination of water rights, in order to gain further information on any subject in controversy the court may employ one or more qualified persons to investigate and report thereon under oath, subject to examination by any party in interest as to their competency to give expert testimony on the subject. (Wat. Code § 2766.)
- 5) Permits a court, in any suit brought in any court of competent jurisdiction in the state for determination of rights to water, to order a reference to the State Water Resources Control Board, as referee, of any or all issues involved in the suit. (Wat. Code § 2000.)
- 6) Provides that upon a written request submitted to the Department of Water Resources by the owners or governing bodies of at least 15 percent of the conduits lawfully entitled to directly divert water from streams or other sources of water

supply in any service area, the Department may, if it determines that it is necessary, appoint a watermaster and if necessary, in its discretion, one or more deputy watermasters for the service area. (Wat. Code § 4050.)

- 7) Permits the appointment of a referee upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom must be heard by a referee if the court finds a reference agreement exists between the parties:
 - a) to hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision; or
 - b) to ascertain a fact necessary to enable the court to determine an action or proceeding. (Code of Civ. Proc. § 638.)

- 8) Permits a court, when the parties do not consent, upon the written motion of any party, or of its own motion, to appoint a referee in the following cases:
 - a) when the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein;
 - b) when the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;
 - c) when a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action;
 - d) when it is necessary for the information of the court in a special proceeding; or
 - e) when the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon. (Code of Civ. Proc. § 639.)

- 9) Permits a court in a groundwater adjudication to appoint one or more special masters whose duties may include the following:
 - a) investigating technical and legal issues, as directed by the court;
 - b) conducting joint fact finding with the parties, their designees, or both;
 - c) investigating the need for, and developing a proposal for, a preliminary injunction, as specified; and
 - d) performing other tasks the court may deem appropriate. (Code of Civ. Proc. § 845(a).)

- 10) Requires a court to fix the special master's compensation on the basis and terms stated in the appointing order, and the court may set a new basis and new terms after giving the parties notice and an opportunity to be heard, and requires the court to allocate payment of the special master's compensation among the parties in an amount and a manner that the court deems equitable. (Code of Civ. Proc. § 845(b).)

- 11) Requires the superior courts in all counties with a population of more than 200,000 to designate one or more judges to develop expertise in the California Environmental Quality Act and related land use and environmental laws, so that those judges will be available to hear, and quickly resolve, actions or proceedings. (Pub. Res. Code § 21167.1(b).)
- 12) Provides that when it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter. (Evid. Code § 730.)

This bill:

- 1) Requires the Judicial Council to establish a program that provides training and education to judges in technical, scientific, legal, management, and infrastructure actions relating to water by January 1, 2025.
 - a) The program is required to include the development of water conflict education, which may include training on both western regional and California-specific water conflict, and may include meetings and conferences.
 - b) Participation in the program may include superior court judges from counties across the state, appellate court justices, and State Water Resources Control Board administrative law judges.
 - c) The Judicial Council is required to seek to include in the program judges from counties in each of the nine California regional water quality control board regions and justices from each appellate district
 - d) The program may be funded by an appropriation from the General Fund in the annual Budget Act or another statute, or by using existing funds for judicial training.
- 2) Authorizes a party, within 30 days after at least one defendant or respondent has been served in an action relating to water, to file a notice for a case to be assigned to a judge who has participated in the training program.
 - a) The presiding judge of the Superior Court that is the case's venue is required to hear the motion as promptly as possible.
 - b) A defendant or respondent who is served between the motion's filing and the hearing on the motion may file a response to it no less than five court days before the hearing.
- 3) Authorizes the presiding judge to take any of the following actions after a hearing on the motion described in 2):

- a) Request that the Judicial Council assign a judge from another county who has participated in the training program to hear the case.
 - b) Assign a judge of the superior court that is the case's venue, subject to Section 838 of the Code of Civil Procedure, who has participated in the training program described to hear the case. Provides that provisions of law related to the disqualification of judges does apply to such an assignment.
 - c) Decline to assign the case outside of the superior court's normal assignment rules, provided that the presiding judge explains in a written order why the case does not require the judge that will hear it to have training related to an action relating to water.
 - d) Defer issuing an order on the motion until additional parties have been served and can submit arguments on the motion, provided that the order of deferral sets both a deadline for the plaintiff or respondent to complete service of the parties that the presiding judge determines to be necessary to hear the motion and a date for another hearing on the motion, which is prohibited from being more than 180 days after the initial hearing date.
- 4) Requires Judicial Council to identify experts in water science or management, or research attorneys, who may be available to any judge adjudicating an action relating to water as an expert pursuant to Section 730 of the Evidence Code, as a research attorney, or to consult on the contents of a document submitted by a party.
- a) Defines "expert in water science or management" to mean a person with practical experience in one or more of the following: water engineering, water modeling, climate science, or managing or administering water rights.
 - b) Authorizes Judicial Council to pay or reimburse courts for the costs of employing or contracting with experts in water science or management or research attorneys in an action relating to water with funds appropriated for that purpose.
- 5) Authorizes a judge to appoint a special master to assist the judge with an action relating to water whose duties may include the following:
- a) investigating technical and legal issues, as directed by the court. The special master shall compile a report of findings in accordance with Section 1108;
 - b) conducting joint factfinding with the parties, their designees, or both;
 - c) investigating the need for, and developing a proposal for, a preliminary injunction; and
 - d) performing other tasks the court may deem appropriate.
- 6) Requires the appointed special master to make a draft report available to the parties and provide at least 60 days for the parties to submit written objections to the draft report, as provided.

- a) Authorizes the special master to notice and hold hearings, as the special master deems appropriate, to gather information or address issues raised in the objections to the draft report.
 - b) Requires the special master to consider the objections to the draft report and develop a final report that shall be filed with the court, together with supporting evidence.
- 7) Authorizes the reasonable and appropriate compensation for experts and research attorneys, an appointed special master, or an expert appointed to an action relating to water to be funded by an appropriation from the General Fund in the annual Budget Act or another statute.
- 8) Defines “action relating to water” to include specified actions and adjudications under existing law.

COMMENTS

1. Stated need for the bill

The author writes:

AB 2313 will broaden and sustain judicial expertise in the area of water law and litigation. As climate change leads to more water conflicts, this bill would create a judicial education program that would prepare judges to adjudicate these complex conflicts efficiently and effectively. It would allow the Chief Justice to direct water cases to judges who have that water training and expertise. The program and the expert resources provided in AB 2313 will help judges resolve water conflicts in California. It will ensure judges have those resources, to effectively adjudicate the management of California’s most essential, scarce, and shared resource – water.

2. Water rights adjudication

The adjudication of water rights in the state can be complex and involve many parties. According to the State Water Resources Control Board a “water right is a legal entitlement authorizing water to be diverted from a specified source and put to beneficial, nonwasteful use. Water rights are property rights, but their holders do not own the water itself.”¹ Existing state law recognizes three types of water rights – riparian rights, appropriative rights, and groundwater rights. Riparian rights are granted to landowners whose land is adjacent to waterways. Appropriative rights allow the holder to divert water based on a theory of first in time, first in right, and is a relic of the Gold Rush era. Groundwater rights give landowners overlying groundwater basins

¹ State Wat. Resources Control Bd., *The Water Right Process* (updated Aug. 20, 2020), available at https://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.html.

rights to pump groundwater. With the impacts of climate change affecting the scarcity and availability of water, via droughts and other conditions, litigation around water rights will likely increase in the near future.

The author notes that:

What makes water cases different is that water conflicts often affect more than just the two parties in litigation. These conflicts can affect an entire community's water or critical statewide natural resources, and may even raise questions about small, disadvantaged communities' access to safe drinking water. In this year's State Budget, the drought package included an authorization for use of a \$25 M contingency fund for urgent drought response efforts in several agencies, including authorization of funding for "water conflict resolution and related legal training for the Judicial Branch." By expanding resources available to judges through coordinated educational opportunities and engaging legal and technical expertise on water, AB 2313 will enable judges to effectively adjudicate the management of California's most essential and scarce resource: water.

An example of the numerous parties that can be involved in the adjudication of water rights can be found in this Committee's analysis of AB 1865 (Bennett, 2022), which detailed a recent situation where more than 12,000 landowners were joined into litigation regarding water rights in the Ventura River watershed. That bill requires a court to initially grant permission to proceed without paying court fees and costs to a person who is joined or countersued in a case involving a water right held by that person. This Committee passed AB 1865 on a vote of 11 to 0.

The complex nature of water rights cases, even for judges, became apparent in the recent case of *Dow v. Lassen Irrigation Company*. ((2022) _ Cal.Rptr.3d _; 22 Cal. Daily Op. Serv. 5494.) The record indicated that the superior court judge was unfamiliar with principles of water law and this fact was highlighted in the appellate decision. (*Id.* at 2.)

In light of the above, and the fact that issues over water are likely only going to be exacerbated with climate change, the bill seeks to enhance the effective adjudication of water rights cases by:

- Requiring the Judicial Council to establish a program that provides training and education to judges in technical, scientific, legal, management, and infrastructure actions relating to water.
- Authorizing a party, within 30 days after at least one defendant or respondent has been served in an action relating to water, to file a notice for a case to be assigned to a judge who has participated in the training program.
- Authorizing the presiding judge to take certain actions on the motion related to the assignment of judges, including requesting the Judicial Council to

- assign a judge from another county who has participated in the training program.
- Requiring Judicial Council to identify experts in water science or management, or research attorneys, who may be available to any judge adjudicating an action relating to water as an expert, as a research attorney, or to consult on contents of document submitted by a party.
 - Authorizing a judge to appoint a special master to assist the judge with an action relating to water, and requires the special master to make a draft report, as provided.
 - Authorizing the reasonable and appropriate compensation for experts and research attorneys, an appointed special master, or an expert appointed to an action relating to water to be funded by an appropriation from the General Fund in the annual Budget Act or another statute.

3. This bill may violate the separation of powers doctrine

The Judicial Council was opposed unless amended, stating that:

By making the training program mandatory and dictating very specific judicial assignment procedures, the bill marks a departure from the Legislature into judicial branch purview in violation of the separation of powers between branches of government. By dictating how courts assign cases and mandating creation of specific judicial training, the Legislature would be inappropriately interfering with a judicial branch duty. The Judicial Council's Center for Judicial Education and Research (CJER) is the sole entity responsible for educating the state's approximately 2,500 justices, judges, and subordinate judicial officers and nearly 20,000 court staff as required by California Rules of Court rules 10.451-10.491. Further, assignment of judges is also something that is purely the role of courts, and, in very limited cases, the Chief Justice. This is not something that is done by the council.

Section 3 of Article III of the California Constitution provides that the powers of state government are legislative, executive, and judicial, and that persons charged with the exercise of one power may not exercise either of the others except as permitted by the state constitution. The courts have held that "the focus in questions of separation of powers is 'the degree to which [the] governmental arrangements comport with, or threaten to undermine, either the *independence and integrity* of one of the branches or levels of government, or the ability of each to fulfill its mission in checking the others so as to preserve the *interdependence* without which independence can become domination.'" (*City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393, 398-99 (emphasis in original; citation omitted).)

The assignment power is constitutionally provided to the Chief Justice in furtherance of the Chief Justice's constitutional duty to "seek to expedite judicial business" and "equalize the work of judges." (Cal. Const., art. VI, § 6(e).) Courts have consistently held

that broad discretionary authority over the judicial assignment process is essential to the Chief Justice's ability to fulfill this duty. (See, e.g., *Mahler v. Jud. Council of California* (2021) 67 Cal. App. 5th 82, 96–97.) In *Mahler*, the court noted “[j]udicial precedent has established that the Chief Justice, as Chair of the Judicial Council, is invested with ‘discretion of the broadest character’ in the assignment of judges.” (*Ibid.*) An argument could be made that a statute containing a legislative restriction on the Chief Justice's exercise of constitutional discretion over the types of judicial assignments that are merited is the type of interference in the judicial branch by the Legislature that undermines the independence and integrity of the judicial branch in a way that impermissibly threatens its independence. Though there is no case law directly on point regarding mandating training for judges, this type of Legislative mandate also seems likely to fall within the realm of impermissible interference under the separation of powers doctrine.

4. Proposed amendments

The author and Judicial Council have agreed upon amendments to address the issues raised above. As such, the Judicial Council has removed their opposition to the bill. The amendments do all of the following:

- Make the training permissive instead of mandatory.
- State it is the intent of the Legislature in enacting subdivision (c) of Section 68556 of the Government Code that if a judge is assigned to an action related to water who has not received training or education provided for under the bill, the assigned judge shall have access to the judicial water experts authorized by the bill.
- Remove the provisions in the bill related to the assignment of judges and instead provide that, for actions relating to water, the court shall prioritize assigning a judge with the training or education provided for under the bill if the court has a judge with the training or education and that judge is available for assignment within a reasonable timeframe.
- Provide that if a judge with the training or education is not available the court may assign another judge and may request that the Chairperson of the Judicial Council assign a judge with the training or education.

The specific amendments are as follows:²

Amendment 1

On page 3 between lines 7 and 8 insert:

It is further the intent of the Legislature in enacting subdivision (c) of Section 68556 of the Government Code that if a judge is assigned to an action related to water who has not received training or education pursuant to subdivision (a) of Section 68556 of the Government Code, the assigned judge shall have access to the judicial water experts authorized in Section 1107 of the Water Code.

Amendment 2

On page 3 it line 11, strike out “shall” and insert: *may*

Amendment 3

On page 3, strike out lines 34 to 38, and on page 4 strike out lines 1 to 29, and insert:

(b) For actions relating to water, the court shall prioritize assigning a judge with training or education provided pursuant to subdivision (a), if both of the following conditions are met:
1) *The court has a judge with training or education pursuant to subdivision (a).*
2) *The judge with training or education pursuant to subdivision (a) is available for assignment to an action relating to water within a reasonable timeframe, as determined by the court.*

(c) For actions relating to water, if a judge with training or education provided pursuant to subdivision (a) is not available, the court may assign another judge.

(d) For actions relating to water, the court may request that the Chairperson of the Judicial Council assign a judge with training or education provided pursuant to subdivision (a).

Amendment 4

On page 4, in line 30, strike out “(c)” and insert: *(e)*

Amendment 5

On page 7, in line 35, strike out “may” and insert: *shall*

² The amendments may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

5. Statements in support

The California Municipal Utilities Association writes in support:

California water law is a complex scheme filled with involved history, competing priorities, and complicated authorities that dictate how judicial officers should, or could, rule on any given case before them. An overview of how interconnected California water law operates, at minimum, is essential for fair adjudicatory proceedings. Justices assigned to oversee water right or water quality proceedings are often not knowledgeable in the intricacies involved in determining priority of water allocations or the science associated with levels of contaminants in drinking water. Requiring the Judicial Council to establish a program to provide training and education to judges in specified actions related to water will increase judicial efficiency and uphold the principles of fairness. CMUA's members, some of whom operate with appropriated water rights, would benefit from such a program.

SUPPORT

Antelope Valley East Kern Water Agency
California Municipal Utilities Association
Central Coast Water Authority
Coachella Valley Water District
Crestline-Lake Arrowhead Water Agency
Metropolitan Water District of Southern California
Napa County Flood Control and Water Conservation District
Palmdale Water District
San Bernardino Valley Municipal Water District
San Geronio Pass Water Agency
Santa Clara Valley Water District
Santa Clarita Valley Water Agency
State Water Contractors
Upper San Gabriel Valley Municipal Water District

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 1865 (Bennett, 2022) requires a court to initially grant permission to proceed without paying court fees and costs to a person who is joined or countersued in a case involving a water right held by that person. AB 1865 is currently pending in the Senate Appropriations Committee.

Prior Legislation: None known.

PRIOR VOTES:

Assembly Floor (Ayes 74, Noes 0)

Assembly Appropriations Committee (Ayes 16, Noes 0)

Assembly Water, Parks and Wildlife Committee (Ayes 15, Noes 0)

Assembly Judiciary Committee (Ayes 10, Noes 0)
