

# Ebb and Flow: The Changing Powers of the State Water Resources Control Board in Times of Drought

*Olivia Filbrandt\**

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## I. INTRODUCTION

The United Nations estimates that global urban populations will grow 60 percent by 2050,<sup>1</sup> stressing water use, land use, waste disposal, and housing needs. Extreme weather, caused by climate change and cyclical weather

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\* Olivia Reid Filbrandt is the California Environmental Law and Policy Center 2017-2018 Environmental Law Fellow. Olivia supports the Center’s environmental policy initiatives, research projects, events, and fundraising activities. Her research focuses on emerging issues in water law and policy, particularly water rights and stream adjudications. Olivia graduated from UC Davis School of Law in 2017 and earned the law school’s Public Interest and Pro Bono certificates as well as the Environmental Law Certificate. She received her undergraduate degree in Anthropology with a minor in Spanish Literature from UC Berkeley in 2014.

<sup>1</sup> United Nations Dep’t. of Econ. & Social Affairs, *World Population Projected to Reach 9.7 Billion by 2050*, UNITED NATIONS (July 25, 2015), <http://www.un.org/en/development/desa/news/population/2015-report.html>.

patterns,<sup>2</sup> further strain the situation. We need new thinking and new solutions based on a shift in the underlying presumptions surrounding sustainable water use: from treating water as a resource used solely for human benefit, to acknowledging that it requires addressing both human and ecosystem needs. Long-term planning and solutions are best addressed on a large scale.<sup>3</sup> Though this brings more voices to the table in initial planning stages, this creates a singular, informed, and comprehensive plan. For California, this means planning should be primarily executed at the state level.

Despite tumultuous rains throughout January, February, and March of 2017, the governor did not declare the drought over until the end of the rainy season.<sup>4</sup> The January 17, 2014 declaration of drought state of emergency was effective until April 7, 2017 even though, as of March, the Sierra snowpack was already 164% of its normal level, the wettest year on record for some parts of the state.<sup>5</sup> The main concern was that a warm April or May would melt the snowpack away.<sup>6</sup> The wet winter that relieved California of drought was at least partly the result of an El Niño event—periodic warming of the eastern equatorial Pacific Ocean.<sup>7</sup> The most recent was one of the strongest in decades, and some scientists suspect that climate change is increasing the frequency of powerful El Niño events.<sup>8</sup> What is certain is that greenhouse gases pumped into the atmosphere by human activities are raising the average temperature of the planet, and by doing

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<sup>2</sup> *Understanding the Link Between Climate Change and Extreme Weather*, U.S. ENVTL. PROT. AGENCY (Jan. 19, 2017), [https://19january2017snapshot.epa.gov/climate-change-science/understanding-link-between-climate-change-and-extreme-weather\\_.html](https://19january2017snapshot.epa.gov/climate-change-science/understanding-link-between-climate-change-and-extreme-weather_.html).

<sup>3</sup> See Karianne De Bruin et al., *Costs and Benefits of Adapting Spatial Planning to Climate Change: Lessons Learned from a Large-scale Urban Development Project in the Netherlands*, 14 REGIONAL ENVTL. CHANGE 1009, 1009–20 (2013); Andrew J. Draper et al., *Economic-Engineering Optimization for California Water Management*, 129 J. OF WATER RES. PLAN. & MGMT. 155, 155–64 (2003).

<sup>4</sup> See Bettina Boxall, *Gov. Brown Declares California Drought Emergency Is Over*, L.A. TIMES (Apr. 7, 2017), [www.latimes.com/local/lanow/la-me-brown-drought-20170407-story.html](http://www.latimes.com/local/lanow/la-me-brown-drought-20170407-story.html); Adam Nagourney, *When Is a Drought Over? A Wet California Wants to Know*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/us/california-drought-snowpack.html>; Ryan Sabalow, *Will 'Very Substantial' Snowpack Prompt Gov. Jerry Brown to Declare the Drought Over?*, THE SACRAMENTO BEE (Mar. 30, 2017), <http://www.sacbee.com/news/state/california/water-and-drought/article141745814.html>.

<sup>5</sup> Boxall, *supra* note 4; Nagourney, *supra* note 4; Sabalow, *supra* note 4; see also Dan Brekke and Craig Miller, *California's Rainy Season of 2016-2017 Is Officially One for the Record Books*, KQED NEWS: THE CAL. REP. (Apr. 13, 2017), <https://www.kqed.org/news/2017/04/13/the-rainy-season-of-2016-17-is-officially-one-for-the-record-books>.

<sup>6</sup> Nagourney, *supra* note 4.

<sup>7</sup> See Kurtis Alexander, *After Near-Record Northern California Storms, Signs of El Niño Rise*, S.F. CHRON. (Mar. 9, 2017), <http://www.sfgate.com/bayarea/article/After-near-record-Northern-California-storms-is-10991042.php>.

<sup>8</sup> Patrick L. Barnard et al., *Extreme Oceanographic Forcing and Coastal Response Due to the 2015-2016 El Niño*, NATURE COMM. 8 (2017); see also Umberto Bacchi, *El Niño-Linked Cyclones to Increase in Pacific with Global Warming Research*, THOMSON REUTERS FOUND. NEWS (Dec. 20, 2016), <http://news.trust.org/item/20161220182643-84jml/>.

so, are adding to the existing burdens of drought.<sup>9</sup> In California, higher temperatures mean drier fields, lower reservoirs, and more stress on crops, livestock, wildlife, and people.<sup>10</sup>

Governor Jerry Brown's April 2015 directive to cut back twenty-five percent from pre-drought water use levels has been eased.<sup>11</sup> While some California communities met this mandate, others beat it and reduced water beyond their goals.<sup>12</sup> With improved weather conditions and the community responses, the State Water Resources Control Board (SWRCB) eased up on the statewide mandate last year.<sup>13</sup> The updated drought response rules vary by region.<sup>14</sup> In some places, there are no restrictions; in others, they remain relatively strict.<sup>15</sup> What remains of the mandates is primarily prevention of gluttonous waste, like watering so much that it runs into the street, or hosing down a driveway. The governor asked the SWRCB to permanently institutionalize reporting and wasteful practices.<sup>16</sup>

The SWRCB wields power over both water quality and water quantity. This paper concerns the SWRCB's authority to regulate water quantity issues in the state. Long-term coping with extreme weather provides an opportunity for innovation as well as a change in the status quo. For the SWRCB in times of drought, this has included unprecedented expansion of control measures over pre-1914 water rights. While California courts have begrudgingly allowed the SWRCB the power to evaluate such rights holders in the past, the change has been slow and deliberate, leaving the drought curtailment notices pertaining to pre-1914 rights holders issued in Spring 2014 beyond the power of the

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<sup>9</sup> See Daniel Swain et al., *The Extraordinary California Drought of 2013/2014: Character, Context, and the Role of Climate Change*, 95 BULL. OF THE AM. METEOROLOGICAL SOC'Y NO. 9 (Special Supp.) S3-S7 (2014).

<sup>10</sup> See *Impacts of Drought*, U.S. GEOLOGICAL SURV. CAL. WATER SCI. CTR., <https://ca.water.usgs.gov/data/drought/drought-impact.html> (Last visited Oct. 9, 2017).

<sup>11</sup> Cal. Exec. Order No. B-29-15 (2015).

<sup>12</sup> Craig Miller, *MAP: California Water Conservation Misses Governor's Mandate in January*, KQED SCI. (Feb. 25, 2015), <https://ww2.kqed.org/science/2016/02/25/california-water-conservation-misses-governors-mandate-in-january>; *Best and Worst Water District in California*, L.A. TIMES (Oct. 5, 2015), <http://graphics.latimes.com/drought-report-list/>; see also *California Drought Portal*, ST. OF CAL., <http://drought.ca.gov/> (last visited Oct. 11, 2017, 6:17 PM).

<sup>13</sup> Associated Press, *California Eases Water Cutbacks*, U.S. NEWS (Mar. 17, 2016), <https://www.usnews.com/news/us/articles/2016-03-17/california-eases-water-cutbacks-as-drought-loosens>.

<sup>14</sup> See Reuters, *California Rolls Back Water Conservation as Drought Eases*, HUFFINGTON POST (May 18, 2016), [https://www.huffingtonpost.com/entry/california-drought\\_us\\_573d0c06e4b0ef86171d4baa](https://www.huffingtonpost.com/entry/california-drought_us_573d0c06e4b0ef86171d4baa).

<sup>15</sup> See Valeria Richardson, *Californians Jeer State's Decision to Extend Drought Restrictions*, THE WASH. TIMES (Feb. 19, 2017), <https://www.washingtontimes.com/news/2017/feb/19/californians-jeer-states-decision-to-extend-drought>.

<sup>16</sup> Sanden Totten, *Gov. Brown Orders Permanent California Water Conservation Due to Drought*, KPCC ENV'T & SCI. (May 9, 2016), <http://www.scpr.org/news/2016/05/09/60441/gov-brown-orders-permanent-california-water-conser/>.

SWRCB. As illustrated in the case against Byron-Bethany Irrigation District, the SWRCB failed to affirmatively prove that it has jurisdiction to issue drought curtailment orders to holders of valid pre-1914 water rights.<sup>17</sup> Moving forward, it is essential that the legislature and judiciary identify SWRCB's authority in these matters in order to "preserve, enhance, and restore" California water for present and future generations.<sup>18</sup>

This paper examines the pressures and complexities of the California water rights system in its responses to drought. It frames the powers of the SWRCB at places they have been expanded and truncated. Difficulties become apparent as the SWRCB attempts long-term planning for extreme weather fluctuations. This paper argues the truncation of such powers stifles comprehensive reform of the complex, arguably inefficient, water rights system in California.

## II. THE CALIFORNIA WATER RIGHTS SYSTEM IS COMPLEX

Water in California is tied up in conflict because of the complicated scheme for allocation and management. California is one of the few states that recognizes both appropriative and riparian rights. Owners of land which abuts a stream, lake, or pond hold riparian rights incident to their ownership. The right is part and parcel of the real estate and is not created by, nor lost, by nonuse. The date of priority – the date which the right is exercised via use of the water – is inconsequential, and the riparian has no right to a fixed quantity of water as against other riparians. Rather, the right holder may use the natural flow of the stream in common with the equal and correlative rights of other riparians. That is, in times of shortage, all must reduce their use proportionally.

Appropriative water rights are the most common water right in the western United States. Developed initially for non-riparian lands, these rights are based on the mining principle of "first in time, first in right."<sup>19</sup> The individual who first appropriates water and puts it to a reasonable and beneficial use has a right superior to later appropriators. In 1872, the legislature codified the common law doctrine and enacted a procedure for posting written notice at the place of diversion.<sup>20</sup> Claimants were required to give record notice of the amount, means of diversion, purpose of use and place of use.<sup>21</sup>

All California water rights – surface and underground, riparian and appropriative – are subject to the overriding limitations of the state

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<sup>17</sup> See *infra* Part VI.

<sup>18</sup> *About Us: Mission Statement*, STATE WATER RES. CONTROL BD. (Feb. 6, 2015), [https://www.waterboards.ca.gov/about\\_us/water\\_boards\\_structure/mission.shtml](https://www.waterboards.ca.gov/about_us/water_boards_structure/mission.shtml).

<sup>19</sup> *History of the Water Boards: The Early Years of Water Rights*, STATE WATER RES. CONTROL BD. (Mar. 30, 2017), [https://www.waterboards.ca.gov/about\\_us/water\\_boards\\_structure/history\\_water\\_rights.shtml](https://www.waterboards.ca.gov/about_us/water_boards_structure/history_water_rights.shtml).

<sup>20</sup> CAL. CIV. CODE §§ 1414, 1415 (West 2017).

<sup>21</sup> *Id.*

constitution.<sup>22</sup> Cardinal principles of reasonable use and beneficial use embedded in the state constitution outline the paramount policy of water conservation. Determination of reasonable, beneficial use is dependent on the facts of each case, considering factors such as existing circumstances, local customs, and the public interest in water conservation.<sup>23</sup>

### III. HISTORIC ADMINISTRATION OF CALIFORNIA WATER RIGHTS

Today's permitting system, which is now the exclusive means of obtaining an appropriative surface water right, dates back to the early twentieth century.<sup>24</sup> A handful of state agencies administered the unique system before the SWRCB was established in 1967 to have primary control over water quality and quantity.<sup>25</sup>

The Water Commission Act of 1913 provided a permitting and regulatory framework for administering surface water rights.<sup>26</sup> The act exempted percolating groundwater, riparian rights, and appropriations pre-dating December 19, 1914 from this permit process. To carry out the permitting and regulatory functions, the Act created the State Water Commission.<sup>27</sup> This Commission consisted of three men appointed by the governor for four-year terms, each chosen based on practical experience and expertise in three key industries: irrigation, mining, and municipal use.<sup>28</sup> The governor and State Engineer were ex-officio members of the Commission.<sup>29</sup> In 1967, the piecemeal water resources administrations were succeeded by the SWRCB, which was empowered with integrating water quality and allocation in California.<sup>30</sup> Structured as a merger between previously-existing State Water Rights Board and the State Water Quality Control Board, the new board broadened the scope of water quality regulation and management by putting their management in one entity.<sup>31</sup> The Board is one of six environmental entities operating under the authority of the California Environmental Protection Agency.<sup>32</sup> The SWRCB protects California's water "to preserve, enhance, and restore the quality of

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<sup>22</sup> See CAL. CONST. art. X, § 2.

<sup>23</sup> GOVERNOR'S COMM'N TO REVIEW CAL. WATER RIGHTS LAW, LEGAL ASPECTS OF WATER CONSERVATION IN CALIFORNIA: STAFF PAPER NO. 3 1 (1977).

<sup>24</sup> *History of the Water Boards*, *supra* note 19.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Jessica Johnson, *Origin of the State Water Resources Control Board: Integrating Water Quality and Quantity*, THE STATE WATER RESOURCES CONTROL BOARD TURNS 50 (2017).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *History of the Water Boards*, *supra* note 19.

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California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations."<sup>33</sup>

The SWRCB is responsible for both issuing water rights permits and licenses and enforcing water rights laws.<sup>34</sup> Appropriate water rights form the largest category of water rights. The SWRCB is responsible for determining the seniority of appropriate water rights holders.<sup>35</sup> This role is essential because in times of shortage or drought, the earliest, most senior water rights are satisfied before more recent, junior water rights. Essentially, the priority of an appropriate water right determines whether water is available to that right vis-à-vis a more junior rights holder. The SWRCB monitors this through regulatory mechanisms, overseeing permitting and licensing, administering civil liability, issuing cease and desist orders, and conducting adjudications on water rights matters.<sup>36</sup> With its curtailment powers, the SWRCB monitors existing water rights use and may issue an administrative taking – limiting the use of the water right – with requisite notice and comment.<sup>37</sup>

Specifically, the SWRCB Office of Enforcement provides legal counsel and technical support for enforcement matters.<sup>38</sup> Its actions provide renewed emphasis on efficient and effective enforcement as a key component of the SWRCB's regulatory functions and statutory responsibilities. In order to evaluate improper allocation or use, the SWRCB has established procedures to ensure a fair and impartial hearing on enforcement matters.<sup>39</sup> The Board Members serve as impartial hearing officers, weighing each parties' evidence and arguments.<sup>40</sup>

Members of the prosecution team, made up of attorneys who work for the

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<sup>33</sup> Johnson, *supra* note 277.

<sup>34</sup> *Water Boards' Structure*, STATE WATER RES. CONTROL BD., [http://www.swrcb.ca.gov/about\\_us/water\\_boards\\_structure/](http://www.swrcb.ca.gov/about_us/water_boards_structure/) (last visited Mar. 30, 2017).

<sup>35</sup> *The Water Rights Process*, STATE WATER RES. CONTROL BD., [http://www.waterboards.ca.gov/waterrights/board\\_info/water\\_rights\\_process.shtml](http://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.shtml) (last visited Mar. 30, 2017).

<sup>36</sup> *See id.*; *see also Water Rights Enforcement: Enforcement Program*, STATE WATER RES. CONTROL BD., [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/enforcement/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/enforcement/) (last visited Mar. 30, 2017).

<sup>37</sup> *Water Rights Judgments/Determinations*, STATE WATER RES. CONTROL BD., [http://www.waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/judgments/](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/judgments/) (last visited Mar. 30, 2017) (listing current drought actions taken by the Board).

<sup>38</sup> *See Water Rights Enforcement: Enforcement Program*, STATE WATER RES. CONTROL BD., *supra* note 36.

<sup>39</sup> *See generally* STATE WATER RES. CONTROL BD., WATER QUALITY ENFORCEMENT POLICY 2–3 (May 20, 2010).

<sup>40</sup> *Frequently Asked Questions: The Hearing Process*, STATE WATER RES. CONTROL BD., [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/faqs.shtml](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/faqs.shtml) (last updated July 10, 2017).

SWRCB, are prohibited from communicating about the proceeding with the SWRCB members or any member of the hearing team.<sup>41</sup> The SWRCB only considers the evidence submitted into the record when making its determination.<sup>42</sup>

#### IV. MODERN EXPANSION OF STATE WATER RESOURCES CONTROL BOARD POWERS

##### A. *Legislative Expansion of SWRCB's Power Over Pre-1914 Rights*

SWRCB's role is traditionally limited on issues of pre-1914 water rights holders. Water battles led to an amendment to California's constitution in 1928 declaring all water – surface water, groundwater, marshes and wetlands – must be for a reasonable and beneficial use such as agriculture, commercial fishing, hydroelectric generation, municipal use, endangered species or recreation.<sup>43</sup> The flexibility of this definition allows for changing interpretations, dependent on the translator's interests. Yet, this has led to issues as groups who perceive their rights to be in conflict—farmers, industry, environmentalists, and outdoor recreationalists, to name a few – continually maneuver for their position to be prioritized and arguments ensue.<sup>44</sup>

Legislative actions have also expanded SWRCB's influence on pre-1914 water rights holders through increased regulation and administrative adjudicatory powers. Administratively, the SWRCB has the power to evaluate and limit use to a level of reasonableness, evaluate any change in purpose, require measurement and reporting, and compel statements of diversion and use.<sup>45</sup> Statutory adjudications on water rights may also reach pre-1914 water rights holders.<sup>46</sup> These special adjudications quantify and prioritize all water rights in the water system. Per the Water Code, a comprehensive decree establishes the ultimate decision that may include pre-1914 water rights holders.<sup>47</sup>

##### B. *Judicial Expansion of SWRCB's Power Over Pre-1914 Rights*

Judicial holdings have gradually expanded the SWRCB's influence over pre-

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<sup>41</sup> *Id.* (“Decisions must be based only on evidence within the hearing record and it is unfair for Board Members to rely on information outside the record.”).

<sup>42</sup> *Id.*

<sup>43</sup> CAL. CONST. art. X, § 2.

<sup>44</sup> CRAIG M. WILSON, *THE REASONABLE USE DOCTRINE & AGRICULTURAL WATER USE EFFICIENCY: A REPORT TO THE STATE WATER RESOURCES CONTROL BOARD AND DELTA STEWARDSHIP COUNCIL* 11 (2012).

<sup>45</sup> CAL. WATER CODE §§ 275, 1707(2)(b), 1841, 5107.

<sup>46</sup> CAL. WATER CODE §§ 2500–2868.

<sup>47</sup> *Id.*

1914 water rights holders. Gradually, judicial opinions have held that California constitutional provisions and the public trust doctrine mandate that the SWRCB have influence over these water rights in order to develop and implement comprehensive plans for long-term water resource management. Specifically, recent decisions have discerned a legislative intent to grant the SWRCB a “broad and “open-ended” authority to undertake comprehensive planning and allocation of water resources.<sup>48</sup> Nevertheless, these progressive holdings have been truncated by other California courts’ recognition that the SWRCB may not amend reasonable, beneficial, and lawful pre-1914 water rights.<sup>49</sup>

Courts have increasingly permitted the SWRCB the power to prevent waste or unreasonable use. In 1935, limitations and prohibitions in the constitutional amendment restricting water use to that which is reasonable and beneficial were held to apply to every water right and every method of diversion.<sup>50</sup> This granted the SWRCB oversight over all water use claims.<sup>51</sup> This has been consistently reaffirmed by the courts, most recently, the California Court of Appeal: “That the SWRCB cannot require riparian users and pre-1914 appropriators to obtain permits before making reasonable and beneficial use of water does not mean the SWRCB cannot prevent them from making unreasonable use.”<sup>52</sup> The SWRCB’s authority to prevent waste or unreasonable use extends to all users, “regardless of the basis for which their right is held.”<sup>53</sup>

The SWRCB has the power to oversee long-term planning that affects pre-1914 water rights holders. The California Supreme Court clarified this in 1983 in holding that the SWRCB’s powers go beyond the narrow scope of deciding priorities of appropriators.<sup>54</sup> Instead, the agency has the responsibility for long-term comprehensive planning and allocation of water such that they may be granted a more central role in its management.<sup>55</sup> “Both the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of resources.”<sup>56</sup> To achieve these goals, the SWRCB has jurisdiction over pre-1914 water rights.

Definitively, the California Court of Appeal held in 1986 that the SWRCB enjoys broad authority to modify water rights, including those held by the federal and state government, for the Central Valley Project and the State Water

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<sup>48</sup> *In Re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339, 348–50 (1979).

<sup>49</sup> *See Millview Cty. Water Dist. v. State Water Res. Control Bd. (Millview)* 229 Cal. App. 4th 879, 889 (2014).

<sup>50</sup> *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 367 (1935).

<sup>51</sup> *Id.*

<sup>52</sup> *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1487 (2014).

<sup>53</sup> *Id.*

<sup>54</sup> *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 444 (1983).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 445.



Project, in order to achieve California and federal water quality goals.<sup>57</sup> Importantly, the SWRCB has broad authority to regulate and monitor for long-term planning, especially in the Sacramento-San Joaquin Delta.<sup>58</sup> This unique waterway accumulates water from California's largest watershed and acts as the hub of the state's water supply system, linking water from the north to the two vast water projects, which play a major role in sustaining the world's sixth largest economy and much of its industry, agriculture, and 39 million people.<sup>59</sup> Indeed, this long-term planning power is in line with emerging state control of resources in order to respond to cyclical droughts.<sup>60</sup>

To exert these powers, the SWRCB is authorized to issue regulations over every water right holder, whether the claim is before or after 1914.<sup>61</sup> The SWRCB may also determine all rights to water of a stream system whether based on appropriation, riparian, or any other basis. This means that pre-1914 rights holders are not exempt from statutory adjudication.<sup>62</sup> Administrative powers of the SWRCB to act autonomously have increased in aiding long-term planning and management. There is now minimal dispute regarding the SWRCB's jurisdiction over reasonable regulatory measures on riparian and pre-1914 appropriative water rights. The SWRCB may also take administrative actions against pre-1914 water rights holders by issuing a cease and desist order against what it has determined to be an unlawful diversion of water, even if the diverter claims a pre-1914 water right.<sup>63</sup> Essentially, a water right holder, whether modern or pre-1914, is not exempt from consideration or regulation by the SWRCB.

The SWRCB may extinguish pre-1914 appropriative water rights in narrow circumstances. Besides where unreasonable, unbeneficial, or illegal diversions are found, pre-1914 appropriative water rights may be subject to forfeiture.<sup>64</sup> The SWRCB may find that a pre-1914 rights holder has forfeited their right

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<sup>57</sup> *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 97–98 (1986).

<sup>58</sup> *Id.* at 116.

<sup>59</sup> Olivia Filbrandt, *Sacramento-San Joaquin Delta People Amid Water Wars*, LEGAL RURALISM, (Jan. 28, 2017), <http://legalruralism.blogspot.com/2017/01/sacramento-san-joaquin-delta-people.html>.

<sup>60</sup> See State of California, *State Drought Response*, CALIFORNIA DROUGHT, <http://drought.ca.gov/resources.html> (last visited Mar. 30, 2017) (detailing drought responses by the Dept. of Water Res., Dept. of Food & Agric., Dept. of Fish & Wildlife, Dept. of Gen. Serv., Dept. of Pub. Health, and the Office of Plan. and Res., among other state agencies).

<sup>61</sup> *People v. Murrison*, 101 Cal. App. 4th 349, 361 (2002) (holding that a water right holder, whether modern or pre-1914, is not exempt from reasonable regulation).

<sup>62</sup> *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 186 Cal. App. 3d 1160, 1168–70 (1986).

<sup>63</sup> *Young v. State Water Res. Control Bd.*, 219 Cal. App. 4th 397, 406–07 (2013) (holding that the SWRCB may issue a cease and desist order against what it has determined to be an unlawful diversion of water, even if the diverter claims a pre-1914 water right.).

<sup>64</sup> *Millview*, 229 Cal. App. 4th at 889; *North Kern Water Storage Dist. v. Kern Delta Water Dist.*, 147 Cal. App. 4th 555, 559 (2007).

when the holder has not exercised that right prior to the running of the statute of limitation and there is an adverse claim against it.<sup>65</sup>

Despite broad and expanding regulatory authority over pre-1914 rights, however, the SWRCB does not have the power to curtail pre-1914 appropriative water rights that are reasonable, beneficial, and legal.<sup>66</sup> In *Millview*, the court considered the SWRCB's authority to issue a cease and desist order under the Water Code where the diversion of water was pursuant to a claimed pre-1914 appropriative water right.<sup>67</sup> The court considered the scope of the SWRCB's authority as follows:

Section 1831 allows the Board [SWRCB] to issue an order preventing the unauthorized diversion of water. Unauthorized diversion includes not merely the diversion of water under a claimed but invalid pre-1914 right, but also diversions beyond the proper scope of a valid pre-1914 right, whether because the diversion exceeds the maximum perfected amount of water under the right or because an intervening forfeiture has reduced the proper scope.<sup>68</sup>

The *Millview* court held that water diverted under a pre-1914 appropriative water right is protected from SWRCB's regulation so long as it is within the bounds of the pre-1914 appropriative water right.<sup>69</sup>

#### V. MODERN DROUGHT

Climate change has exacerbated weather fluctuations.<sup>70</sup> Droughts are longer and drier; wet seasons are muddier and unrulier. Australia's Big Dry, a decade-long drought that began around the start of this century, led at first to the same kind of political bickering heard recently in California.<sup>71</sup> After years of environmental destruction, urban water stress, and considerable suffering by many dryland farmers, Australian politicians and farmers took some serious risks. The country reduced urban water use by investing billions in conservation, education, and efficiency improvement.<sup>72</sup> Most important, it expedited reform to the old water allocation system, which, like California's, had promised specific

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<sup>65</sup> *Millview*, 229 Cal. App. 4th at 889 (finding that forfeiture may be found by the SWRCB where there is a conflicting claim on an appropriated water right that has gone unused for five continuous years).

<sup>66</sup> *Id.* at 894.

<sup>67</sup> *Id.* at 885–88.

<sup>68</sup> *Id.* at 895.

<sup>69</sup> *Id.* at 894.

<sup>70</sup> *Understanding the Link Between Climate Change and Extreme Weather*, *supra* note 2.

<sup>71</sup> Laura Taylor, *Drought Down Under and Lessons in Water Policy for the Golden State*, 40 ENVIRONS ENVTL. L. & POL'Y J. 53, 54–56 (2016).

<sup>72</sup> *Id.* at 65–66.

amounts of water to rights holders.<sup>73</sup> The country instituted a system that guaranteed a minimum supply of water for the environment, and then divided the remainder into shares that could be quickly sold, traded, or stored for the next season.<sup>74</sup> Farmers fought the changes, but with a financial incentive to use less water, they soon became more creative and efficient at “farming water.”<sup>75</sup> Consequentially, water use dropped.<sup>76</sup>

California is far from following Australia’s example. This is because the state historically has not measured water use and the Takings Clause hinders reform in times of emergency.<sup>77</sup> Agriculture exploits stress the water supply by demanding more than the Mediterranean climate can naturally provide while simultaneously sustaining the bustling population well over the naturally sustainable level. Therefore, California water faces unrelenting pressure. Land-use change, population growth, nutrient pollution from wastewater treatment plants, earthquakes, agriculture, and sea-level rise put pressure on the water systems. Drought exacerbates these issues and risks the state’s economy, agriculture, geography, and cultural landscape.

Despite its status as an agricultural mecca, California has a nasty habit of droughts. Although the state has always suffered cyclical droughts, there is considerable concern that global warming is making conditions worse.<sup>78</sup> Sector-specific water needs and access to alternative water sources have led to notable distinctions in the severity of each drought’s impacts across the state.<sup>79</sup> For example, while drought has led to a decrease in the state’s agricultural production, farmers and ranchers moderate each drought’s impacts by employing short-term strategies, such as fallowing land, purchasing water from others, and pumping groundwater.<sup>80</sup> In contrast, some rural communities—mainly in the Central Valley—struggle to identify alternative water sources to

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<sup>73</sup> *Id.* at 61–62 (highlighting that, although Australian water reform started many decades before the drought, the sudden and complete unavailability of water expedited reformation plans).

<sup>74</sup> *Id.* at 73.

<sup>75</sup> *Id.* at 55, 72–73.

<sup>76</sup> *Id.* at 73.

<sup>77</sup> *Id.* at 74, 77–78.

<sup>78</sup> Henry Fountain, *In California, a Wet Era May Be Ending*, N.Y. TIMES (Apr. 13, 2015), <https://www.nytimes.com/2015/04/14/science/californias-history-of-drought-repeats.html>; *see also Understanding the Link Between Climate Change and Extreme Weather*, *supra* note 2.

<sup>79</sup> *See* Laura Bliss, *California’s Drought is About Economic Inequality*, MOTHER JONES (Oct. 8, 2015, 10:00 AM), <http://www.motherjones.com/environment/2015/10/san-joaquin-valley-communities-no-running-water-drought>; *see also* JOSUÉ MEDELLÍN-AZUARA ET AL., ECONOMIC ANALYSIS OF THE 2016 CALIFORNIA DROUGHT FOR AGRICULTURE: A REPORT FOR THE CALIFORNIA DEPARTMENT OF AGRICULTURE (Aug. 15, 2016); *see also* Dale Kasler, *Drought Costs California Farms \$600 Million, but Impacts Eases*, THE SACRAMENTO BEE (Aug. 15, 2016, 12:18 PM), <http://www.sacbee.com/news/state/california/water-and-drought/article95771347.html>.

<sup>80</sup> *See* MEDELLÍN-AZUARA, *supra* note 79.

draw when their domestic wells have gone dry.<sup>81</sup> Multiple years of warm temperatures and dry conditions have had severe effects on environmental conditions across the state, including degrading habitats for wildlife, killing millions of the state's trees, and contributing to more prevalent and intense wildfires.<sup>82</sup> For urban communities, the primary drought impact has been a state-ordered requirement to use less water, including mandatory constraints on the frequency of outdoor watering.

Further contributing to the uncertainty in water management is the presidency of Donald Trump who, while campaigning in Fresno in May 2016, proclaimed that it was "insane" to "shove [water] out to sea" on behalf of endangered fish.<sup>83</sup> Federal involvement in state water management may happen in two distinct ways. President Trump could try to undermine state efforts by withholding federal funds for restoration projects and relaxing federal Endangered Species Act protections. A Republican-controlled Congress could also weigh in by passing federal laws that govern how water is divvied up between states. California is predominantly led by Democratic legislators, which could contribute to an unfavorable decision towards the state at the federal level. Both would be unhelpful by overriding long-term, strategic, and coherent planning efforts of the SWRCB.

At a state level, there have been four remarkable droughts in California during the last 40 years, each producing a unique response action with varying degrees of endurance. The 1976-1977 drought resulted in the Commission to Review California Water Rights Law.<sup>84</sup> During this period, runoff in the Sacramento River basin was thirty-seven percent of average, while runoff in the San Joaquin River basin was twenty-six percent of average.<sup>85</sup> This panel produced a final report with an analysis of water rights law and recommendations for modifications.<sup>86</sup> Ultimately, it recommended four areas for modernization:

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<sup>81</sup> See Bliss, *supra* note 79, at 13; see also Darryl Fears, *California's Rural Poor Hit Hardest as Massive Drought Makes Remaining Water Toxic*, THE WASHINGTON POST (July 5, 2015), [https://www.washingtonpost.com/national/health-science/californias-rural-poor-hit-hardest-as-groundwater-vanishes-in-long-drought/2015/07/05/0ed88938-1452-11e5-9518-f9e0a8959f32\\_story.html](https://www.washingtonpost.com/national/health-science/californias-rural-poor-hit-hardest-as-groundwater-vanishes-in-long-drought/2015/07/05/0ed88938-1452-11e5-9518-f9e0a8959f32_story.html).

<sup>82</sup> Nat'l Oceanic & Atmospheric Admin., *DROUGHT: Monitoring Economic, Environmental, and Social Impacts*, <https://www.ncdc.noaa.gov/news/drought-monitoring-economic-environmental-and-social-impacts> (last visited Mar. 30, 2017).

<sup>83</sup> Michael Hiltzik, *California's Drought: How Trump's Blustering Caricatured a Genuine Crisis*, L.A. TIMES (June 6, 2016, 2:50 PM) <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-trump-westlands-20160606-snap-story.html> (claiming to want clean air and clean water while, in the same breath, denying there is a drought).

<sup>84</sup> JEANINE JONES, CALIFORNIA'S MOST SIGNIFICANT DROUGHTS: COMPARING HISTORICAL AND RECENT CONDITIONS I (Feb. 2015).

<sup>85</sup> CAL. DEP'T OF WATER RES., CALIFORNIA WATER PLAN UPDATE 3-7 (Bulletin 160-98 1998).

<sup>86</sup> GOVERNOR'S COMM'N TO REVIEW CAL. WATER RIGHTS LAW, FINAL REPORT (Dec. 1978).

certainty in water rights, efficiency in water use, instream uses of water, and groundwater.<sup>87</sup> The legislature only embraced the subject in efficiency in water use. In the two years following the Final Report, the legislature enacted some of the Commission's reform proposals into law.<sup>88</sup> Efficiency in water use was increased by mandating that the executive government must do a factual analysis on a case by case basis in order to evaluate the reasonableness of any water use in the state.<sup>89</sup> This meant that each water user was subject to evaluation, if requested. The legislature largely ignored the Commission's recommendations on the remaining three subjects of its Final Report. The legislature ignored reforming water rights likely due to a combination of political pressure, personal interests, and the complexity of the water rights system. Groundwater was not addressed in policy until 2014, even though groundwater mismanagement goes hand in hand with surface water unavailability.<sup>90</sup>

Lasting procedures from the 1987-1992 drought included Executive Order W-3-91, the State Drought Emergency Water Bank, and the Central Valley Improvement Project.<sup>91</sup> The Governor's Order established a Drought Action Team, the State Drought Emergency Water Bank, and community rationing plans to ally with environmental groups.<sup>92</sup> This was done to meet critical water needs in time of drought. It created a voluntary market for the transfer of water on an economic basis. The Central Valley Improvement Project reallocated 800,000 acre-feet annually from off-stream to in-stream uses for fish and wildlife. This federal statute also developed water transfer provisions.<sup>93</sup>

The long-term result of this late twentieth century drought was that water banking, storage for instream flow maintenance, and conjunctive use of ground and surface water were reevaluated for sustained drought demands in line with sophisticated planning. This also changed the longstanding relationships and balances of power in the competition for water. Drought can convince communities to accept water management options that are not seriously considered during normal years. Market forces are an effective way of reallocating water supplies. The Water Bank was generally considered a success

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<sup>87</sup> *Id.*

<sup>88</sup> Bryan E. Gray, *The Uncertain Future of Water Rights in California: Reflections on the Governor's Commission Report*, 36 MCGEORGE L. REV. 43, 44 (2005).

<sup>89</sup> *Id.* at 44–45.

<sup>90</sup> *See generally* Demurrer and Motion for Reconsideration, *Env'tl. Law Found. v. State Water Res. Control Bd.*, No. 34-2010-80000583 (Cal. Super. July 15, 2014); Joseph L. Sax, *We Don't Do Groundwater: A Morsel of California Legal History*, 6 U. DENV. WATER L. REV. 269, 270 (2002).

<sup>91</sup> JONES, *supra* note 844, at 54–55.

<sup>92</sup> BENEDYKT DZIEGLIELEWSKI ET AL., LESSONS LEARNED FROM THE CALIFORNIA DROUGHT (1987–1992): NATIONAL STUDY OF WATER MANAGEMENT DURING DROUGHT 93, 98 (1993).

<sup>93</sup> Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4706 (1992).

by agriculture, the cities, and environmental groups.<sup>94</sup>

Drought responses to the 2007-2009 shortage were largely economical. The State Drought Emergency Water Bank was revived. Further, Executive Order S-06-08 granted agencies the power to expedite grants, implement actions to address drought, and convene the Climate Variability Advisory Committee to prioritize climate research and prepare for continuing drought.<sup>95</sup> Governor Brown rescinded these provisions with the end of the drought.

However, the response to the 2011-2016 drought was the most comprehensive. The state endorsed short-term and long-term responsive activities. Executive, legislative, and community actions created diverse reactions, some temporary and others more permanent. This was done through gubernatorial executive order, regulation or administrative agency order, and legislation. Governor Brown suspended parts of the California Environmental Quality Act, the Water Code, and other regulations to allow drought response actions to be expedited.<sup>96</sup> He also established incentives for citizens to invest in low flow practices like replacing lawns and installing low-flow toilets.<sup>97</sup> Recycled water initiatives were implemented across the state.<sup>98</sup> There was even a campaign to minimize watering of lawns by letting them “fade to gold.”<sup>99</sup>

Additionally, in 2014, voters passed Proposition 1, the Water Quality, Supply, and Infrastructure Improvement Act of 2014.<sup>100</sup> This provided \$7.545 billion to fund ecosystems and watershed protection, infrastructure projects, including surface and groundwater storage, and drinking water protection.<sup>101</sup>

The legislature in 2014 provided broad powers to the SWRCB and \$687.4 million in expenditures for drought-related activities.<sup>102</sup> Specifically, Senate Bill

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<sup>94</sup> DZIEGLIELEWSKI ET AL., *supra* note 922, at 141.

<sup>95</sup> JONES, *supra* note 844, at 93–95.

<sup>96</sup> Edmund G. Brown Jr., *A Proclamation of a State of Emergency* (Jan. 17, 2014), <https://www.gov.ca.gov/news.php?id=18368>; Edmund G. Brown Jr., *A Proclamation of a Continued State of Emergency* (Apr. 25, 2014), <https://www.gov.ca.gov/news.php?id=18496>.

<sup>97</sup> *California Turf Replacement Initiative*, CAL. DEP’T OF WATER RES., <http://www.water.ca.gov/turf/> (last modified Mar. 8, 2016); *Statewide High Efficiency Toilet Retrofit Program*, CAL. DEP’T OF WATER RES., <http://www.water.ca.gov/toiletretrofit/> (last modified Sept. 22, 2016).

<sup>98</sup> Matt Stevens, *California Seeks to Build One of World’s Largest Recycled Water Programs*, L.A. TIMES (Sept. 22, 2015), <http://www.latimes.com/local/lanow/la-me-ln-mwd-recycled-water-20150922-story.html>; Hudson Sangree, *California Looking to Recycled Water to Ease Drought Concerns*, THE SACRAMENTO BEE (Apr. 14, 2014), <http://www.sacbee.com/news/local/article2595660.html>.

<sup>99</sup> Chris Megerian, *To Encourage Californians to Conserve, a Tweak in Wording Can Help*, L.A. TIMES (July 4, 2015), <http://www.latimes.com/local/politics/la-me-pol-drought-poll-20150705-story.html>.

<sup>100</sup> *Proposition 1 Overview*, CAL. NAT. RES. AGENCY, <http://bondaccountability.resources.ca.gov/p1.aspx> (last visited Mar. 30, 2017).

<sup>101</sup> *Id.*

<sup>102</sup> S.B. 103, 113th Sen., 2013–2014 Reg. Sess. (Cal. 2014); S.B. 104, 113th Sen., 2013–2014 Reg. Sess. (Cal. 2014).

(SB) 104 expanded the SWRCB's authority to issue emergency drought regulations in a critically dry year so that such authority is also triggered when the Governor declares a drought emergency.<sup>103</sup> It also expanded the SWRCB's enforcement powers during a drought.<sup>104</sup> After conducting an administrative hearing, the SWRCB has the power to directly impose civil liability for violations of water rights permits, licenses, certificates, registrations, regulations, and orders, instead of referring the matter to the Attorney General for prosecution.<sup>105</sup> The Bill had the immediate effect of enabling water curtailments.<sup>106</sup>

Following the Governor's April 2017 declaration of the end of the drought, SWRCB Chair Felicia Marcus explained, "In the late 80s drought, we learned how much we can save indoors. In this drought, we learned how much we can save outdoors."<sup>107</sup> Maybe in the next drought, because there will be one, we can learn how much we can save in groundwater. The most iconic legislative response to the 2011-2016 drought was the Sustainable Groundwater Management Act. With this comprehensive 2014 bill package, California became the last state in the Union to regulate groundwater,<sup>108</sup> despite being the largest consumer of groundwater.<sup>109</sup> Facing unprecedented drought, the state legislature passed its first ever groundwater regulation. This requires each individual groundwater basin to form a management agency and establish sustainable, long-term planning and monitoring initiatives.<sup>110</sup> The regulation provides the benefit of more local oversight of water resources; however, its drawbacks include slower responsiveness to state-wide issues amid massive subsidence of the water tables in times of drought. Essentially, the SWRCB's expertise in long-term, wide range resource management is sidelined by the priority given to local control.

The most recent drought also brought new technological responses to the forefront: some in the form of a reevaluation of old responses, and some in the form of new solutions. To the dismay of many, Governor Brown implemented revived plans to build large tunnels and pumps to redistribute water from

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<sup>103</sup> S.B. 104, 113th Sen., 2013-14 Reg. Sess. (Cal. 2014) ("[E]nhance the [SWRCB's] drought response authority by streamlining authority to enforce water rights laws and increasing penalty amounts for illegally diverting water during drought conditions").

<sup>104</sup> *Id.*

<sup>105</sup> CAL. WATER CODE §§ 1052, 1055.

<sup>106</sup> S.B. 104, 113th Sen., 2013-14 Reg. Sess. (Cal. 2014).

<sup>107</sup> Boxall, *supra* note 4.

<sup>108</sup> *California Adopts Historic Groundwater Legislation*, UNION OF CONCERNED SCIENTISTS (Sept. 16, 2014), [https://www.ucsusa.org/news/press\\_release/calif-groundwater-legislation-0433.html](https://www.ucsusa.org/news/press_release/calif-groundwater-legislation-0433.html).

<sup>109</sup> *Water Use in the United States: Groundwater Use*, U.S. GEOLOGICAL SURV., <https://water.usgs.gov/watuse/wugw.html> (last updated Dec. 9, 2016).

<sup>110</sup> *Sustainable Groundwater Management*, CAL. DEP'T OF WATER RES., <http://www.water.ca.gov/groundwater/sgm> (last updated Dec. 21, 2017).

northern California to southern California.<sup>111</sup> Desalination programs became a more realistic option for industrial and municipal water use, despite being previously overlooked due to energy inefficiency and expense.<sup>112</sup> However, environmental concerns over disposal of salt extracted during desalination remained.<sup>113</sup> Wastewater recycling is one of the most promising technologies. A number of water recycling plants already exist in the state,<sup>114</sup> and more will likely emerge as, compared to desalination that produces indisposible salt brine, the only limiting factor is cost. Despite these advancements in drought management and technologies, state executive agencies struggled to respond to the drought, the SWRCB chief among them.<sup>115</sup>

## VI. SWRCB DROUGHT STRUGGLES

The water dispute involving Byron Bethany Irrigation District (BBID) provides an ideal case study of the state's struggle to exercise authority over pre-1914 rights holders. It illustrates the challenges of implementing curtailments in times of drought and shows the high evidentiary burden the state carries when bringing enforcement actions against such rights holders. Water districts in California are numerous and diverse. By the last count, California has over 1,200 water districts that are elected by voters or governed by a county board of supervisors or a city council.<sup>116</sup> That figure comes from a Legislative Analyst's report that is over a decade old. Other sources estimate around 2,000 districts when counting entities like mobile home parks and mutual water companies.<sup>117</sup> Senior and riparian water rights holders hold "more than half of the claims on the state's waterways. . . ."<sup>118</sup> Senior and riparian rights holders have 15,750 claimed rights of use to California waterways, whereas junior rights holders have 13,116 claimed post-1914 rights of use.<sup>119</sup> More than half of the entities

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<sup>111</sup> Lauren Sommer, *About that \$17 Billion Water Project: Delta Tunnels 101*, KQED SCIENCE (July 25, 2016), <https://ww2.kqed.org/science/2016/07/25/about-that-17-billion-water-project-delta-tunnels-101/>.

<sup>112</sup> Daniel Potter, *Why Isn't Desalination the Answer to All California's Water Problems?*, KQED SCIENCE (Dec. 18, 2015), <https://ww2.kqed.org/science/2015/12/18/why-isnt-desalination-the-answer-to-all-californias-water-problems/>.

<sup>113</sup> *Id.*

<sup>114</sup> *Proposition 1 Overview*, *supra* note 1000.

<sup>115</sup> See discussion *infra* Section VI.

<sup>116</sup> *Water Special Districts: A Look at Governance and Public Participation*, LEGIS. ANALYST'S OFF. (Mar. 2002), [http://www.lao.ca.gov/2002/water\\_districts/special\\_water\\_districts.html](http://www.lao.ca.gov/2002/water_districts/special_water_districts.html).

<sup>117</sup> Wes Strickland, *The Organization of Water Utilities in California*, PRIVATE WATER LAW (Sept. 25, 2013), <https://privatewaterlaw.com/2013/09/25/the-organization-of-water-utilities-in-california/>.

<sup>118</sup> *Senior Water Rights Data – California*, ASSOCIATED PRESS, [http://hosted.ap.org/specials/interactives/\\_data/ca\\_water\\_rights/](http://hosted.ap.org/specials/interactives/_data/ca_water_rights/) (last visited Mar. 30, 2017).

<sup>119</sup> *Id.*



with pre-1914 appropriative water rights are corporations, and among the biggest are the water departments of San Francisco and Los Angeles.<sup>120</sup>

For reference, Los Angeles holds 171 total rights;<sup>121</sup> whereas, BBID holds one. Turlock Irrigation District claims and uses 1.9 million acre-feet of water annually across 150,000 acres of farmland.<sup>122</sup> BBID claims 50,000 acre-feet of water for about 25,000 acres.<sup>123</sup> Despite their relatively small size, however, it seems that in bringing an enforcement action against BBID, SWRCB wanted to make an example of them.

In June of 2010, BBID filed an initial statement of Water Diversion and Use.<sup>124</sup> This statement claimed a pre-1914 appropriative water right in the area previously known as Italian Slough in Contra Costa County.<sup>125</sup> BBID claimed 26,179 acre-feet of water use for municipal, industrial, and agricultural use for 2009.<sup>126</sup> A supplemental statement was filed in July 2013 demonstrating BBID's claimed water rights via use for years 2010, 2011, and 2012.<sup>127</sup> These submissions established BBID's claim to a pre-1914 appropriative water right.

In January 2014, Governor Jerry Brown issued Proclamation No. 1-17-2014, declaring a state of emergency due to severe drought conditions.<sup>128</sup> The SWRCB concurrently issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversion" for critically dry watersheds.<sup>129</sup> This gave notice to water rights holders that their permitted usage for the year may be decreased. The legislature passed SB 104 which gave the SWRCB broad powers in curtailment and issuance of civil liability for illegal water use, was passed in

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> CH2M, BYRON BETHANY IRRIGATION DISTRICT AGRICULTURAL WATER MANAGEMENT PLAN 2-1, 4-1 (2017).

<sup>124</sup> Byron Bethany Irrigation Dist., *Initial Statement of Water Diversion and Use*, STATE WATER RESOURCES CONTROL BOARD (June 30, 2010), [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/byron\\_bethany/docs/exhibits/pt/wr84.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/exhibits/pt/wr84.pdf).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See Byron Bethany Irrigation Dist., *Supplemental Statement of Water Diversion and Use for 2010*, STATE WATER RES. CONTROL BD. (July 1, 2013), [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/byron\\_bethany/docs/exhibits/pt/wr85.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/exhibits/pt/wr85.pdf); Byron Bethany Irrigation Dist., *Supplemental Statement of Water Diversion and Use for 2011*, STATE WATER RES. CONTROL BD. (July 1, 2013), [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/byron\\_bethany/docs/exhibits/pt/wr86.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/exhibits/pt/wr86.pdf); Byron Bethany Irrigation Dist., *Supplemental Statement of Water Diversion and Use for 2012*, STATE WATER RES. CONTROL BD. (July 1, 2013), [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/byron\\_bethany/docs/exhibits/pt/wr87.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/exhibits/pt/wr87.pdf).

<sup>128</sup> Brown, *A Proclamation of a State of Emergency*, *supra* note 96.

<sup>129</sup> *Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions*, STATE WATER RES. CONTROL BD. (Jan. 17, 2014), [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/docs/notice\\_of\\_curtailment.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/notice_of_curtailment.pdf).

March 2014.<sup>130</sup>

In April 2014, the Governor issued a Proclamation of a Continued State of Emergency.<sup>131</sup> The Proclamation granted the SWRCB broad authority to “adopt and implement emergency regulations pursuant to Water Code section 1058.5.”<sup>132</sup> Guidelines allowed the Board to issue regulations it deemed “necessary to prevent the waste, unreasonable use, unreasonable method of use” and other water uses.<sup>133</sup> The Proclamation gave the SWRCB explicit power “to require curtailment of diversions when water is not available under the diverter’s priority of right.”<sup>134</sup> This last provision became problematic in the SWRCB’s efforts to curtail BBID’s claimed water right.

With this power, the SWRCB issued a “Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right.” This notification curtailed appropriative water right holders. It did not apply to pre-1914 appropriative water rights, such as those claimed by BBID. As the drought pressed on in February of 2015, the SWRCB ordered that all pre-1914 appropriative and riparian water rights claimants submit information relating to their claimed water right, monthly diversions, and basis of right.<sup>135</sup> BBID complied with the order,<sup>136</sup> as other reporting requirements and warnings about curtailments followed in the ensuing months.<sup>137</sup>

On June 12, 2015, the SWRCB issued an unavailability notice curtailing water rights commencing during or after 1903.<sup>138</sup> This notified all holders of pre-1914 appropriative water rights that a priority date of 1903 or later were subject to curtailment due to lack of water to serve their claimed right. This meant that BBID, with a claimed appropriative water right of 1914, was subject to curtailment due to drought conditions. Acting within their claimed right and in order to meet the agricultural and municipal demands of their members, BBID did not curtail their water usage.

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<sup>130</sup> S.B. 104, 113th Sen., 2013–14 Reg. Sess. (Cal. 2014).

<sup>131</sup> Brown, *A Proclamation of a Continued State of Emergency*, *supra* note 966.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Diversion of Water from Sacramento and San Joaquin River Watershed and Delta*, WR 2015-0002-DWR (State Water Resources Control Board Feb. 4, 2015).

<sup>136</sup> See *BBID Initial Response to February 2015 Informational Order (S021256)*, STATE WATER RES. CONTROL BD. (Feb. 9, 2015), [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/byron\\_bethany/docs/exhibits/pt/wr88.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/exhibits/pt/wr88.pdf).

<sup>137</sup> *Notices of Water Availability (Curtailment and Emergency Regulations)*, STATE WATER RES. CONTROL BD. [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/water\\_availability.shtml](https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/water_availability.shtml) (last updated Nov. 2, 2016).

<sup>138</sup> Enforcement Action ENF01951 – Administrative Civil Liability Complaint at 3, *Diversion of Water from the Intake Channel to the Banks Pumping Plant (Formerly Italian Slough) in Contra Costa Cty.*, (State Water Resources Control Board July 20, 2015) (ENF01951).

In July, the SWRCB Office of Enforcement sent a notice of Administrative Civil Liability to BBID.<sup>139</sup> The notice claimed that BBID was in violation of California Water Code section 1052, which prohibits the unauthorized diversion of water.<sup>140</sup> The SWRCB has the power under SB 104 to administratively impose civil liability for unauthorized diversion of water during periods of drought emergency. The maximum fine prescribed by statute may not exceed \$1,000 per day of violation plus \$2,500 per acre-foot diverted without authorization.<sup>141</sup> The SWRCB claimed that BBID diverted water unlawfully for thirteen days and a total of 2,067 acre-feet of water.<sup>142</sup> The SWRCB could have levied a fine up to the maximum amount of \$5,180,500. However, the SWRCB levied a fine of \$1,553,250 for BBID's water diversion and use "during period when water supplies were insufficient to fulfill [BBID's] claimed right."<sup>143</sup> Indeed, the SWRCB offered BBID the possibility of reducing their fine if they could show that they use the water for health and safety needs or for critical power generation.<sup>144</sup>

BBID responded two-fold. First, they requested a hearing with the SWRCB on the penalties.<sup>145</sup> In addition, BBID also filed a civil case against the SWRCB in Contra Costa Superior Court challenging the Board's authority to issue the curtailment notice.<sup>146</sup> The court held it would continue the court proceedings while the administrative action was still pending and thus denied the motion to stay the administrative hearing.<sup>147</sup> Essentially, the court recognized the SWRCB's special expertise over this matter and determined the SWRCB would be best suited to review the claims before the court does so.

The administrative proceedings moved forward in front of the SWRCB hearing officers. During the hearing, the SWRCB considered (1) whether they had the authority to curtail BBID's water rights and (2) whether Water Code section 1052 applied to a diversion made under a claim of pre-1914 or riparian

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<sup>139</sup> *Id.* at 1.

<sup>140</sup> *Id.* at 1–2.

<sup>141</sup> *Drought Relief Legislation Increases Regulatory Powers and Potential Penalties Affecting Appropriative Water Rights*, CONTINUING EDUCATION OF THE BAR (June 18, 2014), <https://ceb.com/drought-relief-legislation-increases-regulatory-powers-and-potential-penalties-affecting-appropriative-water-rights>.

<sup>142</sup> Enforcement Action ENF01951, *supra* note 1388, at 1.

<sup>143</sup> *Id.* at 2.

<sup>144</sup> *Id.*

<sup>145</sup> Daniel Kelley, *Request for Hearing*, ST. WATER RESOURCES CONTROL BOARD (Aug. 6, 2015), [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/byron\\_bethany/docs/acl\\_hearrequest080615.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/acl_hearrequest080615.pdf).

<sup>146</sup> *Byron-Bethany Irrigation Dist. v. State Water Res. Control Bd.*, No. N15-0967 (Contra Costa Cty. Super. Ct. 2015).

<sup>147</sup> Order After Hearing on Sept. 22, 2015, *California Water Curtailment Cases*, Judicial Council Coordination Proceeding No. 4838 (Santa Clara Cty. Super. Ct. 2015) (consolidated ruling on five cases filed by separate parties against SWRCB regarding the curtailment notices).

water rights.

At the end of a multi-day hearing, the SWRCB's presiding members agreed to dismiss the charges against BBID.<sup>148</sup> The Board held that the state did not present sufficient data to show that BBID violated the water rights priority system.<sup>149</sup> Moreover, the SWRCB staff failed to prove that the Board had authority over pre-1914 appropriative water rights, and BBID failed to prove that the SWRCB definitively did not.<sup>150</sup>

In an enforcement action like this, the SWRCB Office of Enforcement staff carried the burden of proof.<sup>151</sup> The SWRCB concluded that the SWRCB staff did not present evidence sufficient to carry its burden of showing water levels were low enough to warrant curtailments of BBID's pre-1914 rights.<sup>152</sup> The SWRCB also did not accept BBID's argument that its pre-1914 rights were not subject to section 1052 enforcement actions.<sup>153</sup> On the other hand, the SWRCB was nearly silent on their claimed ability to curtail valid pre-1914 appropriative water rights.<sup>154</sup> Despite this, the SWRCB affirmed that it had complete authority to prevent illegal diversions under a claim of pre-1914 appropriative water right.<sup>155</sup>

The long-term implications of this holding are that the SWRCB maintains the power to issue curtailments on a case by case basis. To be in compliance with this power, however, requires extensive data analysis that impedes quick drought responses. Generally, the SWRCB has continued authority to impose fines and other administrative penalties for diversion of water based on unavailability. Any water right holder who diverts water that is unavailable based on the priority of right is liable to more senior rights holders. This authority allows the SWRCB to administer water rights and effectuate the water rights system when the water supply is insufficient to satisfy all claimants.

## VII. IMPEDIMENTS TO SWRCB'S ABILITY TO RESPOND TO MODERN DROUGHT

Due process principles present another impediment to exigent circumstances of drought. Enforcement proceedings such as the ones in front of the SWRCB

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<sup>148</sup> Order Dismissing the Administrative Civil Liability Complaint, *Byron-Bethany Irrigation Dist.*, WR 2016-0015 (State Water Res. Control Bd. 2016).

<sup>149</sup> *Id.* at 16.

<sup>150</sup> *Id.*; See also *Frequently Asked Questions (FAQ) Order Dismissing Pending Water Right Enforcement Actions Against Two Irrigation Districts*, STATE WATER RES. CONTROL BD., [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/byron\\_bethany/faq.s.html](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/faq.s.html) (last updated June 6, 2016).

<sup>151</sup> Order Dismissing the Administrative Civil Liability Complaint, *Byron-Bethany Irrigation Dist.*, *supra* note 148 at 11.

<sup>152</sup> *Id.* at 14–16.

<sup>153</sup> *Id.* at 11.

<sup>154</sup> *Id.* at 10.

<sup>155</sup> *Id.*

must adhere to due process protections. These protections arise from federal and state constitutions as well as the California Administrative Procedure Act.<sup>156</sup> Environmental statutes whose violations give rise to civil penalties are “criminal in nature.”<sup>157</sup> Due process requires that penal laws “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>158</sup> Further, due process requires a fair tribunal, adequate notice, and an opportunity to be heard.

The SWRCB levied the administrative civil liability fine against BBID pursuant to the California Water Code.<sup>159</sup> Such civil liability merits sufficient definiteness to avoid arbitrary and discriminatory enforcement.<sup>160</sup> If the SWRCB revived their actions to levy fines under California Water Code section 1052, “water at issue” would be expanded to mean water used under a pre-1914 claim of right.<sup>161</sup> No case law has held that a pre-1914 right may be curtailed outside of a finding of illegal diversion or finding of unreasonableness.

The complexities of California water management and drought responses would improve greatly if the SWRCB had more authority to curtail pre-1914 water rights in extreme drought situations. This would allow the SWRCB to respond to modern demands on the resource as drought cycles become the new norm for the state. Indeed, even a measure of normal is a statistical construct and struggles to illustrate the variance of California precipitation. Waiting for these rights to be exercised in an unreasonable or unbeneficial way is inefficient when long-term planning mandates a comprehensive picture of allocation and use. Forfeiture of the right has not occurred until there is nonuse for five years.<sup>162</sup> Further, rights holders may claim conservation as a reasonable and beneficial use of the appropriated water.<sup>163</sup>

Despite legal precedents to the contrary, there may be hope for reform and unified enforcement. The SWRCB has not defined “waste” and “unreasonable use,” though it is within the scope of their power to do so. They also have mechanisms to evaluate these concepts.<sup>164</sup> If the SCRCB defined “unreasonable”

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<sup>156</sup> See *Morongo Band of Missions Indians v. State Water Res. Control Bd.*, 45 Cal. 4th 731, 736, 738 (2009).

<sup>157</sup> *Tull v. United States*, 481 U.S. 412, 418 (1987).

<sup>158</sup> *Skilling v. United States*, 561 U.S. 358, 402–03 (2010).

<sup>159</sup> CAL. WATER CODE § 1052.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See *Millview*, 229 Cal. App. 4th 879; *North Kern Water Storage Dist. v. Kern Delta Water Dist.*, 147 Cal. App. 4th 555, 560 (2007).

<sup>163</sup> CAL. WATER CODE § 1011.

<sup>164</sup> See WILSON, *supra* note 444 (tracing the SWRCB’s history of evaluating “unreasonable use,” and illustrating that defining such terms is an administrative mechanism available to the agency that it has been hesitant to exercise).

to include water use contrary to a curtailment order issued under extreme drought situations, the SWRCB's existing powers to prevent unreasonable use would then give them authority to curtail pre-1914 water rights during a drought. The Board might encounter opposition in defining "unreasonable" in this way because writing such a regulation would require notice and public comment that may attract community involvement objecting to the Board's expertise. Another issue is that providing a definition is not a definitive solution to clarifying the SWRCB's authority, it would only establish pre-1914 appropriative water rights holders as subject to curtailments. Analysis of such SWRCB actions against these rights holders would still need to be addressed on a case-by-case basis.

A finding of unreasonable or unbeneficial use is grounds for penalty or extinction of the water right. The ability to encompass pre-1914 appropriative water rights into long term plans by eliminating the distinction between pre- and post-1914 rights would provide a more amicable solution.

Many people are upset at how the SWRCB currently handles water rights allocations. Indeed, one assemblyman suggested that to revamp the state's water rights administration and enforcement proceedings, the Office of Administrative Hearings (OAH) should assume the SWRCB's existing authority over water rights.<sup>165</sup> Though, the suggestion that the OAH would be more fair and impartial was misplaced. As recently as 2009, the California Supreme Court rejected the perpetually-repeated claim that the SWRCB administrative hearings violate due process.<sup>166</sup> Moreover, the altered administrative process in the bill actually bifurcated and would have inevitably delayed state administrative water rights enforcement hearings designed to halt such illegal water diversions. Governor Brown vetoed the legislation for "not work[ing] as intended" and for likely "further complicat[ing] the process."<sup>167</sup>

#### VIII. GOING FORWARD

The imminence or actual presence of drought inspires reformation in water law. But the truth is that permanent, beneficial change has come slowly in California, at best. John Steinbeck observed, "and it never failed that during the dry years the people forgot about the rich years, and during the wet years they lost all memory of the dry years."<sup>168</sup> In California, this is primarily due to the limited powers of the SWRCB.

Any proffered solution to California's water supply challenge that is simple or

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<sup>165</sup> Assemb. B. 313, 2017–18 Reg. Sess. (Cal. 2017).

<sup>166</sup> *Morongo Band of Mission Indians v. State Water Res. Control Bd.*, 45 Cal. 4th 731 (2009).

<sup>167</sup> Edmund G. Brown Jr., *Veto of Assembly Bill 313* (Oct. 15, 2017), [https://www.gov.ca.gov/docs/AB\\_313\\_Veto\\_Message\\_2017.pdf](https://www.gov.ca.gov/docs/AB_313_Veto_Message_2017.pdf).

<sup>168</sup> JOHN STEINBECK, *EAST OF EDEN* 12 (1952).

easy will also be wrong. There is a better way to spend our time than by unraveling 103 years of jurisprudence. But the biggest gamble is to do nothing. Courts increasingly find broad, expansive powers of the SWRCB to be within the legislature's intended grant of authority. Because of this, it is essential that a statewide approach be accessible to SWRCB managers for both exigent drought and long-term efficiency planning. The state has implemented numerous policy changes to facilitate drought response efforts. Some communities have adopted these practices into their habitual, daily lives such that February 2017 water conservation surpassed February 2016 water conservation, when the mandatory restrictions were in place.<sup>169</sup> This suggests that conservation has indeed become commonplace in the state consistent with the Governor's May 2016 directive.<sup>170</sup> The majority of these actions, however, were enacted on a temporary basis.<sup>171</sup> Along with continuing some funding and activities, the state will benefit from extending or making permanent short-term drought-related policies including reporting requirements, conservation mandates, and expanded SWRCB authority.

Moreover, there are initiatives not yet enacted that could be implemented to improve the state's ability to respond to future droughts.<sup>172</sup> Requiring that all surface water rights holders be brought under SWRCB's permitting system would modernize long-term planning efforts. In the same vein, streamlining the process for approving voluntary transfers among water users would alleviate water availability concerns and likely allow for the allocation of more water for environmental purposes. From a managerial standpoint and in order to combat modern pressures, it is essential that the SWRCB be given the explicit power to reanalyze and reform the allocation of water in California, particularly those rights that date to pre-1914.

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<sup>169</sup> See Steve Scauzillo, *Californians' Big Water Savings in February is a Good Sign of the Future of Conservation*, SAN GABRIEL VALLEY TRIB. (Apr. 4, 2017), <http://www.sgvtribune.com/2017/04/04/californians-big-water-savings-in-february-is-a-good-sign-for-the-future-of-conservation/>.

<sup>170</sup> See *id.*; see also Exec. Order No. B-37-16, MAKING WATER CONSERVATION A CALIFORNIA WAY OF LIFE (2016) (describing the need to conserve water in the future).

<sup>171</sup> See Dale Kasler, *Drought May Be Nearly Over, but Californians Are Still Saving Water*, THE SACRAMENTO BEE (Apr. 4, 2017), <http://www.sacbee.com/news/state/california/water-and-drought/article142626989.html>.

<sup>172</sup> See BRIAN GRAY ET AL., PUB. POL'Y INST. OF CAL., ALLOCATING CALIFORNIA'S WATER: DIRECTIONS FOR REFORM (2015) (suggesting the state could improve its approach to allocating water by streamlining water rights administration, establishing environmental water budgets, and facilitating regional sharing).