

AN ASSESSMENT OF THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT FOR MUNICIPAL WATER SUPPLIERS

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KEY POINTS

- SGMA requires sustainable groundwater management
- Sustainable management will often require (a) “cap and trade” and (b) augmented supplies/replenishment where possible
- Key areas of conflict will be (a) setting the cap and individual rights thereto (i.e., allocations) and (b) the burden of paying for augmented supplies
- The GSP must follow water rights law, but the law is substantially uncertain
- Unresolved conflict will often result in a groundwater adjudication
- Stakeholders should strive hard for compromise to avoid costly litigation

The Sustainable Groundwater Management Act Design



Form GSA

Develop GSP



Or Else!



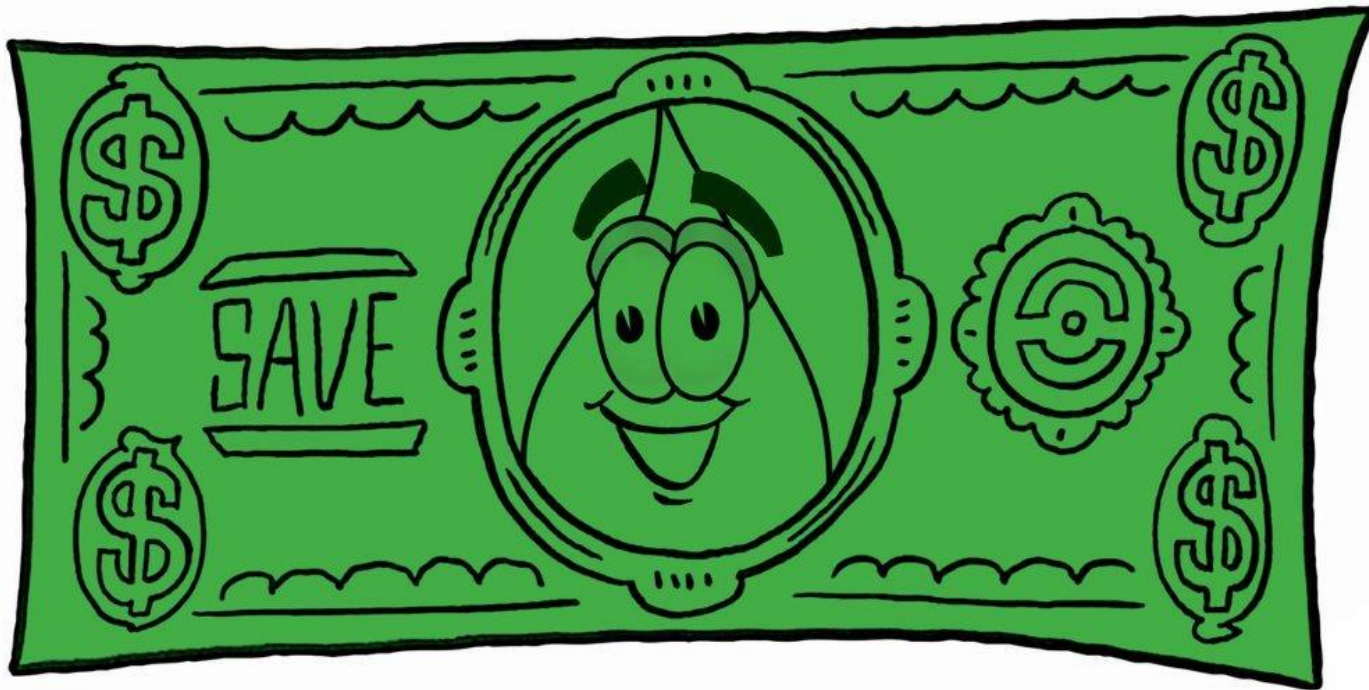
Form a Groundwater Sustainability Agency



Develop a Bunch of Great Ideas to Sustainably Manage the Basin



Determine How to Pay for the Great Ideas



Write it All Up in a Groundwater Sustainability Plan and Get DWR to Approve Your Plan



Essential SGMA Provisions

- Mandatory for “priority basins”
- Groundwater Sustainability Agency by 2017
- Groundwater Sustainability Plan by 2020/2022
- Plan must achieve sustainability in 20 years
- Avoid “undesirable results”
- State intervention





What is Sustainable Groundwater Management?

Avoid “undesirable results,” meaning significant and unreasonable:



Lowering
GW Levels



Reduction
of Storage



Seawater
Intrusion



Degraded
Quality



Land
Subsidence



Surface Water
Depletion

Identify undesirable result and establish:

- Monitoring program with representative monitoring points
- Minimum thresholds - Quantitative minimum value used to define an undesirable result
- Measurable objectives - Quantitative target or goal

Expansive GSA Authority

**Adopt rules,
regulations,
ordinances**

Conduct
investigations of
water rights

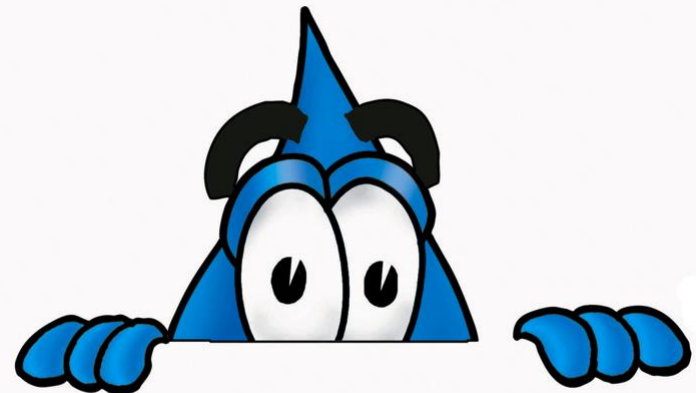
Well registration,
metering,
reporting,
monitoring,
investigation

Replenishment,
reclaimed water,
and other
programs

**Regulate
groundwater
production;
establish
production
allocations**

**Administrative
fees and
assessments**

Enforcement
actions



But!

“**Nothing** in [the SGMA], or in any groundwater management plan adopted pursuant to [the SGMA], **determines or alters surface water rights or groundwater rights under common law** or any provision of law that determines or grants surface water rights.”

Water Code § 10720.5(b)



How Will the Locals Get Along. . .

Who governs (who will be the Groundwater Sustainability Agency)?

Who can pump, who cannot, and under what conditions?

Who pays for management/replenishment?



SGMA and Water Rights

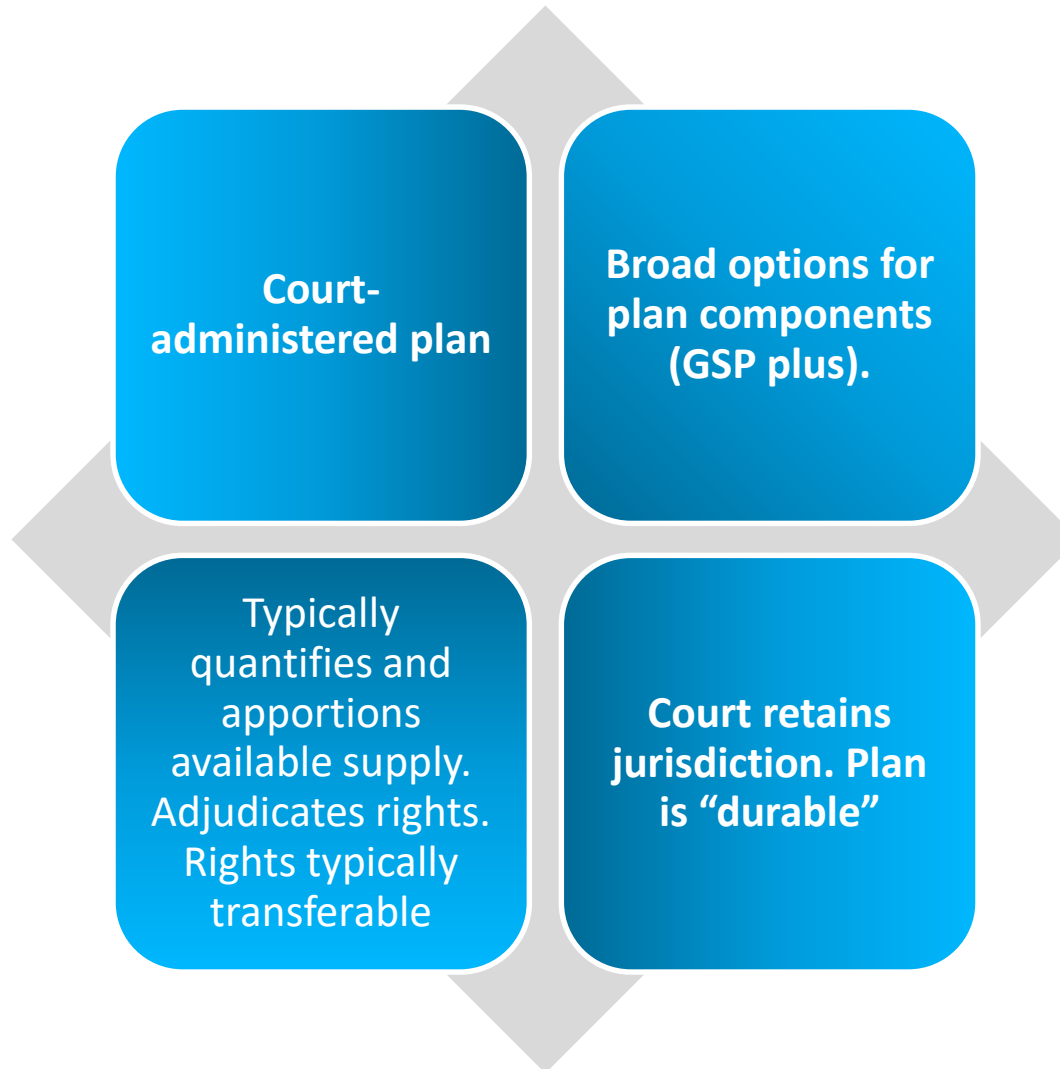


Plan Durability

- Validating a Groundwater Sustainability Plan
- Agreement
- General groundwater adjudication
- Streamlined comprehensive adjudication
- “Friendly” adjudication (stipulation)
- Resolving future conflicts
 - Cooperation and ongoing outreach
 - Facilitators
 - Courts (continuing jurisdiction)



Adjudication



Management is the Same (SGMA or Adjudication)

- Both require sustainable management – avoid “undesirable results”
- Sustainable yield (SGMA) = safe yield (adjudications)
- Groundwater Sustainability Agency (SGMA) = watermaster (adjudications)
- Groundwater Sustainability Plan (SGMA) = physical solution (adjudications)
 - Monitoring and reporting
 - Pumping limits, allocations, transferability
 - Pump fees
 - Replenishment/yield enhancement
- State intervention v. court intervention

Adjudication Challenges

- Every landowner has rights = 1,000s of parties
- Can take decades
- Can cost \$\$ millions
- Complex technical and legal issues
- Now need to coordinate with SGMA



Adjudication Reform – Streamlining 2015

- Designed to expedite and lessen the expense of future adjudications.
- AB 1390 - New provisions in the Code of Civil Procedure for future basin adjudications.
- SB 226 - Addresses the coordination and consistency of future groundwater adjudications with basin management under SGMA

AB 1390 – Key Provisions

- Process to determine all groundwater rights, and establish in rem jurisdiction and comprehensive effect of the adjudication
- Judicial Council to assign a judge (non-county) to preside
- Permits the court to form classes of groundwater rights holders
- Authorizes the court to stay the litigation to allow for progress on a GSP
- Allows the court to appoint special masters
- Requires litigants to make early factual disclosures

AB 1390 – Key Provisions (Continued)

- Allows Court to adopt a preliminary injunction limiting groundwater use
- Encourages settlement and specific procedures for court to review proposed settlement stipulations supported by majority of parties
- Permits the court to “subordinate” the priority of dormant (i.e., unused) overlying rights as applied in *In re Waters of Long Valley*
- Establishes required findings that the court must make in entering a judgment in a comprehensive adjudication and preserves the court’s continuing jurisdiction over the action.

SB 226 – Key Provisions

- Allows the state to intervene as a party in a comprehensive adjudication
- Provides that the court manage the proceeding in a manner that minimizes interference with SGMA/GSP process
- Exempts a basin managed pursuant to a judgment entered in a comprehensive adjudication from SGMA/GSP requirements if DWR determines that the judgment satisfies the objectives of SGMA
- Prohibits the court from entering a judgment that would impair efforts to achieve sustainable groundwater management.

Adjudication Reform

- Future adjudications = more efficient; not necessary “fast”
- Designed to prohibit use of adjudications to to delay/avoid sustainable management
- Adjudications can be used to ensure SGMA management is consistent with water right priorities
- Designed to encourage compromise and “cram down” reasonable management on unreasonable dissenters
- Maybe used as “friendly adjudications” to make the plan durable

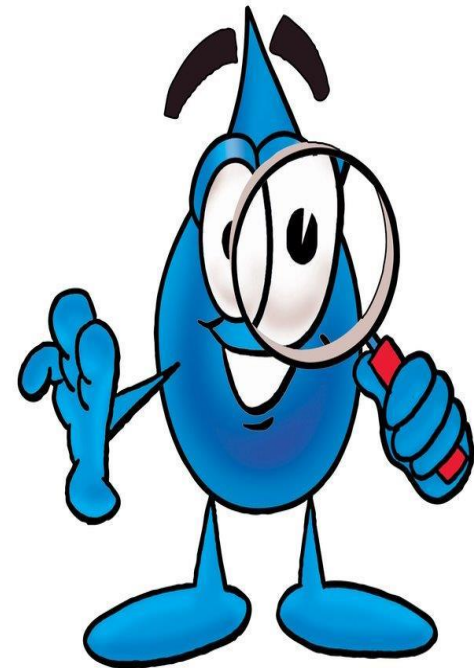
Practical Impacts of SGMA

Short-term

- More conflict
- Increased uncertainty

Long-term

- Less conflict
- Less pumping
- Sustainable management
- Greater certainty
- More expensive
- More options, flexibility, and VALUE



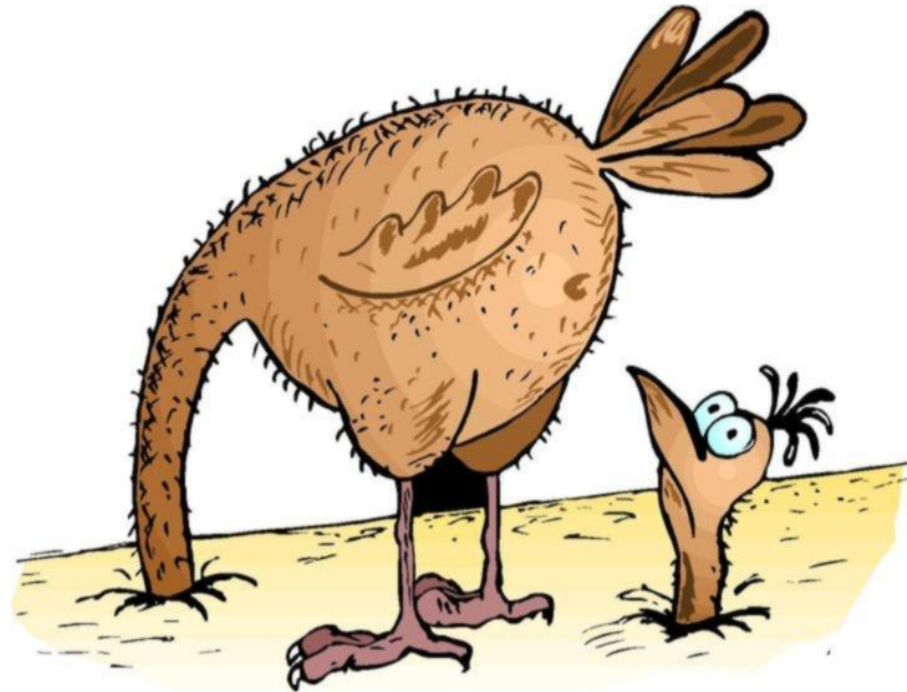
Implementation Challenges

- Setting allocations
- Apportioning costs of augmented supplies
- Other technical and substantive plan components (e.g., thresholds, objectives, monitoring?)
- Plan coordination issues
- Dept. of Water Res. and other agencies
- Timing and expense
- Inconsistent plans/rules
- GSPs v. adjudication



California Water Law

- Riparian/overlying (Landowner) Rights are First Priority Rights
- Appropriative Rights (Non-Overlying) are Second Priority Rights
- Surface water regulated by the State
- Percolating groundwater regulated by local/judicial management, if regulated





Cal. Const. Article X, § 2

... 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.**

Interpreted: Sustainable Management. The Triple Bottom Line:

Society, Environment, and Economy

Overlying Groundwater Rights

Analogous to Surface Water Rights
Senior in Priority to Appropriative Rights

Same Legal Characteristics Apply:

- Tied to Land Ownership
- Not Affected by Historical Use
- Can Only Use on Overlying Land



Not Transferable at Common Law

Appropriative Groundwater Rights

For Non-Overlying
Use (e.g.,
Municipal Water)

Defined by
Historical Quantity
of Use

Priority Based
Upon First-In-Time,
First-in-Right



Transferable at Common Law

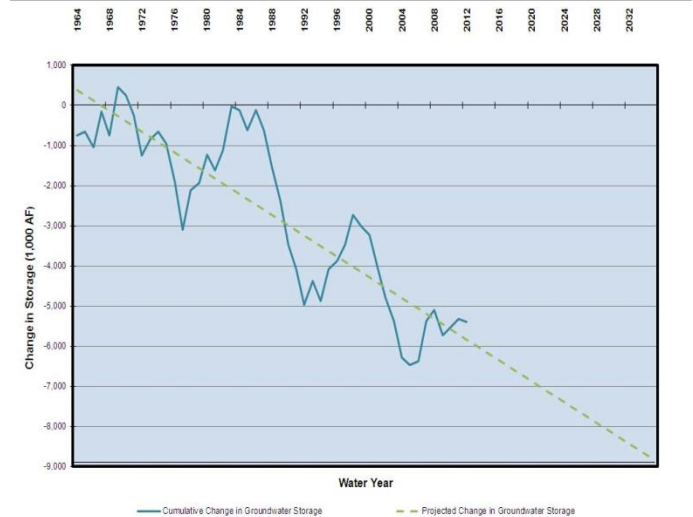
Overdraft ...

The Rules Change . . . Maybe

Adverse Basin Impacts (e.g., Seawater Intrusion/Subsidence)

Ramp-Down is Needed

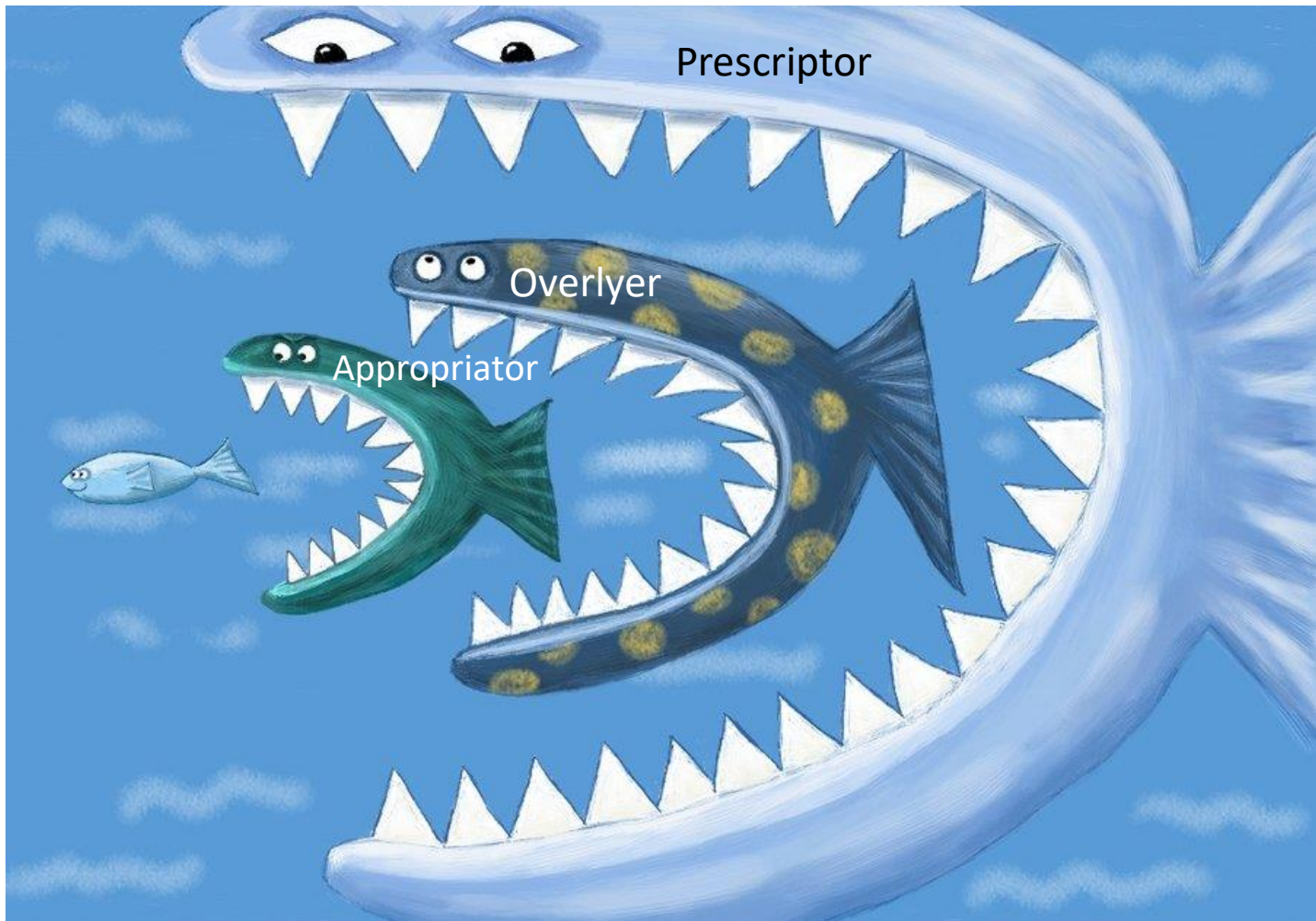
Prescriptive Rights



Prescription

- Four Elements: Actual, Open and Notorious, Adverse, Exclusive and Continuous for Five Years
- Overdraft = Adversity
- Notice – Must at least be constructive notice (reasonable person standard)
- Overlying landowners preserve “overlying rights” through “self-help” pumping
- Result is “equal” claim (overlying landowners lose priority claim)
- Eliminate dormant overlying rights

Note: overdraft can result in “subordination” of dormant overlying rights even without prescription – *Long Valley Doctrine*



Allocation Theories

- **Historical production:** Based on average amount of production over a base period (e.g., 1995-2015)
- **Net irrigated acreage owned:** Division of safe yield by quantity of basin irrigated acreage
- **Gross acres owned:** Division of safe yield by quantity of all acreage owned (or all acreage capable of irrigation).
- Prescription in overdrafted basins might compel historical production approach, but:
 - What base period?
 - Highest use v. average use?
 - Lack of production data?

Itching for a Water Right Fight (Adjudication)?



Substance Toward Compromise

Fair and Practical Production Allocations & Assessments

- Different classes of production rights that “reflect” GW rights
- Gradual ramp-down (time to adjust where practical)
- Management and replenishment (various options)
- Transferability and market solutions
- Other restrictions and opportunities tailored to local conditions and desires



Procedures Toward Compromise

Outreach and Early Collaboration

- Outreach, education, discussion, input
- Facilitators, workshops, advisory committee, collaborative technical group
- Inclusive governance
- Organize diverse interests



More Information

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Brownstein Water Blog

water.bhfs.com



Desktop Reference to the Sustainable Groundwater Management Act of 2014
water.bhfs.com/sgmadesktopreference