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Volume 36

Issue 1 *Symposium on the 25th Anniversary of the  
Report of the Governor's Commission to Review  
California Water Rights Law; Part 1 of 2*

Article 11

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1-1-2005

# Searching for Certainty in a State of Flux: How Administrative Procedures Help Provide Stability in Water Rights Law

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## Recommended Citation

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# Searching for Certainty in a State of Flux: How Administrative Procedures Help Provide Stability in Water Rights Law

Samantha K. Olson\* and Erin K.L. Mahaney\*\*

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## I. INTRODUCTION

When the Governor’s Commission to Review California Water Rights Law (“Commission”) developed six topics for intensive review, it did not include certainty as a topic.<sup>1</sup> Nonetheless, at some point, the Commission determined that an examination of the relative uncertainty in water rights and proposals for providing greater certainty was sufficiently important to California water right law to address it in its final report.<sup>2</sup> Thus, in chapter 2 of its Final Report, the Commission identified the benefits of certainty, the sources of uncertainty and its consequences, and proffered recommendations intended to improve certainty in water rights. This article explores the concept of certainty as it relates to water right law, reviews the Commission’s conclusions and its recommendations, examines statutory adjudication procedures and its utility in providing certainty, identifies additional sources of uncertainty not addressed by the Commission, and ultimately finds that the most feasible means of improving certainty is the continued, vigorous application of existing administrative procedures.

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1. GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 3 (Dec. 1978) [hereinafter FINAL REPORT].

2. After reviewing the numerous background and issue papers, and after extensive public workshops and technical review, see FINAL REPORT, *supra* note 1, at 3-5, presumably the Commission recognized that certainty remained a significant issue, even though the enactment of statutory appropriative procedures had greatly reduced the scope of the problem. See FINAL REPORT, *supra* note 1, at 16-17.

## II. THE CONCEPT OF CERTAINTY IN WATER RIGHTS

Before reviewing the Commission's recommendations on certainty, it is helpful to understand that the Commission sought to further at least two goals in its recommendations: first, to provide certainty as to individual water rights, specifically resolution and some finality about who holds what rights; and second, to address certainty as to the public's ability to better regulate the utilization of water resources. The first goal, certainty for individuals, includes not only certainty for an individual water right holder, but all the individual water right holders on a stream. The latter concept of societal certainty actually encompasses broader issues, including the efficient utilization of water resources and the protection of the environment. These goals, while not mutually exclusive, present some tension worth exploring in more detail. Ultimately, absent implementation of some of the Commission's more dramatic proposals, which it considered but declined to recommend, certainty for both individuals and the public can best be achieved by rigorous implementation of the procedures under which water rights are administered and regulated.

The traditional view of certainty is directed towards the property rights of an individual water right holder. Clearly, one goal of water rights law is to provide certainty to an individual so that if he or she invests money in the application process and for infrastructure to apply water to a beneficial use, that water will continue to be available to him or her. The Commission observed, "[f]or the individual, property is the means for holding and enjoying personal wealth, satisfying the private need for security and stability."<sup>3</sup> Individual certainty, however, cannot be viewed in isolation because certainty for one individual can create uncertainty for another, particularly in an over-allocated system.

The Commission also discussed the benefits to society as a whole of utilizing property, pointing out that regulation of private property is necessary to protect the public interest.<sup>4</sup> For individuals and the public at large:

The realization of these benefits of property requires some degree of certainty. Certainty gives the security of knowing what one has and what one can do with it. It allows planning and rational investment. It permits government to gauge effectively the social disadvantages of unregulated property and to legislate accordingly.<sup>5</sup>

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3. *Id.* at 16.

4. *Id.*

5. *Id.*

The individual and collective need for certainty has been manifested in water rights longer than any other property right due to the uniqueness of the resource.<sup>6</sup> The substance of water is a necessity of life, and its availability is dynamic depending on the climate and weather in any given year.<sup>7</sup> Water is a common resource in the truest sense of the term, and must inherently be shared.<sup>8</sup> The very nature of water is uncertain and the law developed in some ways to mitigate that uncertainty, and to accommodate these other special characteristics. The law also purposefully developed in ways that maintained some uncertainty so that it might adapt to changing circumstances.

The scope of a water right incorporates elements designed to create certainty to the extent possible, taking into account the public nature of the resource and its other unique attributes. California employs a dual system of water rights for surface water that recognizes both appropriative and riparian rights.<sup>9</sup> Both types of water rights are usufructuary; the “right” is the right to use the water, not an ownership interest in the *corpus* of the water itself.<sup>10</sup> An appropriative water right consists of the right to use a specified quantity of water for reasonable beneficial use if it is available. The law of prior appropriation evolved from mining customs, wherein the first in time had first right to use a given quantity of water. This priority system remains a bedrock principle in providing certainty to the individual property owner. In contrast, riparian rights attach to land abutting a water body; the right is not a fixed quantity, rather, a riparian may use a

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6. See Andrew H. Sawyer, *Changing Landscapes and Evolving Law: Lessons from Mono Lake on Takings and the Public Trust*, 50 OKLA. L. REV. 311, 343-46 (1997) (distinguishing the property interest in water from the property interest in land).

7. An available supply of water differs from that of certain other natural resources—such, for example, as deposits of iron ore or precious metals, or even oil—in that it is in a state of continuous or intermittent replenishment from other sources of water supply, through the cyclical operation of physical laws. . . . A water supply, therefore, is almost never in truly static condition, awaiting exploitation by man. Its component parts are generally in motion—they have come from some other water supply or supplies, and are en route to still others. Therefore, diversion of water from a particular source of supply interrupts the natural replenishment of some other available source of supply. Recognition of this fundamental relationship is necessary to an orderly definition of water rights.

WELLS A. HUTCHINS, UNITED STATES DEPARTMENT OF AGRICULTURE, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 1-2 (Misc. Publ'n No. 418, 1942).

8. See Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 1, 4 (2002).

9. Rights to percolating groundwater are not subject to the SWRCB's permitting jurisdiction and are considered separately in the Commission's Report. See generally FINAL REPORT, *supra* note 1, at 135-249. California incorporates the doctrine of correlative rights in its groundwater law. Under California law, landowners overlying a common groundwater supply share equal rights of reasonable use to percolating groundwater for beneficial purposes on the overlying land. See WELLS A. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 431 (1956). If the supply becomes insufficient, each owner is allowed a reasonable share and the shortage is borne equally among the users. A groundwater appropriation is characterized as a right in percolating groundwater that is surplus to the quantities of water reasonably necessary for beneficial use on overlying lands. *Id.* at 455.

10. See *Crandall v. Woods*, 8 Cal. 136, 142 (1857); *Eddy v. Simpson*, 3 Cal. 249, 252 (1853). “Usufruct” is a right to use and enjoy another's property without damaging or diminishing the property. BLACK'S LAW DICTIONARY 1542 (7th ed. 1999).

correlative share of the water with other riparians on the stream. Waste is prohibited under either system.

Nevertheless, California water rights historically were plagued with uncertainty, even with these elements of the common law established. As the Governor's Commission pointed out, "[u]ncertainty was one of the major problems identified by the Conservation Commission, whose recommendations led to the adoption of the Water Commission Act of 1913."<sup>11</sup> The Conservation Commission observed in 1913 that enormous quantities of unused rights had been claimed and kept in "cold storage" without complying with the law requiring diligent pursuit of a project.<sup>12</sup> No exact knowledge existed on the amount of water open to appropriation.<sup>13</sup> Water right litigation only settled the rights between those individuals that were a party to the suit, and at great expense and time. The Conservation Commission called for procedures that "speedily and economically" could result in a just determination of water rights.<sup>14</sup>

In 1913, the State Legislature enacted the Water Commission Act ("Act").<sup>15</sup> The Act required all new appropriations of surface water and water flowing in subterranean streams in a known and definite channel to receive approval from an administrative agency of the state.<sup>16</sup> The agency created to administer the Act was the California Water Commission, predecessor to the State Water Resources Control Board ("SWRCB").<sup>17</sup> The Act brought much more certainty to water rights by providing an administrative framework whereby permits were granted for a specific quantity of unappropriated water with a specific priority date.<sup>18</sup> A permittee must complete the appropriation within the time period granted by the agency, and in accordance with due diligence principles. In issuing permits and licenses, the SWRCB may include terms and conditions to protect existing water rights and the public interest.<sup>19</sup>

Thus, as early as 1913, it appeared that the certainty the state would strive for was grounded in administrative procedures, designed to ensure that the rules already in place were followed, that an efficient procedure was put in place to make water right determinations, and that the information needed to make these determinations was available, including hydrological information, and information about existing right holders. This type of procedural certainty is actually a hybrid of individual and societal needs, like the common law it

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11. See FINAL REPORT, *supra* note 1, at 16.

12. See STATE CONSERVATION COMM'N, REPORT OF THE CONSERVATION COMMISSION OF THE STATE OF CALIFORNIA 21 (Transmitted to the Gov. and Leg., Jan. 1913) [hereinafter CONSERVATION COMMISSION].

13. *Id.* at 22.

14. *Id.*

15. See 1913 Cal. Stat. ch. 586.

16. *Id.*

17. *Id.*

18. See FINAL REPORT, *supra* note 1, at 17 (stating that the administrative system "goes far" toward providing certainty).

19. See *id.* at 10.

codified.<sup>20</sup> The orderly processing and documentation of the amount and priority of each right holder protects individuals. For example, a senior right holder is protected against junior appropriators in times of water shortage. Junior appropriators have certainty in knowing the limitations of their water rights. A new appropriator has knowledge of the extent of any property right in deciding whether to invest. Although each individual benefits by having certainty as to the extent of existing water rights, a well-defined water right also benefits society as a whole (e.g., all water users in the chain of use).<sup>21</sup> Moreover, society achieves greater certainty by having a mechanism in place to ensure that elements of the law that provide certainty are followed and that resources will not be over-exploited. Procedures governing the allocation of water and administration of water rights enable society to gauge whether the regulation achieves the greatest public good.

This premise comprises a central theme of this article: certainty afforded by defined administrative procedures best achieves the dual goals of certainty for individuals and the public. This is what the Conservation Commission hoped to achieve by establishing a mechanism for administering water rights in the state. Fifty years later, the Governor's Commission identified additional areas for improvement.

The Governor's Commission set out to review the status of water rights law, evaluate proposals for modifications to the law, and recommend appropriate legislation in a report to the Governor.<sup>22</sup> While the existing system of appropriative and riparian water rights law and the administrative control by the SWRCB had operated fairly effectively,<sup>23</sup> certain deficiencies still remained. The Commission observed:

Riparian surface water rights and overlying groundwater rights are neither quantified nor given priorities vis-à-vis other riparian or overlying rights. Such uncertainty, in the view of many critics, inhibits investment and

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20. The codification of water laws had two primary and complementary purposes: (1) formal recognition and adoption of the customary practices that formed the evolving prior appropriation doctrine throughout the West; and (2) elimination of the unavoidable uncertainties and chaos resulting from allowing important property rights to be gained by custom rather than by clearly stated positive law.

Janet C. Neuman & Keith Hirokawa, *How Good is an Old Water Right? The Application of Statutory Forfeiture Provisions to Pre-Code Water Rights*, 4 U. DENV. WATER L. REV. 1, 8-9 (2000).

21. See *id.* at 20 (arguing that "the need for stability and certainty is a collective need, not just an individual need").

22. See Exec. Order No. B-26-77 (May 11, 1977).

23. The existing system performed in much better fashion than might have been anticipated during two of the driest years in California history. Riparian and appropriative rights have served as the foundation for billions of dollars worth of investment. They are property rights subject to constitutional protection. Their deficiencies are better remedied by making them more secure and their utilization more efficient than by eliminating them in favor of an untried system.

FINAL REPORT, *supra* note 1, at 12-13.

encourages litigation. Appropriative rights are quantified and have priorities, but the scope of the unregulated pre-1914 appropriative rights is uncertain in many instances.<sup>24</sup>

One of the Commission's major goals was procedural and administrative certainty, which was confirmed by its discussion on the consequences of uncertainty.<sup>25</sup> The Commission observed that uncertainty hampered the local management and supervision of water uses and the state administration of water rights.<sup>26</sup> In addition, it cited the recurring and costly litigation that failed to resolve disputes as a continuing problem, emphasizing deficiencies in the judicial procedures to effectively deal with water resource issues.<sup>27</sup>

### III. SOURCES OF UNCERTAINTY IDENTIFIED BY THE COMMISSION: A STATUS REPORT

The Commission identified several sources of uncertainty in its Final Report, including inadequate recording of non-statutory rights and rights to future use. Non-statutory rights and rights to future use are both problematic because they exist outside of the administrative system established to confer and regulate water rights and promote the orderly development of the state's water resources. Since these rights generally do not receive any oversight, no centralized data exist regarding the amount of water used or the amount that may be needed in the future. The entire system of water allocation subject to permits and licenses rests atop certain "grandfathered" pre-1914 rights and other rights, and may be upset or even toppled if these underlying water uses expand or change dramatically. These outlier doctrines also have a great potential to be abused due to lack of oversight and confirmation.

#### A. *Inadequate Quantification and Recordation of Non-Statutory Rights*

The Commission identified the large number of non-statutory rights that were not quantified and recorded as a major source of uncertainty.<sup>28</sup> Non-statutory rights include pre-1914 rights, riparian rights, and prescriptive rights. A number of pre-1914 rights were documented under the filing provisions of the Civil Code, but most were not. Those that did file often grossly exaggerated the actual extent of the right.<sup>29</sup> There was no effective mechanism for recording riparian rights or prescriptive rights. The lack of information concerning the

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24. *Id.* at 12.

25. *See id.* at 21-25.

26. *Id.* at 21-22.

27. *Id.* at 22-25.

28. *Id.* at 17.

29. *Id.* at 18.



extent to which water is already being used creates enormous uncertainty for junior and potential appropriators, and also creates a huge information gap for general and coordinated planning of water use in the state.

### 1. Pre-1914 and Riparian Rights

Non-statutory rights hinder the SWRCB's ability to administer water law in the state, thereby limiting the certainty that the administrative framework provides. When issuing a permit, the SWRCB must first determine whether water is available to appropriate.<sup>30</sup> This involves estimating the amount of water already allocated to senior right holders, and also how much water may be needed for instream beneficial use.<sup>31</sup> For permits and licenses, the SWRCB has detailed information regarding the scope of the rights it is charged to protect. But the task of assessing the amount of water already appropriated under pre-1914 and riparian rights is difficult. As a result, the SWRCB must often make decisions without accurate information about existing senior water rights. Granted, those right holders have an incentive to appear at proceedings that could potentially interfere with their rights; however, uncertainty still exists and remains throughout the life of any decision made by the SWRCB without complete information. The same problem with the ambiguity of non-statutory rights can arise in virtually every other area of water rights administration, including complaint investigations, processing water transfers, water quality certification, licensing, change petitions, and compliance inspections.

Non-statutory rights are supposed to be recorded by filing statements of diversion and use under Water Code section 5101. Although filing is mandatory, there is no penalty and little legal consequence for failing to file.<sup>32</sup> In practical effect, compliance is viewed as voluntary. The Commission estimated that only ten percent of claimed holders of non-statutory rights filed statements.<sup>33</sup> In recent years, it appears that more water users have filed statements, perhaps due to an increased presence of SWRCB field staff and information provided by them.<sup>34</sup> It is still impossible to determine how many claimants of non-statutory water rights comply with section 5101.

This lack of recordation further compounds a related problem concerning water users inventing or exaggerating a non-statutory right as a defense to a possible enforcement action or for some other purpose such as facilitating a water

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30. See CAL. WATER CODE § 1375(d) (West 2000).

31. See *id.* § 1243.

32. Willful misstatements concerning statements of diversion and use are subject to civil and criminal penalties. *Id.* § 5107. However, no similar penalty is available for failure to file. Failure to file has no legal consequences, except that the SWRCB may investigate, at the water user's expense, the facts regarding diversion and use. *Id.* §§ 5105, 5108. Also, a water user may not object for not receiving notice of proceedings before the SWRCB. See *id.* § 5106(b).

33. See FINAL REPORT, *supra* note 1, at 18.

34. From 1999 to 2003, a total of 480 new statements of diversion and use were filed.

transfer. Unenforced recording procedures make it more likely for non-statutory rights to “spring up” as necessary to meet an individual’s needs in any given situation.<sup>35</sup> The fact that an old (or new) right was not previously recorded provides no evidence as to whether it ever actually existed. For example, a water right claimant may greatly exaggerate the historical diversion and use, or change the season of diversion (e.g., using a right historically used for direct diversion during the irrigation season for year-round use). In addition, parties can attempt to revive rights long since forfeited by non-use. This issue does not apply to dormant riparian rights since a riparian may activate a right at any time and a riparian right is not lost by non-use. But new or exaggerated claims to pre-1914 rights exacerbate the uncertainty already resulting from bona fide non-statutory rights. They also defeat the purpose of the Water Commission Act, which attempted to ensure that future water appropriation takes place in an organized, comprehensive, and regulated manner.

The SWRCB can and will investigate, and make findings regarding non-statutory rights, to the extent that such findings are required to reach an issue properly before it.<sup>36</sup> In addition, the SWRCB may investigate and ascertain whether or not water is, or is not, validly appropriated under Water Code section 1051.<sup>37</sup> A water diversion not otherwise authorized pursuant to a valid right is a trespass and subject to enforcement action.<sup>38</sup> SWRCB findings do not amount to an adjudication of these rights,<sup>39</sup> and any such findings are subject to review by a court.

Factual inquiries are possible and may be necessary at times; however, such inquiries are time-consuming and historical evidence may be hard to find. Stricter recording requirements could simplify the process and address problems with newly fabricated claims to “old” rights. To date, the potential for recording requirements to quell the uncertainty of non-statutory rights has not been realized.

The Commission recommended strengthening the filing requirements for statements of diversion and use “to create an effective statewide recording requirement for all uses of water.”<sup>40</sup> The proposal included a schedule of legal sanctions for failure to comply, which ranged from SWRCB refusal to issue a

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35. See, e.g., S.W.R.C.B. Order No. WR 2003-01 (Jan. 22, 2003). The petitioner filed a statement of water use of a claimed pre-1914 right at the same time as the transfer petition. *Id.* at 2.

36. See, e.g., S.W.R.C.B. Order No. 99-01 (Mar. 3, 1999). Fresno River non-statutory right holders filed a complaint alleging that the U.S. Bureau of Reclamation (“USBR”) was operating Hidden Reservoir to the detriment of their senior water rights. Parties submitted evidence and the SWRCB made findings on the nature and extent of downstream riparian, appropriative and prescriptive rights in order to determine whether USBR had violated its permit by diverting water to which senior water right holders were entitled.

37. See S.W.R.C.B. Order No. 2001-22, at 25-26 (Aug. 16, 2001) (upheld by El Dorado Irrigation Dist. v. State Water Res. Control Bd., No. 01CS01319, at 29 (Cal. Sup. Ct. Dec. 23, 2003)).

38. See CAL. WATER CODE § 1052 (West 2000).

39. United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 169 (Ct. App. 1986).

40. See FINAL REPORT, *supra* note 1, at 27.

permit or consider a protest, to civil penalties of up to \$1000 for failing to file or making willful misstatements.<sup>41</sup> These proposed changes were not implemented. The proposed changes may have met resistance since, in some cases, water users prefer to rely on the uncertainty of non-statutory rights rather than have them defined.

Even if the recommendations had been adopted, the proposals were too timid to remedy the problems created by non-statutory rights, including inflated or revived non-statutory pre-1914 rights. The reporting must be able to count as evidence of the existence and quantity of the right.<sup>42</sup> The Commission did recommend deleting section 5108, which provides that statements are for informational purposes only and have no legal consequences.<sup>43</sup> But no explicit language was proposed to allow a determination regarding the validity of a claimed right based on a filing. As it stands, it is best that filings do not constitute evidence of the existence of a claimed right, as the provision provides no mechanism to test the validity of the facts claimed in the filing.

Another solution considered but rejected by the Commission was the incorporation of all non-permit rights into the statutory permit system, or some other quantification of non-statutory rights.<sup>44</sup> The Commission minimized the extent of uncertainty created by these rights on a statewide scale and pointed out that many non-statutory rights on the Feather, Sacramento, and San Joaquin Rivers had been “fixed” by Central Valley Project (“CVP”) and State Water Project (SWP) studies and contracts.<sup>45</sup> This is incorrect. Various agencies conducted studies in order to make assumptions regarding the physical characteristics involved, including estimates of existing water rights. However, these studies did not determine actual water rights, and clearly state that assumptions may differ substantially from the actual water rights as determined in a court or by the SWRCB.<sup>46</sup> Moreover, this type of “accounting” does nothing to track forfeitures of pre-1914 rights, or increased use of riparian rights. In sum, the Commission vastly underestimated the degree of uncertainty that non-statutory rights create.

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41. *See id.* at 31.

42. For example, under Oregon’s statutory system, water rights could only be acquired by permit after 1909. Pre-1909 water rights are left intact as “undetermined vested rights,” and claimants must file a registered statement describing the claim and including the information necessary to determine the claimed vested or reserved right. The registration preserves evidence for a future adjudication. Failure to file creates a rebuttable presumption that the claim was abandoned. *United States v. Oregon*, 44 F.3d 758, 764 (9th Cir. 1994).

43. *See* FINAL REPORT, *supra* note 1, at 46.

44. *See id.* at 25.

45. *See id.* at 26.

46. *See* S.W.R.C.B. Order No. 2004-04, at 13 (Feb. 19, 2004) (rejecting estoppel argument based on statements in 1956 Cooperative Study Program assuming that Delta lowlands have riparian status).

## 2. Prescriptive Rights

The Commission also proposed to deal with the problem of prescriptive acquisition of water rights by abolishing prescription prospectively and awaiting judicial clarification of existing prescriptive claims.<sup>47</sup> The problems associated with prescriptive rights, such as inadequate recording, are no longer a major issue since the California Supreme Court's ruling in *People v. Shirokow*.<sup>48</sup> In *Shirokow*, the court held that the statutory permit procedure was the exclusive method for acquiring a new appropriative water right after 1914.<sup>49</sup> A water diverter could not claim a prescriptive right against the state, and thus a diversion without a permit constituted a trespass enjoined under Water Code section 1052.<sup>50</sup>

In reaching its conclusion, the court relied on Water Code section 1225, which provides that no right to appropriate water "subject to appropriation" shall be initiated or acquired except in accordance with division 2 of the Water Code.<sup>51</sup> In determining which water was subject to appropriation, the court construed Water Code section 1201 in accordance with the legislative intent of the entire statutory system in order to effectuate the law.<sup>52</sup> Citing the comprehensive regulatory scheme of various provisions of the Water Code, the court concluded that "section 1201 should be interpreted in such a manner that the waters of the state be available for allocation in accordance with the code to the fullest extent consistent with its terms."<sup>53</sup> The court recognized that allowing unauthorized diversions to ripen into prescriptive rights would greatly interfere with the SWRCB's duties and would create uncertainty about the availability of water.<sup>54</sup>

### B. Rights to Future Use

A second source of uncertainty identified by the Commission is the doctrines conferring present rights to use water some time in the future.<sup>55</sup> In the statutory appropriation system, the Commission identified two types of dormant rights: the municipality exemption from due diligence requirements,<sup>56</sup> and provisions for

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47. FINAL REPORT, *supra* note 1, at 31.

48. 605 P.2d 859 (Cal. 1980).

49. *Id.* at 865.

50. *Id.* at 866.

51. *See id.* at 863; CAL. WATER CODE § 1225 (West Supp. 2004).

52. *Shirokow*, 605 P.2d at 863-64.

53. *Id.* at 865.

54. *Id.* at 865-66 ("The problem [of uncertainty] is compounded by nonsanctioned uses which make it difficult for the board to determine whether the waters of the state are being put to beneficial use for the greatest public benefit.").

55. FINAL REPORT, *supra* note 1, at 18.

56. CAL. WATER CODE §§ 106.5, 1203, 1462 (West 1971). State policy allows a municipality to acquire water rights to hold for future use subject to the waste and unreasonable use prohibition. Others may appropriate surplus water in the interim.

state filings.<sup>57</sup> With respect to the latter provision, the Feigenbaum Act<sup>58</sup> was enacted in 1927 in response to the state's increased role in the storage and distribution of the state's water.<sup>59</sup> The Act authorized the state to file on any and all unappropriated waters that it needed in the coordinated plan for water development, securing a priority from the date of filing as against any intervening appropriator regardless of the length of time it took to apply these rights to a beneficial use.<sup>60</sup> The U.S. Bureau of Reclamation ("USBR") and the Department of Water Resources ("DWR") used most of the filings in the 1950's. Yet residual filings remain and, if assigned, have the ability to upset priorities of water rights granted in the interim. The uncertainty associated with state filings, however, is less than that of uncertainties associated with non-statutory rights to future use because an applicant must proceed with the water right application process and is subject to all of the requirements under part 2, division 2, of the Water Code.<sup>61</sup> Moreover, the SWRCB could adjust the priority of all or a portion of any assignment for consistency with a coordinated plan or consistency with water quality objectives.<sup>62</sup> For these reasons, the state filing provisions may actually increase certainty on a societal level.

With respect to non-statutory rights, the "relation back" doctrine allows development of a project and continued development of a pre-1914 right after 1914 without a permit if the use remains within the scope of the original intent and if water is applied to beneficial use within a reasonable time with due diligence.<sup>63</sup> Here is another doctrine that invites abuse if the elements are construed too liberally. First, the right must not exceed the scope of the original intent, evidence of which may only amount to the original pre-1914 posting. The quantities claimed on postings were often exaggerated, and if used to interpret the intent of a project, may greatly exceed the total amount of water available in the entire stream.<sup>64</sup> Second, a lax interpretation of the due diligence requirement to apply water within a reasonable time requirement could give a pre-1914 water right holder a windfall over post-1914 appropriators who proceeded with due diligence and in compliance with the Water Code, thus undermining the

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57. See FINAL REPORT, *supra* note 1, at 19.

58. 1927 Cal. Stat. ch 286, sec. 1-2, at 508-10 (codified at CAL. WATER CODE §§ 10500-10507).

59. 25 Op. Cal. Att'y Gen. 8, 10-11 (1955).

60. *Id.*

61. CAL. WATER CODE § 10504 (West 1992).

62. *Id.*

63. FINAL REPORT, *supra* note 1, at 20. The Commission combined the discussion of the relation back doctrine with the doctrine of gradual or progressive development. The doctrine of relation back extends the priority of the right back to the date of commencement if all the work is completed within a reasonable time, in good faith, and with due diligence. HUTCHINS, *supra* note 9, at 113. The doctrine of gradual development entitles a right holder to an increased quantity of water to serve needs in the future within a reasonable time and with reasonable diligence. *Id.* at 118. Under both doctrines, the right does not vest until the project is complete and water is applied to beneficial use.

64. See FINAL REPORT, *supra* note 1, at 18 (noting that in 1903, claims on the Kings River amounted to 750,000 cubic feet per second ("cfs") where the actual flow was under 10,000 cfs).

permitting system. In addition, allowing an excessive amount of time to complete a project could nullify forfeiture requirements.<sup>65</sup>

The element of due diligence, which helps establish certainty as to the scope of a pre-1914 water right, is relaxed under the municipality exemption. Municipalities exercising pre-1914 water rights are afforded more time to extend use to the maximum amount of the claim within the original intent of the project.<sup>66</sup> While it makes sense that a municipality should be allowed to secure a water supply for future growth, those water rights outside of the permitting system have the potential to wreak havoc on the orderly administration of water in the state. Given the alternatives available to municipalities (including voluntary transfers, condemnation of senior water rights, conservation, reclamation, and desalination), the due diligence exemption appears unnecessary and outdated. Municipalities can afford to pay for water and should not be allowed to develop additional water supplies far into the future, upsetting established uses, without providing compensation.

### C. Riparian Rights

Riparian rights are inherently uncertain since the amount of the water right is not quantified, but is instead based on a correlative share with other riparian users on a stream. The amount of water a riparian may use varies depending on hydrology and how many other users need the water on the stream. A riparian can activate a riparian right or increase water use under an existing right at any time in the future.<sup>67</sup> These unexercised, or so-called dormant, riparian rights create uncertainty for intervening appropriators.<sup>68</sup> Uncertainty is minimized to some degree since a riparian right extends only to the natural flow. Most recent appropriators depend increasingly on storage, and thus unexercised riparian rights do not threaten their water rights unless riparians takes stored water to which they are not entitled. This problem applies equally, or more so, to existing riparians as well. The uncertainty of unexercised riparian rights is also minimized

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65. See CAL. WATER CODE §1240 (West 2000). As construed by the courts, an appropriative right is lost after five consecutive years of non-beneficial use. See *Wright v. Best*, 121 P.2d 702, 710 (Cal. 1942) (citing former Civil Code section 1411); *Smith v. Hawkins*, 42 P. 453, 454 (Cal. 1895); see also CLIFFORD T. LEE, GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, LEGAL ASPECTS OF WATER CONSERVATION IN CALIFORNIA 61 n.227 (Staff Paper No. 3, Aug. 1977) ("The original Civil Code provision did not state any express period of time before nonuse caused previously appropriated water to revert to unappropriated water. The Supreme Court drew an analogy to the five year period required for adverse possession to ripen into a prescriptive title and judicially imposed a five year period.").

66. Under Civil Code section 1416, a city or county that filed and acquired rights under the posting and recording provisions of the Civil Code is deemed to be in compliance with the Civil Code provisions, waiving the requirement to commence construction of the project within sixty days of posting notice and to prosecute the work diligently and uninterruptedly to completion.

67. FINAL REPORT, *supra* note 1, at 20.

68. *Id.* at 20-21. See also William R. Attwater & James Markle, *Overview of California Water Rights and Water Quality Law*, 19 PAC. L.J. 957, 971 (1988) ("The [riparian] right was perceived by many as a 'dog-in-the-manger' doctrine which could wreak havoc with uses under appropriative rights and result in great economic dislocation.").

by the severance doctrine, which limits riparian ownership to the smallest parcel in the chain of title.<sup>69</sup>

The California Supreme Court helped clarify the extent to which dormant riparian rights may be limited in statutory adjudications in 1979, one year after the Commission issued its final report.<sup>70</sup> The court in *Long Valley* reviewed a superior court decree that was adopted pursuant to a statutory adjudication proceeding conducted by the SWRCB.<sup>71</sup> In the adjudication, the SWRCB made determinations regarding the priority, quantity, season, and purpose of use of all water rights in the stream system, including riparian rights.<sup>72</sup> The SWRCB awarded one of the claimants the amount of water necessary to irrigate eighty-nine acres of land that were currently under cultivation, but extinguished his right to irrigate an additional 2,884 acres sometime in the future.<sup>73</sup> The California Supreme Court reversed, holding that while the SWRCB had broad authority to ascertain the nature of unexercised riparian rights, it could not entirely extinguish such rights without raising serious constitutional issues.<sup>74</sup> The court found that in an adjudication, unexercised riparian claims may be assigned a priority lower than rights being exercised at the time of the adjudication, and additional rights authorized after the adjudication, if necessary to promote reasonable and beneficial use of the state's scarce water resources.<sup>75</sup> In ruling, the court heavily relied on Article X, Section 2 of the California Constitution, giving great weight to the problems with uncertainty pointed out by the Governor's Commission.<sup>76</sup> In statutory adjudication proceedings this case is helpful in quelling the enormous uncertainty created by dormant riparian rights. Outside of statutory adjudications, however, dormant riparian rights are a continuing source of uncertainty, which is increasing due to improved irrigation technology that enables irrigation on previously inaccessible places of use.

#### D. California Constitution Article X, Section 2

The Commission cites the 1928 amendment to the California Constitution as potentially casting a "shadow of uncertainty" on an increasing number of water uses.<sup>77</sup> California voters enacted Article X, Section 2 of the California

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69. See *Lux v. Haggin*, 10 P. 674, 773-74 (Cal. 1886); *Boehmer v. Big Rock Creek Irrigation Dist.*, 48 P. 908, 910-11 (Cal. 1897).

70. See *In re Waters of Long Valley Creek Stream System*, 599 P.2d 656 (Cal. 1979) [hereinafter *Long Valley*].

71. *Id.* at 659.

72. See generally CAL. WATER CODE §§ 2500-2900 (West 1971 & Supp. 2004).

73. See *Long Valley*, 599 P.2d at 660.

74. *Id.* at 662.

75. *Id.* at 663.

76. See generally *id.* at 663-67.

77. FINAL REPORT, *supra* note 1, at 21.

Constitution in 1928,<sup>78</sup> declaring that the general welfare of the state requires that state water resources be applied to beneficial use to the fullest extent, and that waste, unreasonable use, and unreasonable method of use be prohibited.<sup>79</sup> What is reasonable depends on the facts of a given case and may change over time.<sup>80</sup> Lack of concrete definitions and standards on what is reasonable and what is waste has generated insecurity in the water community, particularly because unreasonable and wasteful uses are not within the scope of the original property right.<sup>81</sup> While the amendment can generate uncertainty as to individual water users, especially those exercising questionable practices, the case specific application of the “rule of reason” guarantees that society as a whole has a mechanism to ensure that water is best utilized in the public interest.

In fact, the amendment was originally enacted in order to increase certainty for appropriators in response to the California Supreme Court’s decision in *Herminghaus v. Southern California Edison Co.*<sup>82</sup> and other decisions holding that riparian users had no duty to conserve water even to the detriment of appropriative diverters upstream. The amendment applies the doctrines of reasonable and beneficial use to both riparian and appropriative water right holders.<sup>83</sup> In addition, the amendment applies to pre-1914 water rights, limiting the uncertainty that is generated by grossly exaggerated or fictitious claims. The measure of the right is the amount reasonably put to beneficial use, including reasonable conveyance losses. In the absence of reporting requirements, it is difficult to establish what the actual diversion may have been for pre-1914 claims to vast amounts of water, with few or no historical uses established. If the amount allegedly diverted greatly exceeds that which was reasonably necessary for any uses that may have occurred at the time, the pre-1914 claim will not be accepted. The court later relied on the amendment to further reduce the uncertainty created by dormant riparian rights in the *Long Valley* case.<sup>84</sup>

While the amendment can create uncertainty for individual water users, the uncertainty can actually encourage water users to ensure that their use of water is efficient, an important goal in water law. Recently, the Imperial Irrigation District (“IID”) and the San Diego County Water Agency (“San Diego”) entered into a water conservation and transfer agreement allowing San Diego to receive 200,000 acre-feet of conserved water a year from Imperial County. This historic transfer greatly increases the security of urban water supply in southern

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78. Previously CAL. CONST. art. XIV, § 3.

79. CAL. CONST. art. X, § 2.

80. See *State Water Res. Control Bd. v. Forni*, 126 Cal. Rptr. 851, 855 (Ct. App. 1976) (citations omitted).

81. See *Joslin v. Marin Municipal Water Dist.*, 429 P.2d 889, 898 (Cal. 1967). See generally Clifford W. Schultz & Gregory Weber, *Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations*, 19 PAC. L.J. 1031, 1091 (1988).

82. 252 P. 607 (Cal. 1926).

83. See *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972, 986 (Cal. 1938).

84. See discussion *supra* text accompanying notes 70-76.



California, which is facing cutbacks from Colorado River deliveries caused by increased use by other western states and the worsening drought. IID engaged in negotiations and implemented the agreement in large part because of the uncertainty generated under Article X, Section 2. In a previous proceeding, the SWRCB had reserved continuing jurisdiction over the reasonable and beneficial use evaluation of the IID's water use.<sup>85</sup> IID explored and ultimately implemented the conservation opportunity to avoid any future finding that its practices were wasteful, or as the attorney for the IID put it, "to get that monkey off their back."<sup>86</sup> Thus, the uncertainty generated under the amendment ultimately led to the largest agricultural to urban water transfer agreement in California history.

Any insecurity that is generated by the case-by-case application of the reasonableness doctrine is trumped by the important values that the doctrine serves. The amendment arguably codifies historic attributes of water rights law that, if applied, serve a greater certainty in the long term. For instance, water users are protected against the uncertainty that another could wastefully use water to their detriment. As the California Supreme Court stated:

[i]t is suggested that the application of the doctrine of reasonable use of water lays the matter open to too much uncertainty. Conceding that the ascertainment of reasonable use is difficult, it does not follow that it cannot be done. The requirements of public welfare demand that it be done, and the uncertainty ends when a definite application of the rule has been made to the facts in each case.<sup>87</sup>

#### IV. STATUTORY ADJUDICATIONS

As a remedy to the problem of uncertainty, the Commission considered incorporating all non-permitted water rights into the statutory water right permit system; however, it soon recognized that incorporation probably would require the adjudication of every California stream.<sup>88</sup> The Commission ultimately concluded that the benefits of incorporating all water rights in California did not appear to justify the costs of such adjudication.<sup>89</sup>

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85. See S.W.R.C.B. Order No. WR 88-20 (Sept. 7, 1988); S.W.R.C.B. Order No. 84-12 (Sept. 20, 1984); S.W.R.C.B. Decision 1600 (June 21, 1984).

86. See Public Hearing on Amended Joint Petition of the Imperial Irrigation District and the San Diego County Water Authority, Opening Statement of David L. Osias, at 86 (Apr. 23, 2002), at <http://www.waterrights.ca.gov/IID/IIDHearingData/LocalPublish/transcript042302.pdf> (copy on file with the *McGeorge Law Review*).

87. *Peabody v. City of Vallejo*, 40 P.2d 486, 495 (Cal. 1935).

88. FINAL REPORT, *supra* note 1, at 25-26.

89. *Id.* at 26 (noting that Oregon has spent over eight million dollars to adjudicate seventy percent of the state's area and that adjudication and incorporation in California would cost at least as much).

As an alternative to incorporation, the Commission recommended the adjudication of water rights on a stream-by-stream basis as the primary method of addressing uncertainty.<sup>90</sup> The Commission assumed that adjudications would occur on stream systems where uncertainty and its associated ills were the most significant.<sup>91</sup> This selective approach to adjudication would provide certainty on a more favorable cost-benefit basis.<sup>92</sup> Moreover, the Commission noted, existing statutory adjudication procedures already provided a mechanism to implement the adjudication alternative.<sup>93</sup>

According to the Commission, a comprehensive statutory adjudication would have several benefits. First, because a statutory adjudication would bind all claimants on a stream, a comprehensive determination of water rights would provide an efficient alternative to litigation, prevent recurring litigation, and afford the “certainty of official recognition to private property rights.”<sup>94</sup> Second, the adjudication procedure would establish a framework for compromise and agreement among water users, with the SWRCB acting as a mediator.<sup>95</sup> Third, watermaster service programs would provide for the orderly control and management of water.<sup>96</sup> Finally, a statutory adjudication would provide valuable information for water right administrative and planning purposes, including information regarding whether water is available for appropriation or for protection of instream uses, and the extent of vested rights.<sup>97</sup>

This section provides a brief overview of western state adjudications and reviews the Commission’s proposals, the legislative response, current statutory adjudication procedures, the relevance of the Commission’s recommendations not implemented, and the likelihood that such recommendations would create certainty in water rights.

#### A. Overview of Western State Adjudications

Major adjudications in the western states have three purposes. First, major adjudications confirm existing water rights. A precise definition and creation of an accurate record of water rights provides certainty of title to water rights, and thus allows water distribution in accordance with those rights. It also improves water resources planning and allows users to more accurately predict the risks of curtailment during water shortages.<sup>98</sup> Second, major adjudications create an

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90. *Id.*

91. *Id.*

92. *Id.* at 27.

93. See *id.* n.26 (citing CAL. WATER CODE §§ 2500-2868). The Commission noted that eighteen statutory adjudications had been completed within the past sixty-four years.

94. *Id.* at 27-28.

95. *Id.* at 28.

96. *Id.*

97. *Id.*

98. See A. Dan Tarlock, *The Illusion of Finality in General Water Rights Adjudications*, 25 IDAHO L. REV. 271, 272 (1988-89); A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems & Solutions*, 30 LAND & WATER L. REV. 9, 12 (1995).

accurate water use information database that will improve water management and allow the state agency to make informed decisions regarding the allocation of unappropriated water.<sup>99</sup> Third, major adjudications recognize and quantify inchoate federal reserved water rights.<sup>100</sup>

At common law, water right adjudications followed procedures generally applicable to civil quiet title actions or bills in equity. These proceedings, however, resulted in piecemeal litigation, were costly for parties who attempted to join all potential claimants to avoid piecemeal litigation, and were limited by a lack of accurate information. The resulting decrees often included errors, inflated water rights, described rights inconsistently, omitted necessary information such as point of diversion or amount, or were otherwise unadministrable.<sup>101</sup> Western states responded to these problems by employing the expertise of a specialized water resource agency, creating procedures specifically designed for water right adjudications, and shifting a portion of the proceedings' costs to the state agency.<sup>102</sup>

Like many western states, California has an integrated adjudication system that has both administrative and judicial components.<sup>103</sup> The SWRCB's order of determination forms the basis for subsequent judicial determination of water rights. California's statute has been upheld against due process and separation of powers challenges, in part, because the agency determinations are not final. The determinations are subject to objection, and contested matters are to be determined by the court under civil rules.<sup>104</sup> Moreover, this hybrid adjudication procedure, which requires the active participation of both the SWRCB and the court, meets the requirements for waiver of federal sovereign immunity under the McCarran Amendment.<sup>105</sup>

### B. The Commission's Proposal

The Commission offered a number of recommendations and proposed legislation to improve statutory adjudication procedures. The Commission first proposed several changes in an effort to improve greater access by water right claimants to, and increase use of, statutory adjudications. The Commission would

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99. See Tarlock, *supra* note 98, at 272.

100. See *id.*

101. See Krogh, *supra* note 98, at 15-16.

102. *Id.* at 17.

103. See generally *id.* (comparing administrative, judicial, and integrated state adjudication systems).

104. See *Bray v. Superior Court*, 268 P. 374 (Cal. 1928); Krogh, *supra* note 98, at 47; *cf.* *United States v. Clifford Matley Family Trust*, 354 F.3d 1154 (9th Cir. 2004) (holding that the Special Master's failure to hold evidentiary hearing prior to issuance of water right ruling does not automatically violate due process).

105. Under the McCarran Amendment, 43 U.S.C.A. § 666 (West 1986), the federal government has waived sovereign immunity with respect to comprehensive suits for adjudication of water rights. See *United States v. Oregon*, 44 F.3d 758, 765 (9th Cir. 1994) (stating that an administrative agency's involvement under Oregon's statutory adjudication statute did not preclude adjudication from being a "suit" within the meaning of McCarran Amendment).

allow the SWRCB to initiate a statutory adjudication and the courts to transfer private quiet title suits to the SWRCB for adjudication.<sup>106</sup> The SWRCB would be required to hold mandatory hearings to determine whether the public interest and necessity would be satisfied when the SWRCB decides to initiate a proceeding, accept a court reference, or grant a petition for adjudication.<sup>107</sup> If the SWRCB received a court reference, but determined that the public interest and necessity would be best served by a full determination of rights, then the SWRCB would petition the court to modify its order of reference and to order a statutory adjudication.<sup>108</sup>

The Commission attempted to address the goals of finality and comprehensiveness by including interconnected groundwater in adjudications and quantifying riparian rights. Specifically, the Commission drew upon legislation affecting the Scott River adjudication as an example. The Commission recommended including groundwater in the adjudication when the groundwater is closely interconnected with a stream system, its use would substantially affect the use of adjudicated surface water, and its inclusion is essential to a fair and effective determination of water rights.<sup>109</sup> The Commission also recommended expressly authorizing the SWRCB and the courts “to quantify all riparian uses and to accord unexercised riparian rights lower priorities than active uses of water” only in adjudications where it is necessary to secure the reasonable beneficial use of water under Article X, Section 2 of the California Constitution.<sup>110</sup>

The Commission recommended several procedural modifications to expedite the statutory adjudication process. For example, proposed Water Code section 2757.5 would prohibit the court’s consideration of an exception unless the exception was presented to the SWRCB in the form of an objection, except in the court’s discretion and for good cause shown.<sup>111</sup> The Commission also recommended that the SWRCB and claimants be able to seek trial distributions of water at various stages of the proceeding.<sup>112</sup> Moreover, the Commission proposed allowing the court, either on its own motion, a motion by the SWRCB, or a motion by a water right holder whose claim was determined by the decree, to enter an order appointing the Department of Water Resources or the SWRCB to supervise the distribution of water through the agency of a watermaster.<sup>113</sup>

In addition, the Commission suggested legislation allowing the SWRCB, or any water right holder whose claim was determined by the decree, to petition the court for modification of the decree.<sup>114</sup> The SWRCB would have to provide

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106. FINAL REPORT, *supra* note 1, at 28, 36.

107. *Id.* at 28, 34-35.

108. *Id.* at 29, 34.

109. *Id.* at 29, 33.

110. *Id.* at 29-30, 38.

111. *Id.* at 37.

112. *Id.* at 30, 36-37.

113. *Id.* at 38.

114. *Id.* at 39-41.

notice of, and an opportunity to object to, the modification, and in its discretion could hold a hearing on the objections.<sup>115</sup> The SWRCB then would file a report with its recommendations with the court and the parties, and the court would hold a hearing.<sup>116</sup> The court could only order modification of the order if it found “that the modification will not operate to the injury of any legal user of water and that no reasonable beneficial use of water will be impaired thereby.”<sup>117</sup> The court would be required to order the petitioner to reimburse the SWRCB for its costs of providing notice to the claimants.<sup>118</sup>

Finally, the Commission recommended that the state assume all or a portion of the costs of the statutory adjudication depending, in part, on who initiates the proceeding.<sup>119</sup> If the SWRCB initiates the statutory adjudication, then the Commission recommended that the SWRCB bear its entire cost.<sup>120</sup> If the adjudication was initiated by petition or by transfer from a superior court, then the SWRCB would have the discretion to assume any portion of the cost.<sup>121</sup> When the SWRCB holds a hearing to determine whether the public interest and necessity will be served by the adjudication, when appropriate, the SWRCB would be required to take into consideration the estimated cost of the proceeding and the apportionment of the costs between the SWRCB and the claimants on the stream.<sup>122</sup>

### C. Legislative Response

The California Legislature failed to adopt any of the Commission’s recommendations when the Final Report was issued. In fact, since that time, the Legislature has enacted only one provision similar to that proposed by the Commission, proposed Water Code section 2757.5, which generally would prohibit the court’s consideration of an exception unless the exception had been presented to the SWRCB in the form of an objection.<sup>123</sup> The development of statutory adjudication procedures, however, has not been static. Since the Commission issued its report in 1978, the Legislature has adopted provisions intended to clarify a water right claimant’s obligations and expedite the adjudicative process.<sup>124</sup>

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115. *Id.* at 39.

116. *Id.* at 40.

117. *Id.*

118. *Id.* at 41.

119. *Id.* at 30.

120. *Id.* at 30, 39.

121. *Id.* at 30, 34.

122. *Id.* at 30.

123. *Id.* at 37. In 1985, the Legislature enacted Water Code section 2763.5, which similarly prohibits a court from considering an exception to the order of determination.

124. *See, e.g.*, CAL. WATER CODE § 2529(a)(4) (West Supp. 2004) (stating that a claimant who fails to appear forfeits all right to water previously claimed); *id.* § 2702 (concerning the reconsideration of order of determination).

#### D. SWRCB Implementation of Statutory Procedures

To gain a better understanding of the problems associated with statutory adjudications, and the utility of such adjudications in creating certainty in water right law, it is helpful to understand the current statutory adjudication procedures and the SWRCB's experiences with such adjudications.

##### 1. Current Statutory Adjudication Procedures

Water Code sections 2500 to 2900 establish a statutory adjudication procedure to determine "all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right."<sup>125</sup> A stream system includes surface water and subterranean streams flowing through known and definite channels, but does not include other underground water supplies.<sup>126</sup>

A claimant to the waters of any stream system can petition the SWRCB for a determination of rights to the water of that stream system.<sup>127</sup> After investigation, if the SWRCB finds that the public interest and necessity will be served by a determination of water rights, then the SWRCB must issue an order granting the petition and proceed with the determination.<sup>128</sup> As soon as practicable after granting the petition, the SWRCB issues a notice of the proceeding informing all claimants of the pending proceeding<sup>129</sup> that they must timely inform the SWRCB of their intent to file a proof of claim and that they will be required to submit proof of their claim.<sup>130</sup> The SWRCB then publishes the notice for four consecutive weeks in one or more newspapers published in each county in which any part of the stream system is located and mails the notice to all persons known to the SWRCB who own land that appears to be riparian or who divert water from the stream system.<sup>131</sup>

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125. *Id.* § 2501 (West 1971).

126. *Id.* § 2500. Due to the Scott River's hydrogeology, the Legislature found it necessary to include interconnected groundwater in any statutory determination "as a foundation for a fair and effective judgment of [water] rights," but emphasized that inclusion of groundwater was limited to the Scott River. *Id.* at § 2500.5 (West Supp. 2004). See also *United States v. Oregon*, 44 F.3d 758, 768-70 (9th Cir. 1994) (holding that a comprehensive adjudication need not include a determination of groundwater users in order to invoke the McCarran Act waiver of sovereign immunity).

127. CAL. WATER CODE § 2525 (West 1971). A person claiming injury to public trust resources is considered a "claimant" and is permitted to seek a SWRCB determination of the allocation of water in a stream system under Water Code section 2501. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 730 (Cal. 1983).

128. CAL. WATER CODE § 2525. The SWRCB has the discretion to exempt minor quantities of water if it finds that the use of such minor quantities would have no material effect on the rights of other claimants. *Id.* § 2502 (West Supp. 2004). Section 2503 defines minor quantities as diversions or extractions that do not exceed ten acre-feet annually. *Id.* § 2503.

129. *Id.* § 2526 (West Supp. 2004).

130. *Id.* Interested claimants have a duty to notify the SWRCB of their intention to file a proof of claim and to submit a proof of claim as required. *Id.* § 2528 (West 1971). A person may claim a right under an incomplete appropriation. *Id.* § 2801.

131. *Id.* § 2527 (West Supp. 2004).

Additionally, within sixty days of the date that claimants must notify the SWRCB of their intention to file a proof of claim, the SWRCB must file a notice of pending proceeding in the applicable county recorder's office.<sup>132</sup> The notice must explain that any claimant who fails to appear and submit proof of a claim will forfeit all rights to water, unless entitled to relief under another provision of law.<sup>133</sup> The notice also must identify the current owners of parcels that appear to be riparian.<sup>134</sup>

As soon as practicable after granting the petition, the SWRCB is required to begin an investigation of the stream system, the diversion of water, beneficial uses, and the water supply available for those uses.<sup>135</sup> After giving notice to each person who filed a notice of intent to file a proof of claim, the SWRCB must conduct a detailed field investigation of that person's use of water, including the place of use, purpose of use, point of diversion and conveyance systems, and the amount of water diverted and reasonably required to satisfy the uses made.<sup>136</sup> The SWRCB must provide each claimant with a copy of the SWRCB's factual determination after the field investigation.<sup>137</sup> The SWRCB must conduct a similar field investigation of the water projects that are known to the SWRCB, but where the water user did not file a notice of intent to file proof of claim.<sup>138</sup> Those persons may file a proof of claim on the same basis as persons who timely filed notices of intent.<sup>139</sup>

On completion of the field investigations, and after the time to file proofs of claim has expired, the SWRCB must prepare a report describing the water supply and each claimant's water right claim.<sup>140</sup> The report must identify any material differences between the water right claims and the SWRCB's factual determinations made during the investigation.<sup>141</sup> The SWRCB must mail a copy of the report to each claimant and to each person who is not a claimant but is identified in the report as a water user.<sup>142</sup> The SWRCB then must allow claimants and interested persons to inspect the proofs of claim, measurements, and other data.<sup>143</sup> The claimants and water users may file objections to any portion of the report and the SWRCB may then hear those objections.<sup>144</sup>

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132. *Id.* § 2529(a).

133. *Id.* § 2529(a)(4).

134. *Id.* § 2529(b).

135. *Id.* § 2550.

136. *Id.* § 2551.

137. *Id.* § 2553.

138. *Id.* § 2554.

139. *Id.* § 2555.

140. *Id.* § 2600.

141. *Id.* § 2601.

142. *Id.* § 2604.

143. *Id.* §§ 2625-2627.

144. *Id.* §§ 2604, 2650.

After any hearing on objections, or the expiration of the time for filing objections if no objections are filed, the SWRCB must adopt an order of determination that establishes the rights to the water of the stream system.<sup>145</sup> The order may prescribe a time for completion of the appropriation if the claimant has yet to complete an appropriation.<sup>146</sup> The SWRCB may order reconsideration of the order on its own motion or on the motion of any affected party.<sup>147</sup>

As soon as practicable after adoption of the final order, the SWRCB must file the final order and underlying evidence in the superior court of the county in which the stream system, or a portion thereof, is located.<sup>148</sup> After the superior court sets a time for hearing, the SWRCB must provide notice of the hearing by registered mail and publication.<sup>149</sup> Each party in interest may file with the court notice of exceptions to the final order of determination.<sup>150</sup> Any claimant who did not have actual knowledge of the pending proceeding prior to the entry of the order of determination may intervene by filing with the court an exception to the order and a proof of claim.<sup>151</sup> Absent a showing of good cause, the court cannot consider an exception unless the claimant or water user had presented the exception to the SWRCB in the form of an objection.<sup>152</sup> The court may take additional evidence during the hearing.<sup>153</sup> "After the hearing, the court shall enter a decree determining the right[s] of all persons involved in the proceeding."<sup>154</sup> If no exceptions are filed, the court, on the SWRCB's motion, must enter a decree affirming the order of determination.<sup>155</sup>

The decree is final regarding the rights of all claimants.<sup>156</sup> Any claimant who has failed to appear and submit proof of claim is estopped from subsequently asserting rights to the stream system and forfeits all rights to water previously claimed, unless entitled to relief under applicable law.<sup>157</sup> In rendering its decree, the court may provide that, within three years, the SWRCB or any party affected by the decree may apply to the court for modification of the decree to the extent that the decree determines quantities of water.<sup>158</sup> Appeals may be taken from the court's decree in the same manner as in civil cases.<sup>159</sup>

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145. *Id.* § 2700.

146. *Id.* § 2803 (West 1971).

147. *Id.* § 2702 (West Supp. 2004).

148. *Id.* § 2750.

149. *Id.* §§ 2753-2754 (West 1971).

150. *Id.* § 2757.

151. *Id.* §§ 2780-2781.

152. *Id.* § 2763.5 (West Supp. 2004).

153. *Id.* § 2767 (West 1971).

154. *Id.* § 2768.

155. *Id.* § 2762.

156. *Id.* § 2773.

157. *Id.* § 2774.

158. *Id.* § 2900.

159. *Id.* § 2771.



The SWRCB will continue to administer post-1914 appropriations, including those that are incomplete.<sup>160</sup> If the SWRCB issues a license, then either the licensee or the SWRCB may file a motion with the court requesting the court to enter a supplemental decree in accordance with the license.<sup>161</sup> Similarly, any change authorized by the SWRCB pursuant to chapter 10 (commencing with section 1700), part 2, division 2 of the Water Code or a revocation of a permit or license may be the subject of a supplement decree.<sup>162</sup>

Before the Water Code was amended effective January 1, 2004, and at the time of the Commission's report, a person who filed a proof of claim was required to pay a ten-dollar filing fee.<sup>163</sup> After mailing the order of determination, the SWRCB calculated its total expenses, including salaries, wages, traveling expenses, and other costs properly chargeable to the proceeding.<sup>164</sup> If the total expense exceeded the total amount received from the claimants, then the SWRCB equitably apportioned the remaining expense against the parties.<sup>165</sup> The SWRCB then provided a statement of expense and apportionment to the parties and the court, and the parties could object to the expense or apportionment.<sup>166</sup> The court was required to hold a hearing on any objections, determine the expense and apportionment as the court deemed equitable, and enter a judgment against the parties accordingly.<sup>167</sup> The SWRCB could, however, refuse to proceed with the investigation if funds available for its use were inadequate to undertake the expense of the proceeding or if reimbursement for the expense of such proceeding was uncertain.<sup>168</sup> As discussed further below, as of January 1, 2004, the SWRCB now may collect its costs at the beginning of the adjudication.<sup>169</sup>

## 2. Overview of the SWRCB's Implementation of Statutory Adjudications

To date, the SWRCB has conducted twenty-seven statutory adjudications.<sup>170</sup> The SWRCB has considered a number of factors in considering whether its approval of a petition for determination of water rights would serve the public

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160. *Id.* § 2819 (West Supp. 2004).

161. *Id.*

162. *Id.* §§ 2819-2820.

163. 1976 Cal. Stat. ch. 545, sec. 20, at 1386 (current version at CAL. WATER CODE § 2850 (West Supp. 2004)).

164. *Id.* § 2851 (1971).

165. *Id.* § 2852.

166. *Id.* §§ 2853, 2855.

167. *Id.* § 2859.

168. *Id.* § 2864.

169. *See infra* Part IV.E.3.

170. A map and list of California water right determinations may be found at <http://www.waterrights.ca.gov/hearings/Judgements/JudgementsMap.pdf>. Certain decrees may be found at <http://www.waterrights.ca.gov/hearings/ADJUDICATIONS.htm>.

interest and necessity. Factors favoring approval of a petition include insufficient water to irrigate irrigable lands, fish and wildlife issues,<sup>171</sup> the existence of a discrete controversy, and the possibility of physical violence.<sup>172</sup> The SWRCB's denial of such petitions seems to be influenced by either the small number of water users involved<sup>173</sup> or a decision not to adjudicate rights to foreign water.<sup>174</sup> Most of these proceedings have taken place in the northern portion of the state. Given the increase in California's population from nearly 3.5 million people in 1920 to nearly 34 million people in 2000,<sup>175</sup> and the corresponding competition for additional water, the statutory adjudication procedures appear to be underutilized.

### E. Continued Relevance of the Commission's Proposals

This section discusses the relevance of the Commission's proposals to statutory adjudications today, focusing on the proposals regarding interconnected groundwater, dormant riparian rights, and allocation of costs.

#### 1. Interconnected Groundwater

The Commission recommended including groundwater in a statutory adjudication when the groundwater is closely interconnected with a stream system and its use would substantially affect the use of adjudicated surface water.<sup>176</sup> Although never adopted, the Commission's recommendation has merit today. A statutory adjudication will not provide the finality and certainty that water right claimants seek if it does not include interconnected groundwater that may affect surface water use. Indeed, claimants to surface water rights whose claims have been denied, or who have junior priority rights that cannot be exercised in dry years, may simply initiate diversions of percolating groundwater to circumvent the effect of the decree. A completed adjudication will not provide the legal basis for enforcement against groundwater users who may contribute to problems in a water-short area.<sup>177</sup> Thus, absent consideration of interconnected

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171. See S.W.R.C.B. Order No. WR 80-10 (May 15, 1980).

172. See S.W.R.C.B. Order No. WR 78-06 (Mar. 16, 1978).

173. See, e.g., S.W.R.C.B. Order No. WR 87-04 (May 21, 1987) (finding that the controversy is limited to a minority of landowners and should be resolved by agreement or by superior court adjudication); S.W.R.C.B. Order No. WR 84-01 (Jan. 19, 1984).

174. See, e.g., S.W.R.C.B. Order No. WR 84-08 (July 19, 1984) (finding that "[c]ertainty of water rights is not needed by those who have rights to the foreign water").

175. U.S. Department of Commerce, U.S. Census Bureau, *Historical Populations of California Counties 1850-2000*, at <http://www.dof.ca.gov/html/demograp/calhist2a.xls> (last visited Sept. 19, 2004) (copy on file with the *McGeorge Law Review*).

176. FINAL REPORT, *supra* note 1, at 29.

177. It may simplify the issues, however. In particular, if the groundwater claimant was also a party to the adjudication, the claimant will be precluded from challenging determinations made in the adjudication decree, including the validity of surface water rights confirmed in the decree and any determinations made

groundwater that substantially affects the use of surface water, a statutory adjudication will fail to authoritatively determine existing water rights and will not provide certainty regarding use of those rights. Nevertheless, including interconnected groundwater in statutory adjudications may be politically infeasible because many groundwater extractors are likely to object to any proposal that would limit their diversions.

## 2. Dormant Riparian Rights

Although the Commission's proposal to give dormant riparian rights a lower priority was not adopted by the Legislature, it swayed the California Supreme Court in the *Long Valley* decision.<sup>178</sup> Accordingly, the Commission's proposal has been implemented through the judicial process.<sup>179</sup>

The SWRCB has placed, or attempted to place, unexercised riparian rights in lower priority in at least seven statutory adjudications: Purisima Creek,<sup>180</sup> Roaring Creek,<sup>181</sup> Willow Creek,<sup>182</sup> Soquel Creek,<sup>183</sup> Hallett Creek,<sup>184</sup> San Gregorio Creek,<sup>185</sup> and Long Valley Creek.<sup>186</sup> Except for the Soquel Creek adjudication, the SWRCB quantified the existing appropriative and riparian rights. The superior courts accepted the SWRCB's recommendation that unexercised riparian rights should not be allotted water under the decree and that future exercise of such rights shall require approval of the court in a supplemental decree. If the previously unexercised riparian rights were allotted water in a supplemental decree, then those rights would be accorded a priority subordinate to all pre-existing uses. The adjudications also gave existing domestic uses a higher priority than all other uses, regardless of the basis of the right.

In contrast, when the decree in the Soquel Creek adjudication was entered in 1977, the trial court rejected the SWRCB's recommendation that unexercised riparian rights not be recognized in the decree.<sup>187</sup> Instead, the court reserved jurisdiction to define those rights when they were exercised, and the decree provided that those previously unexercised rights would receive the same priority as active riparian rights.<sup>188</sup> The SWRCB unsuccessfully appealed the trial court's

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concerning public trust needs.

178. See *Long Valley*, 599 P.2d 656 (Cal. 1979). The court cited extensively from the Commission's Final Report, noting that the document identifies uncertainty as a major problem in water right law and that riparian rights are a principal source of this uncertainty. *Id.* at 665-67.

179. See discussion *supra* text accompanying notes 70-76.

180. *In re Waters of Purisima Creek Stream System*, No. 278007 (Super. Ct. San Mateo County Oct. 8, 1985).

181. *In re Waters of Roaring Creek Stream System*, No. 83723 (Super. Ct. Shasta County Sept. 4, 1985).

182. *In re Waters of Willow Creek Stream System*, No. 87524 (Super. Ct. Shasta County July 7, 1986).

183. *In re Waters of Soquel Creek Stream System*, No. 57081 (Super. Ct. Santa Cruz County Mar. 2, 1977).

184. *In re Waters of Hallett Creek Stream System*, No. 16291 (Super. Ct. Lassen County July 30, 1984).

185. *In re Waters of San Gregorio Creek Stream System*, No. 355792 (Super. Ct. San Mateo County Jan. 29, 1993).

186. *In re Waters of Long Valley Creek Stream System*, No. 12999 (Super. Ct. Lassen County Aug. 6, 1976).

187. *In re Waters of Soquel Creek Stream System*, No. 57081 (Super. Ct. Santa Cruz County Mar. 2, 1977).

188. *Id.*

decision<sup>189</sup> and the California Supreme Court denied hearing on June 9, 1978. In 1981, following the California Supreme Court's 1979 decision in *Long Valley*,<sup>190</sup> the trial court sought a recommendation from the SWRCB regarding an application by a dormant riparian for an allotment of water. The SWRCB requested that the trial court enter a supplemental decree that would govern future requests to activate dormant riparian rights and provide that an allotment of water to a previously unexercised riparian right would receive a later priority than existing riparian rights. The court agreed and entered a supplemental decree in February of 1982.

Thus, although never implemented by the Legislature, the Commission's recommendation regarding dormant riparian rights received judicial approbation in *Long Valley*. In a statutory adjudication, the SWRCB has the authority to decide whether an unexercised riparian claim will lose its priority relative to existing rights, both riparian and appropriative, claimed in the adjudication.<sup>191</sup> This approach provides a degree of finality and certainty in statutory adjudications that would otherwise be lacking.

### 3. Allocation of Costs

The Commission recommended that the state assume all or a portion of the costs of the statutory adjudication depending, in part, on who initiates the proceeding.<sup>192</sup> In promulgating this recommendation, however, the Commission wholly failed to recognize the time-consuming and resource-intensive nature of statutory adjudications and to consider basic agency resource issues, such as financing and staffing, associated with its proposal. It is unclear why the Commission proposed a change with such major fiscal implications without expressly addressing those implications.

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189. *In re Waters of Soquel Creek Stream System*, 145 Cal. Rptr. 146 (Ct. App. 1978).

190. *Long Valley*, 599 P.2d 656, 669 n.15 (Cal. 1979) (disapproving the *Soquel Creek* decision to the extent that it conflicts with the California Supreme Court's conclusion that the SWRCB may make determinations regarding priority).

191. *See id.* at 668-69. For example, the San Gregorio decree established levels of priority in the following order:

(1) all active rights inside residential domestic use, regardless of whether the basis of right is riparian or appropriative; (2) all active riparian rights and appropriative rights initiated before December 19, 1914, for outside domestic use, irrigation, and commercial stockwatering; (3) all active riparian rights for industrial use; (4) priority of post-1914 rights as established as of the date of filing the application; and (5) unexercised riparian rights as of the date of application for activation.

*In re Waters of San Gregorio Creek Stream System*, No. 355792, slip op. at 5-6 (Super. Ct. San Mateo County Jan. 29, 1993).

192. *See supra* Part IV.B.

Until recently, the Water Code provided for the reimbursement of the SWRCB's expenses, but only after it completed its order of determination. The claimants paid a ten-dollar filing fee and the SWRCB bore the expense of the adjudication until the court approved an allocation of expenses and the SWRCB was able to collect its costs.<sup>193</sup> In the meantime, the SWRCB had to provide notice to hundreds of parties, conduct an investigation, prepare a report, hear objections, issue a final order of determination, and participate in court proceedings, over a number of years and without additional funds. This lack of available funding delayed the adjudication process because the SWRCB simply could not hire needed staff based on the expectation that it would be reimbursed for its expenses years later.

For example, the SWRCB's most recent statutory adjudication, on the San Gregorio Creek stream system in San Mateo County, had approximately three-hundred parties and resulted in a decree in 1993, thirteen years after the SWRCB issued its order granting claimants' petition for a determination of water rights.<sup>194</sup> Not all of the claimants paid the ten-dollar filing fee, thus leaving the SWRCB with less than \$3,000 to cover the upfront costs of the adjudication, which included investigations in 1980, 1981, and 1982, and hearings in 1985 and 1989.<sup>195</sup> The long period of time required for the investigations and hearings stemmed in part from the SWRCB's inability to commit a large number of staff to the effort. Dedicating a large number of staff was not feasible because any resources committed to the adjudication came at the expense of other budgeted activities. Additionally, the San Mateo Superior Court received evidence in hearings held in 1991 and 1992. In 1997, the SWRCB sought reimbursement of its expenses amounting to nearly \$300,000, but did not obtain a judgment from the court for this full amount. Although only a small portion of the judgment is outstanding, just under \$9,000 as of 2004, it merits noting that nearly twenty-four years after the SWRCB granted claimants' petition, the SWRCB still has not fully recovered its expenses. Moreover, the SWRCB has spent considerable time and resources trying to collect these expenses and has borne those collection costs on its own.

Further, the court reserved continuing jurisdiction to change or modify the decree.<sup>196</sup> Any party who wishes to transfer or modify his or her rights may request that the SWRCB investigate the proposed transfer or modification.<sup>197</sup> The SWRCB is required to provide notice and an opportunity for hearing and, following the investigation and any hearing, file a report with the court.<sup>198</sup> The

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193. See *supra* Part IV.D.1.

194. See S.W.R.C.B. Order No. WR 80-10 (May 15, 1980).

195. See *In re* Waters of San Gregorio Creek Stream System, No. 355792, slip op. at 4 (Super. Ct. San Mateo County Jan. 29, 1993).

196. *Id.* at 12.

197. *Id.* at 13.

198. *Id.*

SWRCB's recommendation is subject to court review and approval as a supplemental decree.<sup>199</sup> The SWRCB, however, is only entitled to receive reimbursement for the investigation.<sup>200</sup> The SWRCB simply does not have the resources to bear the expense of years of adjudication proceedings, as well as post-decree modifications.

To address this issue, Senate Bill 1049 amended the fee provisions of the Water Code applicable to the water right program and statutory adjudications.<sup>201</sup> Effective January 1, 2004, Water Code section 1528 requires each person who files a proof of claim to pay a fee according to a fee schedule established by the SWRCB.<sup>202</sup> The SWRCB must adopt a schedule of fees that is "sufficient on the average to pay the administrative expenses of the [SWRCB] in processing, reviewing, and preparing a report on the claims submitted to the [SWRCB]."<sup>203</sup> The initial filing fee is now set at \$500,<sup>204</sup> and the SWRCB must collect the fee at the time of submission of proofs.<sup>205</sup> During the pendency of the proceeding, after notice to the parties, the SWRCB may order the parties to make interim or partial payments of the expense as the SWRCB deems proper and equitable under the circumstances.<sup>206</sup> If a party fails to pay its fee or apportioned expenses, then the SWRCB may refer the matter to the State Board of Equalization for collection of the unpaid fee or expenses.<sup>207</sup> These changes do not affect the actual cost to the parties, but instead only affect the timing of the payment to the SWRCB. Accordingly, the SWRCB will now be better able to fund its work on statutory adjudications.

#### F. Utility of Statutory Adjudications in Providing Certainty

The Commission recommended increased use of statutory adjudications as a means of providing finality and certainty as to water rights on a stream system.<sup>208</sup> A threshold issue is whether statutory adjudications actually provide the certainty that the Commission believed they would.

While statutory adjudications confirm existing rights, they may not provide the final determination of water rights and certainty that its proponents seek.<sup>209</sup> First, as

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199. *Id.*

200. *Id.*

201. 2003 Cal. Stat. ch. 741.

202. CAL. WATER CODE § 1528 (West Supp. 2004).

203. *Id.*

204. CAL. CODE REGS. tit. 23, § 1069 (2003).

205. CAL. WATER CODE § 2850 (West Supp. 2004).

206. *Id.* § 2865.

207. *Id.* §§ 1535(b), 1536, 2868. The State Board of Equalization shall collect the fees in accordance with the Fee Collection Procedures Law, Revenue and Tax Code, division 2, part 30 (commencing with section 55001), which provides for interest and penalties on unpaid fees.

208. FINAL REPORT, *supra* note 1, at 27-28.

209. See Tarlock, *supra* note 98, at 285.

noted above, interconnected groundwater is not included in most statutory adjudications.<sup>210</sup> Second, unlike an owner of dry land, a water right holder has a duty to put water to beneficial use or lose the right to the unused water.<sup>211</sup> Third, a water right will fluctuate with available supply, increases in efficiency, and changes in use.<sup>212</sup> Absent an efficient and expeditious means of modifying or supplementing a final decree, the decree will not reflect the actual uses of the adjudicated stream system and will not provide certainty to water right holders that their rights are protected. Fourth, the Commission failed to address the application of water quality and environmental laws, which may affect an otherwise “final” adjudication. For example, as discussed elsewhere in this article, the application of the public trust doctrine and the state and federal endangered species acts to water rights creates uncertainty. Although *National Audubon Society v. Superior Court*<sup>213</sup> was not decided until after the Commission issued its Final Report, other environmental laws existed at the time the report was issued. With respect to the public trust doctrine, although the SWRCB routinely considers public trust values in its orders and decisions, only a few statutory adjudication decrees have recognized flows necessary for the protection of fisheries, wildlife, and other instream and public trust uses. Those decrees have imposed minimum flows on future appropriative and unexercised riparian rights, and not on existing water right claimants.<sup>214</sup> No adjudication, however, is final against the application of the public trust.<sup>215</sup> Finally, the Commission also failed to address post-decree administration. Without effective administration and enforcement, a decree will not provide the finality that the parties sought. For example, although a decree may provide for watermaster service,<sup>216</sup> in reality, such service may be ineffective or nonexistent.

The purpose of a watermaster is to distribute water in accordance with the decree, and to assure water users that their rights are being protected, without the parties having to resort to legal action. The San Gregorio decree is typical in that it requires the parties to appoint a watermaster to distribute water and regulate disputes in accordance with the decree.<sup>217</sup> The court reserved continuing jurisdiction to approve the appointment of the watermaster, to appoint a watermaster if the parties

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210. See *supra* Part IV.B.

211. See CAL. CONST. art. X.

212. See Tarlock, *supra* note 98, at 285.

213. 658 P.2d 709 (Cal. 1983).

214. See *In re Waters of San Gregorio Creek Stream System*, No. 355792, slip op. at 9 (Super. Ct. San Mateo County Jan. 29, 1993) (requiring that, absent a showing that a proposed diversion will not adversely affect those uses, any future activation of unexercised riparian rights and future appropriative rights are subject to certain minimum bypass flows); see also *In re Waters of Willow Creek Stream System*, No. 87524 (Super. Ct. Shasta County July 7, 1986); *In re Waters of Roaring Creek Stream System*, No. 83723 (Super. Ct. Shasta County Sept. 4, 1985).

215. *Nat'l Audubon Soc'y*, 658 P.2d at 728.

216. An independent watermaster may be appointed or the service of the Department of Water Resources' watermaster program may be requested pursuant to part 4 (commencing with section 4000) of division 2 of the Water Code.

217. *In re Waters of San Gregorio Creek Stream System*, No. 355792, slip op. at 13 (Super. Ct. San Mateo County Jan. 29, 1993).

do not appoint one, or to appoint a replacement watermaster if the parties do not do so within thirty days after an appointed watermaster ceases to perform its duties.<sup>218</sup> Any party to the adjudication or the SWRCB may petition the court to approve or appoint a watermaster, or the court may do so on its own motion.<sup>219</sup> Despite these provisions, the stream system has been without a watermaster for several years.

Watermasters face several difficulties in administering water right decrees. For example, absent specific enforcement authority, the watermaster may have difficulty obtaining access to private property and enforcing the terms of the decree. If a watermaster lives in the community, it may be difficult for the watermaster to feel that he or she should take enforcement action against a neighbor. Also, the watermaster may not have a good mechanism for collecting the costs of his or her services, particularly from parties who are often reluctant to pay for those services. Although these issues can be worked out with the court that imposed the decree, a watermaster may not have experience working with the court or may be intimidated by the judicial process. Moreover, a watermaster might be more concerned with the practicalities of making the system work than with ensuring that the decree is enforced and updated. For example, decrees are rarely updated or modified to reflect changes in ownership, new diversions, lot adjustments, water transfers, or abandoned rights. Better training, an emphasis on maintaining the decree, and a more efficacious means of updating the decree may help to resolve these problems.

#### *G. Future of Statutory Adjudications in Providing Certainty in Water Right Law*

The Commission may have overestimated the utility of statutory adjudications in providing certainty in California water right law. Statutory adjudications are expensive and time-consuming for both the parties and the SWRCB, and consequently are underused. More efficient procedures should be considered,<sup>220</sup> as well as a means of improving post-decree administration to ensure that the water right administration does not end with the entering of the decree. Nonetheless, regardless of any procedural improvements, a degree of uncertainty will persist in any adjudication in light of the potential applicability of environmental law and the public trust doctrine. In sum, a statutory adjudication may provide an important tool in addressing certainty, but it is not the sole answer to the problem.

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218. *Id.* at 13-14.

219. *Id.* at 14.

220. For example, although the Water Code specifies the information that should be included in a proof of claim, the SWRCB may need information before a claimant files a proof of claim or at later stages of the proceeding. It would be helpful if the SWRCB had the authority to require parties to submit relevant information, including changes in address, and changes in water right ownership. Moreover, proofs of claim are filed after the SWRCB conducts its investigation, but in some cases the investigation could be simplified if the certain information was submitted to the SWRCB first, e.g., reports on amounts diverted (including authority to require installation of measuring devices for diversions that are not measured). In other cases, the SWRCB may be aware of the need for information only after the proofs of claim are filed.



V. OTHER SOURCES OF UNCERTAINTY NOT IDENTIFIED BY THE COMMISSION

The Commission did not address several additional sources of uncertainty, including area of origin statutes, the public trust doctrine, state water quality law, federal environmental statutes, and groundwater.

A. Area of Origin Statutes

The Commission decided not to review the statutory law that protects areas from where water is exported.<sup>221</sup> The county of origin statute amended the Feigenbaum Act<sup>222</sup> in an effort to protect a county where water originates so that it may develop water resources as necessary in the future.<sup>223</sup> Thus, state filings retained priority as of the date of filing except that any application could not deprive the county of origin of water necessary for the development of the county.<sup>224</sup> Since 1969, California has included a condition in every assignment to preserve the preferential right of the county.<sup>225</sup> The Watershed Protection Act<sup>226</sup> extends protection to the watershed or area immediately adjacent to a watershed that can be conveniently supplied with water, giving future uses in that area priority over diversions for export by the Central Valley Project and State Water Project.<sup>227</sup> Similar to other paramount and preferential rights that may be exercised in the future, these statutes create uncertainty about the future viability of water rights acquired in the interim. Indeed, the entire infrastructure of the state and federal water projects could be at risk depending on the growth of counties in watersheds where water originates. Moreover, uncertainty exists regarding how these statutes may be applied. For instance, the statutory language is ambiguous as to the geographic scope of watershed of origin. A watershed could be defined as a small basin or a very large basin depending on how one defines the drainage.

The uncertainty of these statutes is mitigated in some respect because a person must still apply for a water right permit with the SWRCB to actually obtain a water right. The procedural requirements and other aspects of the law must still be met. In addition, it appears that even if a water right were obtained, upsetting state and federal contracts, the affected water agency could acquire the water right through condemnation.<sup>228</sup> Thus far, some parties have opted to enter into private agreements instead of obtaining further clarification from the courts

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221. FINAL REPORT, *supra* note 1, at 3.

222. CAL. WATER CODE §§ 10500-10507 (West 1992 & Supp. 2004).

223. *Id.* § 10505 (West 1992).

224. *Id.* § 10500.

225. *See id.* § 10505.5.

226. *Id.* §§ 11460-11463.

227. *Id.* § 11460.

228. *See id.* § 11461.

on how the statutes may apply.<sup>229</sup> Undoubtedly, area of origin issues will play a role as populations increase.

### B. The Public Trust Doctrine

Another area of uncertainty in the law not identified by the Commission is the application of the public trust doctrine to water rights. While the development and application of this law may have been foreseeable, the Final Report predated the California Supreme Court's decision regarding Mono Lake,<sup>230</sup> which defined the principles of the public trust doctrine as applied to water rights. The public trust doctrine originates from Roman law, where states hold title to and responsibility for the beds of navigable waters of the state, which cannot be extirpated by legislation or transferred to private ownership. In *National Audubon Society v. Superior Court*, the court integrated the public trust doctrine into the state water law system, finding that the trust must be protected in all water allocations so far as feasible.<sup>231</sup>

The law generates uncertainty because it may be applied to previously established water rights,<sup>232</sup> and because public trust values may evolve and change, similar to that of the reasonable use doctrine.<sup>233</sup> Criticism of the doctrine greatly exaggerates the consequences of its application.<sup>234</sup> To date, public trust has been applied in tandem with statutes enacted to protect the environment and instream flows.<sup>235</sup> Like the rule of reason, the goals achieved by the law outweigh the uncertainty that the doctrine engenders. Moreover, the doctrine itself is limited by the rule of reason, so that any application of the public trust must be reasonable and not

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229. In 1998, the cities of Fairfield, Benicia, and Vacaville filed water right applications to divert water from Barker Slough in the fully appropriated San Joaquin/Sacramento Delta Estuary. These cities claimed priority over the Department of Water Resources and the Bureau of Reclamation under the area of origin statutes and municipal preference. See California Environmental Protection Agency, State Water Resources Control Board, *Division of Water Rights: Hearing and Workshop Notices*, June 24, 2002, available at <http://www.waterrights.ca.gov/hearings/HearingNotices.htm> (last accessed Aug. 14, 2004) (copy on file with the *McGeorge Law Review*) ("Regarding water right [a]pplications 30680, 30681, and 30682, respectively, by the [c]ities of Fairfield, Benicia and Vacaville to divert water from Barker Slough."). The public hearing was postponed while parties negotiated a settlement. Ultimately, the cities withdrew their water right applications in favor of entering a water supply contract with the Department of Water Resources.

230. See *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

231. *Id.* at 712.

232. *Id.* at 728.

233. See, e.g., *Marks v. Whitney*, 491 P.2d 374 (Cal. 1970) (holding that fish and wildlife, ecological studies, and aesthetics are public trust resources in addition to traditional public uses of commerce, navigability and fishing).

234. Schultz & Weber, *supra* note 81, at 1095-98 ("Like a slumbering giant, the public trust can rise up at any moment and rearrange otherwise long settled arrangements in water resources simply because of a new legislature, administrator or judge.").

235. See, e.g., S.W.R.C.B. Order No. WR 95-04 (Feb. 16, 1995) (concluding that diversions from Big Bear Lake must comply with section 5937 of the Fish and Game Code); S.W.R.C.B. Order No. WR 95-17 (Oct. 26, 1995) (concluding that the public trust doctrine should be applied in tandem with water quality laws, section 5937 of the Fish and Game Code, and other relevant statutes); S.W.R.C.B. Decision 1632 (July 6, 1995) (concluding that CEQA requires mitigation of environmental effects).

constitute waste.<sup>236</sup> This demonstrates the previous point that Article 10, Section 2, of the California Constitution actually increases certainty on a societal level.

### C. Other Environmental Laws

#### 1. California Water Quality Law

California is unique in its integration of water quality and water rights law.<sup>237</sup> Under the Porter-Cologne Water Quality Control Act,<sup>238</sup> the state formulates water quality control plans that establish beneficial uses and water quality standards to protect such beneficial uses for each regional basin.<sup>239</sup> The SWRCB must consider the protection of beneficial uses in determining whether water is available for appropriation.<sup>240</sup> Moreover, the SWRCB may modify permits, and diversions may be curtailed if new information about adverse effects on water quality becomes available and water quality standards are revised. Water diversions that substantially degrade water quality can be considered unreasonable use under Article 10, Section 2 of the California Constitution.<sup>241</sup> Conversely, under the same provision, water quality standards may not compel a wasteful use of water.<sup>242</sup> The Porter-Cologne Act also serves to satisfy the federal Clean Water Act<sup>243</sup> requirements for establishment of water quality standards and for the regulation of pollutants into waters of the United States.<sup>244</sup>

#### 2. Endangered Species Act

The Endangered Species Act (“ESA”)<sup>245</sup> has played an increasing role in generating uncertainty for water right holders and has implications for state water allocation systems. Under section 7 of the ESA, actions that are authorized, funded, or carried out by a federal agency found likely to jeopardize the continued existence of any endangered or threatened species, or that adversely

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236. See *Nat'l Audubon Soc'y*, 658 P.2d at 727.

237. See CAL. WATER CODE § 174 (West 1971); see also Ronald R. Robie, *The Delta Decisions: The Quiet Revolution in California Water Rights*, 19 PAC. L.J. 1111, 1124 (1988). In 1967, the Legislature merged the State Water Rights Board with the State Water Quality Control Board to form the current State Water Resources Control Board. *Id.*

238. See CAL. WATER CODE §§ 13000-14958 (West 1992 & Supp. 2004).

239. See *id.* § 13241 (West 1992).

240. See *id.* § 1243.5.

241. See *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 187 (Ct. App. 1986).

242. *Id.* at 197 (finding that the Antioch water quality standard was a waste and unreasonable use and that the SWRCB properly excluded it from the Water Quality Control Plan).

243. Federal Water Pollution Control Act of 1976, 33 U.S.C.A. §§ 1251-1387 (West 2001 & Supp. 2004).

244. See CAL. WATER CODE §§ 13370-13389 (West 1992 & Supp. 2004).

245. Endangered Species Act of 1973, 16 U.S.C.A. §§ 1531-1544 (West 2000).

modify the critical habitat of such species (if designated), are prohibited.<sup>246</sup> Section 7 imposes obligations on federal irrigation projects not to jeopardize species and is arguably an affirmative duty to conserve the species under section 7(a).<sup>247</sup> Section 9 of the ESA prohibits any “take”<sup>248</sup> of an endangered species unless an incidental take permit is obtained from the appropriate federal agency under section 10.<sup>249</sup> This section applies to any water user, public or private, and imposes civil and criminal liability for knowing violations.<sup>250</sup>

The western United States has experienced a dramatic decline in its fisheries, largely as a result of water projects that alter aquatic habitat in a number of deleterious ways.<sup>251</sup> Not surprisingly, many water projects and associated water rights will come face to face with ESA requirements at some juncture. Further, species federally listed as endangered or threatened will likely be protected under various state laws governing water rights.<sup>252</sup>

### 3. *The Bay-Delta: A Case Study*

The activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (“Bay-Delta”) provide an excellent example of how these environmental statutes may limit existing water rights. The Bay-Delta is located at the confluence of the Sacramento and San Joaquin Rivers, and is the hub for the two major water supply projects in the state: the federal Central Valley Project (“CVP”) and the State Water Project (“SWP”). In granting water right permits to the U.S. Bureau of Reclamation (“USBR”) and the Department of Water Resources (“DWR”) for the projects, the SWRCB had to address water quality problems in the Delta, primarily salinity control requirements. Enforcement of salinity control was accomplished by the SWRCB’s regulation of water rights,<sup>253</sup> because salinity was not subject to waste discharge requirements under the

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246. 16 U.S.C.A. § 1536.

247. See Holly Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U. COLO. L. REV. 361, 381-82 (2001).

248. “Take” includes harm to a species, including substantial habitat modification. See 50 C.F.R. § 17.3 (1994) (defining the term “harm”); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995).

249. See 16 U.S.C.A. § 1538 (West 2000).

250. See 16 U.S.C.A. § 1540 (a)-(b).

251. See Doremus, *supra* note 247, at 367-68.

252. See CAL. FISH & GAME CODE § 5937 (West 1998); CAL. WATER CODE §§ 1243, 11900 (West 1992 & Supp. 2004); *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709 (Cal. 1983); see also California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21177 (West 1996 & Supp. 2004); State CEQA Guidelines, CAL. CODE REGS. tit. 14, §§ 15000-15387 (West 2004). CEQA applies to discretionary projects carried out or approved by a public agency, including granting a permit to appropriate water. See CAL. PUB. RES. CODE § 21080 (West 1996 & Supp. 2004). Any reduction in the number or the restriction of the range of an endangered, rare, or threatened species is considered a significant impact under the law. See CAL. CODE REGS. tit. 14, § 15065(a) (West 2004).

253. Robie, *supra* note 237, at 1137.

Porter-Cologne Act<sup>254</sup> or NPDES permits under the federal Clean Water Act.<sup>255</sup> In reviewing the SWRCB's decision to condition the water projects' water rights to protect water quality, a California appeals court ruled that the SWRCB should consider all diversions that contribute to the salinity problem and also should consider whether all diverters should share in the responsibility.<sup>256</sup> Meanwhile, in 1993, the winter run Chinook salmon was listed as a threatened, and later endangered, species. The Delta Smelt was also listed as threatened. Biological opinions issued by federal agencies established take limits that restricted exports from the Delta. The SWRCB adopted the 1995 Bay-Delta Water Quality Control Plan and, after extensive hearings, issued Decision 1641, which implements flow-related objectives of the 1995 Plan. While all major water diversions were subject to limitation, ultimately the parties reached negotiated agreements, which resulted in the SWRCB assigning responsibility to meet the objectives to the DWR and the USBR, pending a request by either of these agencies that the SWRCB allocate responsibility to others.

In addition, in 1994, state and federal agencies with management responsibilities in the Bay-Delta signed a framework agreement to coordinate efforts to address the problems in the Bay-Delta. The CALFED Bay-Delta Program (now the California Bay-Delta Authority) involved stakeholders representing agriculture, environmental, and urban interests in its planning process to develop long-term solutions. The Environmental Water Account was identified in the CALFED Record of Decision as a tool to protect fish in the Bay-Delta without uncompensated loss to water users.<sup>257</sup> The agencies accomplish this by utilizing the operational flexibility of the water projects to protect species in real time, and acquiring alternative water sources to replace any reduction in water supply. The negotiated settlements in the Bay-Delta hearings and the proactive approach taken by the CALFED program both employ ongoing adaptive management techniques to monitor environmental effects and adjust actions if necessary. Both provide examples for how water users might address uncertainty to water rights caused by environmental statutes.

The Commission did not attempt to explore federal law aspects of California water rights problems, "since the Governor and the Legislature can do little to change these."<sup>258</sup> Federal environmental statutes, however, have become increasingly important in the state water law system and should be addressed in

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254. Releases from dams and diversions may be regulated through waste discharge requirements. 43 Op. Cal. Att'y Gen. 302, 303 (1964). See *Lake Madrone Water Dist. v. State Water Res. Control Bd.*, 256 Cal. Rptr. 894, 897-901 (Ct. App. 1989) (holding that releases of sediment from a reservoir constituted a discharge of waste). The SWRCB has chosen as a matter of policy to use its water right authority instead of its waste discharge control authority. See S.W.R.C.B. Order No. WQ 89-18, at 16, 18-19 (Oct. 19, 1989).

255. *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 184 (Ct. App. 1986). Dam operations and salinity are not a "discharge of a pollutant." *Id.*

256. *Id.* at 187.

257. ENVIRONMENTAL WATER ACCOUNT, CALFED BAY-DELTA PROGRAM, ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT REPORT (Draft EIS/EIR) 1-1 (July 2003).

258. FINAL REPORT, *supra* note 1, at 3.

any comprehensive survey of uncertainty in state water law. While the California Legislature cannot change federal law, it can determine how federal environmental laws are taken into account in state water right administration, which can reduce the uncertainty as to how federal requirements may be applied. For example, while the state may not be able to affect a federal determination that diversions must be curtailed to provide flows needed for endangered species, the state may be able to determine how any curtailments will be allocated, including whether curtailments are based on water right priority or based on other factors. Again, it is important to view the goal of certainty in perspective with other competing goals, including the protection of water quality and endangered species. Water rights, like all property rights, are subject to regulation in furtherance of the public interest. No water right is inviolable and all are subject to government regulation.<sup>259</sup> Thus, while regulation for the public welfare may effectively limit a portion of water previously diverted, such regulation does not create an unacceptable level of uncertainty.<sup>260</sup>

#### D. Groundwater

Groundwater issues are addressed in detail in another section of this symposium, but it is worth noting that groundwater issues remain a great source of uncertainty in water rights. First, the rules and jurisdiction change depending on whether one is pumping from percolating groundwater or from a subterranean stream flowing through known and definite channels.<sup>261</sup> A jury instruction in *City of Los Angeles v. Pomeroy*<sup>262</sup> contained a presumption that sub-surface water is percolating groundwater.<sup>263</sup> But if one water user chooses to apply for a permit before the SWRCB, and the SWRCB determines that a subterranean stream exists, historical groundwater users may lose priority under the SWRCB's permitting jurisdiction.<sup>264</sup> Second, groundwater pumping may affect surface

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259. See *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. at 171; *People v. Murrison*, 124 Cal. Rptr. 2d 68, 76 (Ct. App. 2002) ("A water right, whether it predates or postdates 1914 is not exempt from reasonable regulation. Just as a real property owner does not have an unfettered right to develop property in any manner he or she sees fit, an owner of a water right may be similarly restricted.") (citation omitted).

260. Courts have upheld the application of the ESA to limit water project operations conducted in accordance with state water rights. See *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992) (stating that "enforcement of the Act does not affect the District's water rights but only the manner in which it exercises those rights"). *But see Tulare Lake Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001) (finding that the restriction of water pursuant to federal contracts for ESA compliance amounted to a taking). The *Tulare* Court misconstrued state law in determining whether plaintiffs held a property interest in the water and relied on the fact that the SWRCB had not declared the extent to which plaintiffs' water rights may be limited under either the reasonable use or public trust doctrine. *Id.* at 323. At the time (1992-1993), the SWRCB did consider the needs of fish under the beneficial uses of the Water Quality Plan, but it was not until S.W.R.C.B. Order No. WR 95-06 (June 8, 1995) that it made any determination regarding ESA requirements.

261. See CAL. WATER CODE § 1200 (West 1971).

262. 57 P. 585 (Cal. 1899).

263. *Id.* at 596.

264. See, e.g., S.W.R.C.B. Decision 1645 (Oct. 17, 2002). The SWRCB would likely consider historical

water hydrology, upsetting the priorities of surface water right holders. When determining whether surface water is available for appropriation, the SWRCB may make estimates on the effects of groundwater pumping; however, like riparian rights, there is no surety that the estimates are accurate, and groundwater pumping may increase in the future. Finally, lack of accounting for groundwater use also creates uncertainty problems in statutory adjudications and other coordinated efforts on surface stream systems.

## VI. ADMINISTRATION OF EXISTING LAW

Sources of certainty, which exist in elements of the common law that evolved to address the dynamic between the needs of individuals and the public, are now codified and incorporated into the existing administrative framework. For appropriative rights, these sources of certainty inhere in the principles governing loss for non-use, due diligence, and reasonable and beneficial use requirements. The right to use water is not exclusive. If a senior water right holder cannot or does not use water, lower priorities may then have access to the resource.<sup>265</sup> This shared aspect shifts the concept of certainty, such that the rights of all holders are increased, and a reduction in the “certainty” in one right increases the certainty that the remainder of the right holders will be able to realize. Doctrines that limit a senior’s use to the amount applied to beneficial uses protect other users of the system.<sup>266</sup> Effectively administering and enforcing these existing laws will increase the certainty afforded under these principles.

### A. *Right Limited to Amount Applied to Beneficial Use*

The extent of an appropriative right is the amount of water that is applied to beneficial use. The quantity of the right is not measured by the original claim or by the amount diverted; rather, it is the quantity actually diverted and applied for a beneficial purpose.<sup>267</sup> This principle, if enforced, limits or mitigates the collective uncertainty created when a water right holder holds an unused water right or a portion of a right that is unused. It works in tandem with the application of forfeiture and due diligence principles. If the water was never applied to a beneficial purpose, then the user never acquired the right at all. If at one time the water was applied to beneficial use, but that use has ceased for over five years, then forfeiture will apply.

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use in order of priority when issuing permits to appropriate water from a subterranean stream. *See* CAL. WATER CODE § 1256 (West 1971).

265. *See* Sawyer, *supra* note 6, at 343.

266. *See id.*

267. *See* HUTCHINS, *supra* note 9, at 135.

B. *Use it or Lose it: Revocation Procedures and Forfeiture*

Water Code sections 1240 and 1241 apply to the forfeiture<sup>268</sup> and reversion of appropriative rights, and provide the primary mechanism to enforce the “use it or lose it” doctrine.<sup>269</sup> Water Code section 1241 originated in the Water Commission Act.<sup>270</sup> Prior to 1980, section 1241 provided for the forfeiture of an appropriative right by force of statute for a period of three years of non-use.<sup>271</sup> In 1980, the Legislature amended section 1241 to extend the statutory time period for forfeiture from three to five years.<sup>272</sup>

The 1980 amendment added the following language: “Such reversion shall occur upon a finding by the board following notice to the permittee and a public hearing if requested by the permittee.” The word “may” was also inserted so that section 1241 now reads: “[S]uch unused water *may* revert to the public and shall, if reverted, be regarded as unappropriated public water.”<sup>273</sup> The word “may” is contingent on the board making the now requisite finding.<sup>274</sup>

The amendment to Water Code section 1241 allows the SWRCB some discretion in determining whether five years of non-use has occurred, considering both conservation efforts and other circumstances that may have made it impossible to use water during the five-year period.<sup>275</sup> Once a finding of non-use is made, however, the SWRCB must revoke.<sup>276</sup>

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268. “Forfeiture” under California Civil Code section 1411 is distinct from “abandonment,” which requires proof of intent to permanently relinquish the possession and enjoyment of the property right.

269. See Neuman & Hirokawa, *supra* note 20, at 24.

270. 1913 Cal. Stat. ch. 586, sec. 20(a), at 1012, added 1917 Cal. Stat. ch. 554, sec. 2, at 748. Section 20(a) was added to section 20 of the Act in 1917, a section that deals exclusively with licenses and permits.

271. See Erickson v. Queen Valley Ranch Co., 99 Cal. Rptr. 446, 448 (Ct. App. 1971); see generally HUTCHINS, *supra* note 9, at 295.

272. See CAL. WATER CODE § 1241 (West 2000); 1980 Cal. Stat. ch. 1100, sec. 1, at 3532. The bill was intended to “simplify existing law by making a consistent forfeiture period of five years applicable to both post-1914 appropriative water rights and pre-1914 appropriative water rights.” ENVIRONMENTAL QUALITY AGENCY, ENROLLED BILL REPORT ON SB 1685, at 1 (Sept. 12, 1980).

273. CAL. WATER CODE § 1241 (West 2000) (emphasis added).

274. “Existing law is unclear whether a water user automatically forfeits a post-1914 right after the period of nonuse or whether the Board must take an affirmative action to revoke the right. The Board has interpreted existing law to mean that the forfeiture does not occur until the Board has entered an order revoking the right.” ENVIRONMENTAL QUALITY AGENCY, ENROLLED BILL REPORT ON SB 1685, at 1 (Sept. 12, 1980).

275. In determining whether a revocation has in fact occurred, the SWRCB may consider circumstances that toll the statutory time-period. Defenses to forfeiture may include lack of water availability, see, e.g., Huffner v. Sawday, 94 P. 424 (Cal. 1908), various conservation and transfer provisions in the Water Code, CAL. WATER CODE §§ 1010-1011, 1011.5, 1017, and perhaps litigation where the validity of the water right is at issue. See generally S.W.R.C.B. Decision 1247, at 5-6 (Mar. 30, 1966). Consistent with the definition of due diligence for time extensions, lack of finances and other personal problems are not sufficient cause to allow delay. See, e.g., S.W.R.C.B. Order No. WR 2003-03, at 2, 4 (Feb. 19, 2003) (finding that poor communication among family members was not a valid excuse for lack of diligence).

276. When a permit or license is revoked without a hearing, a permittee or licensee may file a request to set aside the revocation. CAL. WATER CODE §§ 1410.2, 1675.2 (West 2004). The SWRCB, for good cause shown as to why a hearing was not requested, may reinstate the permit. See S.W.R.C.B. Order No. WR 2002-08 (Aug. 9, 2002).



For permits and licenses, the SWRCB may initiate revocation procedures under sections 1410 and 1675 of the Water Code. Water Code section 1241 will apply in cases where water was put to beneficial use at one time, typically for licenses, and under permits for the portion of water that was put to beneficial use. In addition, the SWRCB may revoke a permit or license for failure to pay annual fees for a period of five years.<sup>277</sup>

Forfeiture of pre-1914 rights is governed by Water Code section 1240, which provides: “The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.”<sup>278</sup> As construed by the courts, the appropriative right is automatically lost after five consecutive years of non-beneficial use.<sup>279</sup> The implementation of this statute has thus far been through the courts and private parties, not the SWRCB. The SWRCB may, however, make such a finding in a statutory adjudication or other proceeding if necessary to reach a decision properly before it.<sup>280</sup> In determining the scope and extent of any claimed pre-1914 right, doctrines such as the “relation back” doctrine should be construed narrowly in fairness to other water right holders and to avoid new claims to old rights.

### C. Due Diligence

The requirement that an appropriation of water be completed within a reasonable time with the exercise of due diligence is a long-standing principle of California water law intended to protect the public interest by preventing the “cold storage” of water rights. Strict enforcement of this principle would aid in providing certainty,<sup>281</sup> on both an individual and collective level, that permitted water rights are indeed being used efficiently and in accordance with the terms of the permit.

In 1869, the California Supreme Court noted that a water right is acquired by the actual appropriation and use of the water, and not merely by an intent to take the water.<sup>282</sup> The purpose of the diligence doctrine was to avoid adverse impacts on the development of the state’s water resources. In its 1913 report to the Legislature recommending adoption of the Water Code’s statutory predecessor,

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277. See CAL. WATER CODE § 1539 (West 2004).

278. *Id.* § 1240 (West 2000); see also *Lindblom v. Round Valley Water Co.*, 173 P. 994, 996 (Cal. 1918) (citing CAL. CIV. CODE § 1411).

279. See *Wright v. Best*, 121 P.2d 702, 710 (Cal. 1942) (citing CAL. CIV. CODE § 1411); *Smith v. Hawkins*, 42 P. 453, 454 (Cal. 1895).

280. See discussion *infra* text accompanying notes 36-39.

281. For example, a water right applicant who plans a project to divert water to beneficial use will have some certainty as to how much water a senior water right holder ultimately may claim under a previously filed application if the diligence requirements are enforced. Moreover, the SWRCB will have more certainty in determining how much water is actually available for appropriation for subsequently filed applications.

282. *Nevada County & Sacramento Canal Co. v. Kiddbut*, 37 Cal. 282, 310-14 (1869).

the Conservation Commission similarly concluded that statutory provisions requiring diligence and providing for revocation were necessary because it was not “sound public policy to permit anybody to cold-storage a natural resource so essential to the public welfare as water is.”<sup>283</sup>

Water Code section 1396 requires the construction and beneficial use of water to be prosecuted with due diligence in accordance with the Water Code, the terms of the permit, and the SWRCB’s regulations.<sup>284</sup> The SWRCB may approve a request for an extension of time if the SWRCB finds that there is good cause for the extension.<sup>285</sup> The SWRCB’s regulations allow for an extension of time to be granted only on such conditions as the SWRCB determines to be in the public interest, and on a showing to the SWRCB’s satisfaction that: (1) “due diligence has been exercised;” (2) “failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided;” and (3) “satisfactory progress will be made if an extension of time is granted.”<sup>286</sup> The SWRCB generally will not accept conditions incident to the person and not to the enterprise as good cause for delay.<sup>287</sup> After a hearing on a petition for an extension of time, the SWRCB may revoke the permit.<sup>288</sup>

To ensure that the diligence requirement is enforced, the SWRCB should not tolerate an attempt to reserve water for future use when a permittee has no plans to promptly apply the water to beneficial use.<sup>289</sup> The mere fact that a permittee, even a municipality, has the facilities necessary to divert additional quantities of water, and would put that water to beneficial use as demands increase, is insufficient to justify an extension.<sup>290</sup> Allowing unmerited delay also creates the impression that the SWRCB does not intend to enforce the terms of its permits. Active enforcement of the diligence requirement, as is already provided under the existing administrative framework, will serve to promote certainty in water right law.

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283. CONSERVATION COMMISSION, *supra* note 12, at 39.

284. CAL. WATER CODE § 1396 (West 2000).

285. *Id.* § 1398(a).

286. CAL. CODE REGS. tit. 23, § 844 (West 2003).

287. *Id.*

288. CAL. WATER CODE §§ 1398(b), 1410(a), 1410(b)(1) (West 2000).

289. *See California Trout, Inc. v. State Water Res. Control Bd.*, 255 Cal. Rptr. 184, 204 (Ct. App. 1989) (criticizing the SWRCB for allowing the original permit process “to tarry interminably” and concluding that the extensions of time allowing the expansion of the project were unjustified under the SWRCB’s regulations and the statutes calling for diligence in the completion of water projects).

290. In *California Trout*, the permittee was a large and growing municipality, and there was no serious question about the potential for increased municipal demand adequate to make use of the diversions authorized in the permit. *See also* S.W.R.C.B. Order No. WR 2000-13, at 12-14 (Oct. 19, 2000) (noting that a municipality “is to be afforded some latitude in putting water to beneficial use, because the municipality must be able to plan for, and meet, the needs of its existing and future citizens,” but finding the issue of diligence to be a close one).

#### D. Fees

On December 15, 2003, the SWRCB adopted Resolution No. 2003-0077, approving emergency fee regulations to meet the requirements of the Budget Act of 2003<sup>291</sup> and Senate Bill 1049.<sup>292</sup> “In general, the fee regulations increase filing fees for applications, petitions, registrations, and other filings and adopt annual fees for permits, licenses, water leases, and projects subject to water quality certification.”<sup>293</sup> The fee schedule enforces principles of beneficial use, diligence, and forfeiture to some degree by attaching monetary significance to the amount of a claimed water right.

Some fee payers that had abandoned their water rights have already instituted voluntary revocations of permits and licenses on file with the SWRCB.<sup>294</sup> Applicants seeking water right permits may be subject to annual application fees, which provide an incentive to proceed with due diligence to complete the project. Moreover, the fees are calculated by the amount authorized under the permit or license, thereby promoting a narrowing of the gap between the amount of a claimed water right, and the amount of water a user actually uses or needs. New applicants will be less likely to file for a greater amount of water as a place holder for future development, and existing water right holders may choose to partially revoke portions of the permit or license that are not put to use, in conformance with the beneficial use requirement. These self-executing processes promote the efficiency of the administration of water rights, which in turn increases certainty and carries out other important water policies.

#### E. Enforcement

The Commission did not address enforcement in its chapter on certainty; nonetheless, enforcement mechanisms are vital for providing certainty to surface right holders. The benefits accrued by a comprehensive regulatory program mean little if another can simply take water without complying with the rules. It is fundamentally unfair to those who rightfully gained their water rights and followed procedures. There must be ramifications for noncompliance if the system is to function and bring the security it was meant to provide.

A critical tool for the SWRCB to protect water rights is the enforcement against unauthorized diversion of water.<sup>295</sup> An unauthorized diversion of water is a trespass against the state, which is subject to administrative civil liability and

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291. 2003 Cal. Stat. ch. 157.

292. 2003 Cal. Stat. ch. 741.

293. S.W.R.C.B. Order No. WR 2004-11, at 4 (Apr. 7, 2004).

294. Since the fees were issued in January 2004, the Division of Water Rights has processed over fifty-three voluntary requests for revocation. Hundreds of others have been filed and are currently in the review process. Some revocations may be delayed pending proof that the right holder has taken adequate measures to ensure against unauthorized diversions of water.

295. See CAL. WATER CODE § 1052 (West 2000).

injunctive relief.<sup>296</sup> After notice and an opportunity for a hearing, the SWRCB may issue administrative civil liability for up to \$500 each day a trespass occurs.<sup>297</sup> The SWRCB may also issue a draft cease and desist order for the unauthorized, or threatened unauthorized diversion of water, and violations of permit terms or conditions, or an order.<sup>298</sup> After notice and an opportunity for a hearing, the SWRCB may adopt an order that could include detailed compliance schedules.<sup>299</sup> Violations of cease and desist orders could result in administrative civil liability and injunctive relief.<sup>300</sup> Cease and desist orders are effective in promoting due diligence and bringing projects into compliance.<sup>301</sup>

## VII. CONCLUSION

Certainty is a concept that must be approached in measures of degree. Absolute certainty is an impossible and unwise goal, particularly in the field of water law because of the ever-changing nature of the resource and the society dependent upon it. Pursuit of some degree of certainty in a field that must maintain flexibility, however, may not be completely futile.

Thirty years ago the Commission sought to move toward greater certainty in water right law by increasing the use of statutory adjudications, enacting strong recording requirements for non-statutory rights, and abolishing prescription. To date, most of its recommendations have yet to be realized for a variety of reasons. Statutory adjudications are underutilized and have proven to be fairly ineffective at settling rights with a great degree of finality. Perhaps a second look at other mechanisms acknowledged, but not recommended, by the Commission is warranted. For example, even stricter recording requirements could help quantify and document the largely unregulated body of non-statutory rights. Dormant riparian rights, however, will always remain a problem so long as California employs a dual system of water rights.

Notwithstanding these ongoing problems, California water law has evolved to provide certainty to individual and societal collective needs within the aegis of the administrative process. Continued enforcement and efficient administration of these administrative procedures affords the greatest opportunity to ensure stability and certainty in the allocation and regulation of water resources in California.

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296. *Id.*

297. *Id.* § 1052(b).

298. *See id.* § 1831.

299. *Id.*

300. *Id.* § 1845.

301. *See generally* Andrew H. Sawyer, *Improving Efficiency Incrementally: The Governor's Commission Attacks Waste and Unreasonable Use*, 36 MCGEORGE L. REV. 209 (2005) (detailing administrative enforcement mechanisms).

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