

FEEDING THE WORLD HAS LEFT OUR WATER CONTAMINATED: WILL CALIFORNIA'S HUMAN RIGHT TO WATER ACT FIX THE PROBLEM?

I. INTRODUCTION

Some of the most common pleasures in life are not easily realized for millions of Californians.¹ Not every Californian can enjoy the simple satisfaction of opening the tap to drink a glass of water to quench their thirst.² Little boys and girls running in from recess are simply unable to drink from their school drinking fountain because its water is contaminated.³ This is a stark reality for some California communities.⁴ Unfortunately, for them, the relief of a drink of water only comes after gallons of bottled water are purchased to avoid the unwanted health risks of consuming contaminated water.⁵ Too many Californians live with the consequences of unregulated water, which results in high levels of contamination flowing from their taps.⁶

Over twenty-one million Californians rely on contaminated water,⁷ and of those, over an estimated 4.1 million rely on 100 percent contaminated groundwater.⁸ The State of California does not require

¹ See T. HARTER ET AL., UNIV. OF CAL., DAVIS, ADDRESSING NITRATE IN CAL.'S DRINKING WATER WITH A FOCUS ON TULARE LAKE BASIN AND SALINAS VALLEY GROUNDWATER 2 (2012), available at <http://groundwaternitrate.ucdavis.edu>.

² See generally Patricia Leigh Brown, *The Problem is Clear: The Water Is Filthy*, N.Y. TIMES, Nov. 13, 2012, available at http://www.nytimes.com/2012/11/14/us/tainted-water-in-california-farmworker-communities.html?pagewanted=all&_r=0 (reporting on water conditions in Seville, California).

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

⁷ See generally STATE WATER RES. CONTROL BD., COMMUNITIES THAT RELY ON A CONTAMINATED GROUNDWATER SOURCE FOR DRINKING WATER 13 (Jan. 2013) (providing data on the California population that rely on contaminated groundwater source for drinking water).

⁸ See *id.* at 8.

regulation of every domestic water source.⁹ Small service providers and private well owners are the two types of domestic water providers not regulated.¹⁰ The failure to regulate these water providers has left whole communities such as Seville, in Tulare County, to suffer the result of nitrate that permeates the groundwater feeding their wells.¹¹ In this rural community, where most families are employed by the agricultural industry as farmworkers, the water in their homes and schools is contaminated.¹² The children at the local school are warned not to drink from the fountains and the school receives water deliveries for students and staff.¹³

Seville is just one community suffering the reality of contaminated water and they have no recourse or hope for a sustained solution because small public water service providers and private wells are not protected by California's Safe Drinking Water Act regulation or the California State Water Resource Board's ("State Water Resource Board") funding mechanisms.¹⁴ The State is only required to regulate public water systems, the smallest of which serve at least five service connections.¹⁵ Without financing, small public water service providers cannot maintain or properly regulate the water they serve to consumers.¹⁶ Furthermore, some of the private domestic well owners cannot dig new wells or connect to other wells because it is cost-prohibitive.¹⁷ Overall the expensive nature of operating and maintaining water infrastructure makes it difficult to maintain water

⁹ See generally CAL. HEALTH AND SAFETY CODE § 116275(n) (1995).

¹⁰ *Id.*

¹¹ See Brown, *supra* note 2.

¹² *Id.*

¹³ *Id.*

¹⁴ See STATE WATER RES. CONTROL BD., *supra* note 7, at 14, 22. See generally HEALTH AND SAFETY CODE § 116275(n).

¹⁵ See CAL. HEALTH AND SAFETY CODE, *supra* note 9 (defining "'service connection' as the point of connection between the customer's piping or constructed conveyance, and the water system's meter, service pipe, or constructed conveyance.>").

¹⁶ See PROVOST & PRITCHARD, CNTY. OF TULARE, DEP'T OF WATER RES., BOOK 2: MGMT. AND NON-INFRASTRUCTURE PILOT STUDY, DISADVANTAGED CMTY. WATER STUDY FOR THE TULARE LAKE BASIN ES-2, ES-3 (2014).

¹⁷ See STATE WATER RES. CONTROL BD., *supra* note 7, at 22. See also J.N. Sbranti, *Homeowners Go Dry as Farmers Get Permits to Drill Hundreds of New Wells*, MODESTO BEE, June 28, 2014, available at <http://www.modbee.com/news/local/article3167097.html>.

affordability at a rate that the primarily low-income households can afford.¹⁸

Hopeful to solve the water contamination problem, California's Human Right to Water Act or Assembly Bill ("AB") 685 gained approval in 2012.¹⁹ Although, its passage was not without resistance.²⁰ In 2009, motivated by a constituency living in the largest United States Superfund site, Assemblyman Mike Eng, along with the support of clean water and environmental justice advocates, introduced AB 1242 to recognize the Human Right to Water in California.²¹ After the bill passed through the Assembly and Senate in 2009, Governor Arnold Schwarzenegger vetoed it, rationalizing it would result in "costly and continuous litigation" that would take resources from drinking water improvements.²² In his veto letter, Governor Schwarzenegger said, "the most pressing barrier to achieving the goal is not desire, it is funding."²³ The legislation resurfaced as AB 685 during the 2011-2012 Legislature and made its way to Governor Edmond G. Brown, Jr.'s desk.²⁴ On September 25, 2012, Governor Brown signed AB 685, which statutorily recognized that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes."²⁵ As part of the legislation, all relevant State agencies have an ongoing obligation to

¹⁸ See STATE WATER RES. CONTROL BD., *supra* note 7, at 21.

¹⁹ See generally Jessica L. Atcheson, *In Their Own Words: Safe Drinking Water Is a Basic Human Right Blog, An Interview With Maria Herrera of The Community Water Center* UNITARIAN UNIVERSALIST SERVICE COMMITTEE (Oct. 4, 2012), <http://www.uusc.org/updates/in-their-own-words-safe-drinking-water-is-a-basic-human-right> (discussing the effort to pass the Human Right to Water Act in an interview with Maria Herrera of the Community Water Center).

²⁰ See AB 1242 Veto Letter from Governor Arnold Schwarzenegger to Cal. Assemb. Members (Oct. 12, 2009) (on file with author), *available at* http://leginfo.ca.gov/pub/09-10/bill/asm/ab_1201-1250/ab_1242_vt_20091012.html.

²¹ See Dan Bacher, *Governor Brown Signs Human Right to Water Bill*, DAILY KOS (Sept. 26, 2012 at 07:31 PM PDT), <http://www.dailykos.com/story/2012/09/26/1136910/-Governor-Brown-Signs-Human-Right-to-Water-Bil#>. See Atcheson, *supra* note 19. See Env'tl. Prot. Agency, *Cleaning Up the Nation's Hazardous Waste Sites*, EPA, <http://www.epa.gov/superfund/> (last visited Dec. 13, 2014) (defining a Superfund as a "federal government program to clean up the nation's uncontrolled hazardous waste sites.").

²² See Schwarzenegger, *supra* note 20.

²³ *Id.*

²⁴ See Atcheson, *supra* note 19.

²⁵ See Assemb. B. 685, 2011 Assemb. (Cal. 2012).

consider the human right to water in executing policy, budgetary, and programmatic duties.²⁶

This Comment will address the water that small water systems and private well owners depend on and how this source of water is contaminated. It will show that AB 685 does not create a duty by the State to provide clean and affordable water to residents; therefore, there can be no claim against the State for its failure to provide clean water. Furthermore, this Comment will discuss the opportunities the bill creates for creative funding solutions, such as a water public goods charge, to solve the State's problems of contaminated water use and its inability to provide sustainable water supply for all Californians. Part II will discuss the State's regulatory and water management efforts. Part III will explore California's history of contaminated water use and how it persists. Part IV will analyze both AB 685's abilities and inabilities to create a legal duty. In Part V, this Comment will recommend that small water systems and private well owners be included in the State regulatory framework, that legislation be amended to create a legal duty providing citizens the right to force the State to ensure water quality, and that a water public goods charge²⁷ be implemented to meet the needs of the most vulnerable and to engage all Californians in the improvement of water quality. This Comment will conclude that if California does not implement changes similar to those recommended, too many Californians will continue to be left thirsty in fear of consuming contaminated water.

II. CALIFORNIA'S REGULATORY WATER MANAGEMENT EFFORTS TO IMPROVE WATER QUALITY

In order to understand how the issue of contaminated water persists, it is important to gain an awareness of how California attempts to regulate and manage its water quality. In the early twentieth century, the Senate sought to protect drinking water and by mid-century the first pollution control agencies were created to protect the public from toxic chemicals in water and other extensive water-borne diseases.²⁸ Codified in California Water Code section 106 in 1943, the legislature

²⁶ See CAL. WATER CODE § 106.3(b) (2013).

²⁷ See CAL. PUB. UTILITIES CODE § 399.8(b)(1) (2008) (defining a public goods charge as a fee or surcharge imposed on users for a commodity or resource to create a funding system to benefit the public).

²⁸ See INT'L HUMAN RIGHTS LAW CLINIC, UNIV. OF CAL. BERKELEY, SCH. OF LAW, HUMAN RIGHT TO WATER BILL IN CAL. 3-4 (May 2013).

declared that it is California's policy that water "for domestic purposes is the highest use of water and next use is for irrigation."²⁹ Subsequently, in 1974, the federal Safe Drinking Water Act³⁰ ("SDWA") was passed by Congress and amended in 1986 and 1996, to protect public health by regulating the nation's public drinking water supply.³¹ Essential to the SDWA are the National Primary Drinking Water Regulations,³² which enforce national health-based standards for drinking water that protect against both naturally occurring and man-made contaminants.³³ As part of the SDWA, California implemented a warning system to alert residents about drinking water possibly exposed to chemicals and other toxins.³⁴

Federal and state compliance with the SDWA requires public water systems, regardless of size, to have: (1) adequate and reliable sources of water that either are or can be made safe for human consumption,³⁵ and (2) the financial resources and technical ability to provide services effectively, reliably, and safely for workers, customers, and the environment.³⁶ The federal SDWA grants significant flexibility for states as they structure their water management agencies.³⁷

A. Contaminated Water: Flowing Through the Gaps

²⁹ See CAL. WATER CODE § 106 (1943).

³⁰ See Safe Water Drinking Act, 42 U.S.C. § 300(f) (1974). See also Cal. Safe Drinking Water Act, CAL. HEALTH & SAFETY CODE § 116270 (1997) (establishing the water regulatory structure). See also Env'tl. Prot. Agency, *Regulating Public Water Systems and Contaminants*, WATER EPA (Sept. 11, 2013), <http://water.epa.gov/lawsregs/rulesregs/regulatingcontaminants/basicinformation.cfm> (discussing the EPA's role in drinking water regulation).

³¹ See Env'tl. Prot. Agency, *Safe Drinking Water Act*, WATER EPA (July 30, 2014), <http://water.epa.gov/lawsregs/rulesregs/sdwa/index.cfm>.

³² See Env'tl. Prot. Agency, *Nat'l Primary Drinking Water Reg.*, WATER EPA (Oct. 29, 2014), <http://water.epa.gov/drink/contaminants/> ("National Drinking Water Regulations are legally enforceable standards that apply to public water systems. Primary standards protect public health by limiting levels of contaminants in drinking water.").

³³ *Id.*

³⁴ See CAL. HEALTH AND SAFETY CODE § 25249.6 (1987).

³⁵ See Env'tl. Prot. Agency, *supra* text accompanying note 30.

³⁶ *Id.*

³⁷ See Env'tl. Prot. Agency, *The Safe Drinking Water Act Amendments of 1996, Strengthening Protection for America's Drinking Water*, WATER EPA (Nov. 16, 2012), <http://water.epa.gov/lawsregs/guidance/sdwa/theme.cfm>.

Despite comprehensive regulation efforts, there are small water providers or private well owners that are not required to meet the State's regulations.³⁸ According to an August 2014 pilot study report, *Disadvantaged Community Water Study for the Tulare Lake Basin*, many Disadvantaged Communities ("DACs") in the Tulare Lake Basin encounter challenges in meeting the terms of drinking water regulations and are exposed to nitrate-contaminated groundwater.³⁹ These communities—such as Seville, Porterville, and Terra Bella—lack technical, managerial, and financial resources to operate and maintain their existing water systems, or to purchase new upgraded ones.⁴⁰ The State Water Resources Control Board ("State Water Board") reports that 2.6 million residents rely on nitrate-contaminated groundwater,⁴¹ as a result of agri-industrial contaminants.⁴²

In response to a report submitted to the legislature, the State Water Board launched an interactive nitrate tool, "*Is My Property Near a Nitrate-Impacted Water Well?*", to assist private domestic well owners and determine if their well is within 2,000 feet of other wells with nitrate concentrations above public health standards.⁴³ The tool is meant to help private well owners determine if their well should be tested, since the State does not require testing.⁴⁴ The website recommends annual testing by an accredited drinking water laboratory because "availability of groundwater data is limited, . . . domestic wells are not regulated, [and] domestic well water quality is largely

³⁸ See CAL. HEALTH AND SAFETY CODE §116275(n) (1995).

³⁹ See generally PROVOST & PRITCHARD, *supra* note 16, ES-1 (reporting on challenges the Tulare Lake Basin residents face including nitrate-contaminated water and other quality problems).

⁴⁰ See generally *id.* at 33, 42-46. See also DIV. FIN. ASSISTANCE, POLICY FOR IMPLEMENTING THE DRINKING WATER STATE REVOLVING FUND, EFFECTIVE JAN 1, 2015, *available at* http://www.waterboards.ca.gov/drinking_water/services/funding/documents/srf/dwsrf_policy/dwsrf_policy_final.pdf (providing technical and managerial requirements to secure financial resources available for drinking water infrastructure improvements).

⁴¹ See STATE WATER RES. CONTROL BD., RECOMMENDATIONS ADDRESSING NITRATE IN GROUNDWATER 4 (Feb. 2013).

⁴² See *id.* at 5.

⁴³ See Media Release, State Water Res. Bd., State Water Brd. Releases Interactive Tool: Is My Property Near a Nitrate-Impacted Water Well? (Dec. 3, 2014) (on file with author), *available at* http://www.swrcb.ca.gov/press_room/press_releases/2014/pr120314.pdf.

⁴⁴ *Id.*

unknown.”⁴⁵ While the cost for basic testing can range from \$100 to \$400,⁴⁶ testing by an accredited laboratory is more expensive.⁴⁷ Testing only helps increase awareness of contamination.⁴⁸ It is then incumbent on private domestic well owners to conduct any clean up or take other measures to ensure their water is free from contaminants.⁴⁹

B. Water Contamination Persists Despite Interim Solutions for Other Water Emergencies

Contaminated water has been compounded by the State’s unrelenting drought conditions.⁵⁰ The severe drought conditions lead Governor Brown to declare a State of Emergency on January 2014 and issue an Executive Order to fortify the State’s ability to manage water during the drought.⁵¹ Historic legislation now requires sustainable groundwater management for the first time in California.⁵² Moreover, the California Disaster Assistance Act requires the State to provide water for drinking and sanitation to households currently without

⁴⁵ State Water Res. Control Bd., *Is My Property Near a Nitrate-Impacted Water Well?*, NITRATE TOOL (Dec. 8, 2014),

http://www.waterboards.ca.gov/water_issues/programs/nitrate_project/nitrate_tool/.

⁴⁶ STATE WATER RES. CONTROL BD., *GUIDE FOR PRIVATE DOMESTIC WELL OWNERS* (2011), *available at*

http://www.waterboards.ca.gov/gama/docs/wellowner_guide.pdf.

⁴⁷ *Id.*

⁴⁸ *See* HARTER ET AL., *supra* note 1, at 54.

⁴⁹ *See* HARTER ET AL., *supra* note 1, at 55 tbl.12.

⁵⁰ *See generally* HARTER ET AL., *supra* note 1, at 9 (explaining that “groundwater contamination . . . pose serious challenges to managing the state’s water supply” and that many rural areas are at risk due to exposure to “drinking water wells that are often shallow and vulnerable to contamination.”); *see generally* STATE WATER RES. CONTROL BD., *supra* note 41, 4 (reporting that nitrate contaminated groundwater is a “particularly significant problem in the Tulare Lake Basin and Salinas Valley areas . . . including many of the poorest communities in California” that rely on groundwater for drinking water); *see generally* Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Declares Drought State of Emergency (Jan. 17, 2014) (on file with author), *available at* <http://gov.ca.gov/news.php?id=18368> (announcing a proclamation declaring a state of emergency due to drought conditions).

⁵¹ *See* Office of Governor Edmund G. Brown, *supra* text accompanying note 50.

⁵² *See* Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Signs Historic Groundwater Legislation (Sept. 16, 2014) (on file with author), *available at* <http://gov.ca.gov/news.php?id=18701>.

running water.⁵³ The executive order directs the State Water Board, the Department of Water Resources, and the Governor's Office of Emergency Services and Planning and Research to "work together to identify acute drinking water shortages in domestic supplies and to work with counties and local agencies to implement solutions for those water shortages."⁵⁴ A solution to the problem includes emergency grants to fund water needs.⁵⁵

Some of the funding was distributed to the counties in need within a month after implementation.⁵⁶ Tulare County's Emergency Services, the first to accept funding from the State's effort, accepted a \$1 million grant from the State Water Board to fund bottled water for schools with contaminated water systems in October 2014.⁵⁷ To qualify for the grant, at least eighty percent of the students at each school must be from low-income households.⁵⁸ The funding provides for a private drinking water service to deliver cases of one-gallon plastic jugs to each school.⁵⁹ The school program is funded for three years or until funding runs out or the need for clean water ends, whichever comes first.⁶⁰ The County is also providing water to some communities with contaminated water systems.⁶¹ Although water deliveries are a relief, they do not solve the water contamination problem—once drought conditions subside contamination will continue.⁶²

C. In Need of Long-Term Solutions

⁵³ See Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Streamlines Relief Efforts for Families With Drinking Water Shortages Due to Drought (Sept. 19, 2014), (on file with author) *available at* <http://gov.ca.gov/news.php?id=18713>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See generally David Castellon, *County Prepares for School Water Deliveries*, VISALIA TIMES-DELTA, (Oct. 29, 2014, 10:54 p.m.), *available at* <http://www.visaliatimesdelta.com/story/news/local/2014/10/30/county-prepares-school-water-deliveries/18163307/>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See HARTER ET AL., *supra* text accompanying note 50. See also STATE WATER RES. CONTROL BD., *supra* note 41, at 4-5.

While funding emergency services for water is beneficial, it is an interim solution and does not address the issue of persistent water contamination.⁶³ Long-term solutions are created through projects that bring public water systems into compliance with drinking water standards.⁶⁴ Currently, the State Water Board's Drinking Water State Revolving Fund ("DWSRF") finances public water system assistance through "projects that: (1) address public health risk problems, (2) are needed to comply with the SDWA, and (3) assist those most in need on a per household affordability basis."⁶⁵ The fund's primary purpose is to provide financial assistance for the capital costs associated with water quality "infrastructure projects needed to achieve or maintain compliance with SDWA requirements and to further the public health objectives of the SDWA."⁶⁶

Through the DWSRF, several forms of financial assistance are provided, including incentivized financing, zero-interest loans, debt refinancing, principal forgiveness, and grants to public water service providers.⁶⁷ AB 685 codifies the State's policy that every human being has the right to safe, clean, affordable and accessible water.⁶⁸ As a result of AB 685's passage, State regulators—including the DWSRF—are now required to consider this policy when adopting new policies and when creating grant award criteria.⁶⁹

The DWSRF is funded by annual federal capitalization grants from the Environmental Protection Agency ("EPA") and requires a twenty percent match from the state.⁷⁰ The EPA provides California with funding for capitalization grants for the DWSRF.⁷¹ In October 2014, the EPA pledged \$183 million to fund California projects.⁷² Funding for these water projects is highly competitive and extremely difficult to

⁶³ *Id.*

⁶⁴ See generally DIV. FIN. ASSISTANCE, *supra* note 40.

⁶⁵ *Id.* at 1.

⁶⁶ *Id.* at 1.

⁶⁷ See *id.* at 11-13.

⁶⁸ See CAL. WATER CODE § 106.3(b) (2013) (stating that the State's policy is that "every human being has the right to safe, clean, affordable and accessible water adequate for human consumption, cooking and sanitary purposes.").

⁶⁹ *Id.*

⁷⁰ See DIV. FIN. ASSISTANCE, *supra* note 65, at 11.

⁷¹ *Id.*

⁷² See Mark Grossi, *EPA sends California \$183 million for more water fixes*, FRESNO BEE, Oct. 2, 2014, available at <http://www.fresnobee.com/2014/10/02/4157135/epa-sends-california-183-million.html>.

navigate.⁷³ Unfortunately, those with the highest need often do not have the technical resources to compete.⁷⁴

D. Funding for Water Quality Improvements, but Not All Benefit

California provides multiple programs that provide funding opportunities in addition to the DWSRF.⁷⁵ Although various propositions have passed voter approval, those dollars will not be available to small water suppliers and private well owners because they do not meet regulatory scrutiny.⁷⁶ Small public water suppliers and the private well owners will continue to have contaminated water flow through their taps as these water users slip through the regulatory gap simply because they are too small.⁷⁷

In November of 2014, 67.1 percent of California voters approved Proposition 1, a \$7.1 billion general obligation bond for water improvements.⁷⁸ The bond dollars have been promised for State water supply infrastructure projects, including public water system improvements, surface and groundwater storage, drinking water protection, and water recycling.⁷⁹ The water bond includes the Clean, Safe Reliable Drinking Water Act and makes \$520 million available for expenditures, grants, and loans for projects to improve water quality, or help provide clean, safe, and reliable drinking water to all Californians.⁸⁰ Although the bond money is important for improvements, it is not a solution to the contamination problems faced

⁷³ See STATE WATER RES. CONTROL BD., *supra* note 7, at 21.

⁷⁴ See *id.*

⁷⁵ See generally State Water Res. Control Bd., *Funding Opportunities for Public Water Systems*, WATER BOARDS (Dec. 30, 2014), http://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/DWPfunding.shtml.

⁷⁶ See STATE WATER RES. CONTROL BD., *supra* note 7, at 22.

⁷⁷ *Id.*

⁷⁸ See Cal. Sec'y of St., *Proposition 1 Funding Water Quality, Supply, Treatment, Storage*, SEMI-OFFICIAL ELECTION RESULTS (Dec. 2, 2014, 3:58 p.m.), <http://vote.sos.ca.gov/returns/maps/ballot-measures/prop/1/>.

⁷⁹ See Water Quality, Supply, and Infrastructure Improvement Act of 2014, Assemb. B 1471, 2013 Assemb. (Cal. 2014), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1471.

⁸⁰ *Id.*

by small and private domestic well users because statutes do not require them to be regulated.⁸¹

III. CALIFORNIA'S REGULATION FRAMEWORK HAS NOT DONE ENOUGH: ADVOCATES CALL FOR MORE ACTION

California's designation as the "bread basket of the world"⁸² has not been achieved without consequence.⁸³ The small and private domestic well users of California find themselves in the shadow of this legacy.⁸⁴ Since the early 1900s, nitrate from agricultural cultivation and urban activities has slowly permeated into groundwater.⁸⁵ The result is an accumulation of nitrate, which will continue to permeate drinking water supplies.⁸⁶ The State Water Board has identified thirty-one principal contaminants in community water systems that rely on contaminated groundwater: arsenic and nitrate are the most often detected.⁸⁷ Over twenty-one million California residents live in 682 urban and rural communities that rely on contaminated groundwater as the primary source of their drinking water.⁸⁸ Contaminated drinking water is so prevalent in some areas of California that the State Legislature and the Governor have focused attention on creating solutions for this pervasive problem.

A. Focusing on Nitrate In the Tulare Lake Basin

The DAC's of the Tulare Lake Basin disproportionately bear the health and financial impacts of inadequate access to safe water.⁸⁹ As the State's regulatory framework fails to protect millions from

⁸¹ See CAL. HEALTH AND SAFETY CODE § 116275(n) (1995).

⁸² See N. Cal. Regional Cent., *Breadbasket of the World*, EB5 NORTHERN CALIFORNIA, <http://eb5northerncalifornia.com/index.php?page=breadbasket-of-the-world> (last visited Feb. 19, 2015).

⁸³ See STATE WATER RES. CONTROL BD., *supra* note 41, at 4.

⁸⁴ See HARTER ET AL., *supra* note 1, at 9. STATE WATER RES. CONTROL BD., *supra* note 7, at 18.

⁸⁵ See HARTER ET AL., *supra* note 1, at 9.

⁸⁶ See *id.*

⁸⁷ See STATE WATER RES. CONTROL BD. *supra* note 7, at 16 fig.4.

⁸⁸ See *id.* at 13.

⁸⁹ See generally PROVOST & PRITCHARD, *supra* note 1, ES-1 (identifying the four-county area of the Tulare Lake Basin that is disadvantaged or severely disadvantaged, suffer a variety of water issues including insufficient supply, and poor water quality). See also STATE WATER RES. CONTROL BD., *supra* note 41, at 28.

contaminated water, the cost to obtain clean water is unaffordable as a recent report illustrates.⁹⁰ The study, *Assessing Water Affordability*, reviewed both urban and rural water usage and found that communities in the Tulare Lake Basin pay an unreasonable cost for water, ranging from 0.5% to 3.4% of their Median Household Income (“MHI”).⁹¹ According to the California Department of Public Health, 1.5% of the MHI is a reasonably acceptable cost for water service.⁹² When water affordability was reviewed at a household level in the Tulare Lake Basin, researchers found that households spend more than two percent of their household income, the income used for household needs, on drinking water services.⁹³

This is true for Bertha Diaz, a farmworker and single mother of four, who worries about how she will afford bottled water on the income she earns from picking grapefruit.⁹⁴ Her daily chore is filling a five-gallon water jug at a self-serve station to supplement the contaminated water that runs through her tap.⁹⁵ Ms. Diaz serves as an advocate to improve water conditions.⁹⁶ She serves as a leader among a network of residents seeking drinking water condition improvements.⁹⁷

In response to these issues the State Water Board was required to develop pilot projects focusing on nitrate in groundwater in the Tulare Lake Basin and Salinas Valley.⁹⁸ The State Water Board made fifteen recommendations to the legislature that spanned four key areas, in order to address the issues associated with nitrate-contaminated groundwater.⁹⁹ The key areas included: providing safe drinking water; monitoring, notification and assessment; nitrogen-tracking and reporting; and protecting groundwater.¹⁰⁰ In response to the recommendations submitted to the legislature, the State Water Board launched the interactive tool to help property owners learn if their

⁹⁰ See JULIET CHRISTIAN-SMITH ET AL., PACIFIC INSTITUTE, COMMUNITY WATER CENTER, FRESNO STATE, *ASSESSING WATER AFFORDABILITY* 1, at 7, 8 (Aug. 2013).

⁹¹ See *id.* at 13.

⁹² See *id.* at 8, tbl. 1.

⁹³ See *id.* at 13.

⁹⁴ See Brown, *supra* note 2.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See STATE WATER RES. CONTROL BD., *supra* note 41, at 4.

⁹⁹ See *id.* at 5 and 7-10, tbl. ES-1.

¹⁰⁰ See *id.* at 6.

property is near a nitrate-impacted water well.¹⁰¹ As discussed earlier, the tool is ineffective in providing accurate readings of the location of nitrate contaminated wells due to the lack of regulation of small and private wells.¹⁰²

*B. Governor's Drinking Water Stakeholder Group*¹⁰³

Prevalent nitrate contamination has also evoked the attention of Governor Brown.¹⁰⁴ In 2012, Governor Brown called representatives from State and local organizations together to establish the Governor's Drinking Water Stakeholder Group ("DWSG").¹⁰⁵ The DWSG was to develop recommendations to address nitrate-contaminated drinking water in the Tulare Lake Basin and Salinas Valley.¹⁰⁶ The group focused on covering the costs of operations and maintenance for small systems, while maintaining affordable water rates and identifying State agency actions to make funding programs, regulations, and implementation more flexible and proactive in supporting creative solutions.¹⁰⁷ DWSG developed recommendations it provided to Governor Brown less than one month before he signed the Human Right to Water bill (AB 685).¹⁰⁸ The recommendations included: improvements for data collection and management among small systems of between two and fourteen connections;¹⁰⁹ creation of

¹⁰¹ See Cal. Water Res. Bd., *supra* note 43.

¹⁰² See *Is My Property Near a Nitrate-Impacted Water Well?*, *supra* note 45. See also STATE WATER RES. CONTROL BD., *supra* note 41, at 28.

¹⁰³ See generally Governor's Drinking Water Stakeholder Group, WATERBOARDS.CA.GOV,

http://www.waterboards.ca.gov/water_issues/programs/groundwater/drinkingwater_sakeholders.shtml (last visited Feb. 20, 2015) (showing that the Governor's Drinking Water Stakeholder Group is made up of state agency representatives, water organizations, agricultural groups, and environmental and consumer organizations who are interested in the health of community water and access to clean water).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See GOVERNOR'S DRINKING WATER STAKEHOLDER GRP., FINAL REPORT TO THE GOVERNOR'S OFFICE 1 (2012), available at http://www.waterboards.ca.gov/water_issues/programs/groundwater/docs/stakeholders/08202012_1_final_rep_to_gov.pdf.

¹⁰⁸ Assemb. B. 685, *supra* note 25. See generally *id.* (showing the recommendations were provided August 2012).

¹⁰⁹ See GOVERNOR'S DRINKING WATER STAKEHOLDER GRP., *supra* note 107, at 3-4.

incentives and promotion of safe drinking water solutions;¹¹⁰ improved access to immediate, interim sources of safe drinking water, including access to funding sources for those solutions;¹¹¹ and the cost reductions to accomplish and maintain long-term drinking water solutions.¹¹²

In addition to the unregulated small water providers and private wells, the small systems that are regulated are not consistently reported.¹¹³ In a 2014 report, a DWSG working group identified that the system the State maintains with data of the Tulare Lake Basin and Salinas Valley is not a uniform system for testing small water systems for nitrate contamination.¹¹⁴ The DWSG working group further discovered that testing of local small water systems is inconsistent.¹¹⁵ State small system nitrate sampling varies greatly by county, and nitrate-testing data is not reported to the State.¹¹⁶ Competent data collection is important to the development of solutions, especially for those small well and domestic well users whose wells are not regulated and are consequently at risk of drinking water with nitrate levels that exceed health standards.¹¹⁷

C. Water Advocates Champion Water Health Improvements for All

State regulators and the legislatures are not the only ones working toward solutions for improving the quality of drinking water for Californians.¹¹⁸ Water solution advocates continuously work to ensure the health of their communities and championed the passage of AB

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *supra* Part II.A. See generally GOVERNOR'S DRINKING WATER STAKEHOLDER GRP., DATA COLLECTION & MGMT. FOR LOCAL & STATE SMALL WATER SYS. 1 (2014), available at http://www.waterboards.ca.gov/water_issues/programs/groundwater/docs/stakeholders/1142014_3_data_management_rep.pdf (stating that small systems are not consistently reported).

¹¹⁴ See GOVERNOR'S DRINKING WATER STAKEHOLDER GRP., *supra* note 113, at 1-2.

¹¹⁵ *Id.*

¹¹⁶ See *id.* See also *Is My Property Near a Nitrate-Impacted Water Well?*, *supra* note 45.

¹¹⁷ See GOVERNOR'S DRINKING WATER STAKEHOLDER GRP., *supra* note 113, at 2.

¹¹⁸ See *Long Term Solutions*, COMMUNITY WATER CENTER, http://www.communitywatercenter.org/long_term_solutions (last visited Feb. 20, 2015).

685.¹¹⁹ These advocates strive to address California's contaminated water, its aging and deficient infrastructure for treatment and conveyance, and the challenges small public water service providers encounter in providing customers with safe water at an affordable rate.¹²⁰ The Safe Water Alliance took their fight to the legislature and worked with Assemblyman Eng to pass AB 685.¹²¹

California's water contamination issues also caught the attention of the United Nations.¹²² During an official tour of the United States in February and March 2011, Catarina de Albuquerque, then United Nation's Special Rapporteur,¹²³ visited with Assemblyman Eng and other co-sponsors of AB 685.¹²⁴ During the visit, Ms. de Albuquerque toured Tulare County where she met with community members of Seville and learned more about California's inadequate access to safe drinking water.¹²⁵ She heard first-hand testimony from women who served water from polluted wells to their families because they did not have the money to purchase bottled water.¹²⁶ In a press release hailing the passage of AB 685, Ms. de Albuquerque recalled the crying women who told her they were devoting nearly twenty percent of their

¹¹⁹ See *Long Term Solutions*, *supra* note 118; Atcheson, *supra* note 19.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See generally Press Release, U.N. Human Rights Office of the High Comm'r for Human Rights, Cal.: New Law on the Human Right to Water and Sanitation Sets "Inspiring Example for Others"—U.N. Expert, U.N. Special Rapporteur on the Human Right to Water and Sanitation (Sept. 28, 2012) (on file with author), *available at*

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12605&LangID=E> (indicating that California action's to improve poor water quality caught the attention of the United Nations).

¹²³ See *id.* See also U.N. Human Rights Office of the High Comm'r for Human Rights, Ms. Catarina de Albuquerque, *Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, <http://ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/CatarinaDeAlbuquerque.aspx> (last visited Feb. 20, 2015) (providing background information on Catarina de Albuquerque whom was the first U.N. Special Rapporteur on the human right to safe drinking water and sanitation. She served in this volunteer position until 2014. Ms. de Albuquerque is a Senior Legal Adviser at the Office for Documentation and Comparative Law, and Professor at the Law Faculties of Universities of Braga and Coimbra and Washington College of Law).

¹²⁴ See U.N. Human Rights Office of the High Comm'r for Human Rights, *supra* note 122.

¹²⁵ *Id.*

¹²⁶ *Id.*

\$14,000 annual income to water and sanitation.¹²⁷ She called the passage of AB 685 “an inspiration not only for other states within the USA, but equally for many other countries in the world.”¹²⁸

International participants dedicate their time and energy to advocate globally for human rights through the United Nations’ Committee for Economic, Social and Cultural Rights (“CESCR”), specifically eighteen independent experts recognized in the field of human rights.¹²⁹ In 2002, CESCR declared a human right to water exists globally.¹³⁰ The CESCR adopted the universal right “to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”¹³¹ It is the job of the Special Rapporteur to mandate corrections by emphasizing a remedial, rather than punitive, approach to ensuring access to justice for water and sanitation rights.¹³² In addition to mandating corrections, the Special Rapporteur works with governments, donors, and other international stakeholders to implement solutions and solve the persistent problem of poor water and sanitation service provisions.¹³³ As part of her duties, the Special Rapporteur came to Seville to report on the water

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See U.N. Human Rights Office of the High Comm’r for Human Rights, *Committee on Economic, Social and Cultural Rights*, <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/Membership.aspx> (last visited Feb. 20, 2015).

¹³⁰ See Fact Sheet, U.N. Human Rights Office of the High Comm’r for Human Rights, *The Right to Water*, U.N. Fact Sheet No. 35 at 1 (August 2010) (on file with author), *available at* http://www.undp.org/content/undp/en/home/librarypage/environment-energy/water_governance/water_supply_and sanitation/_the_right_to_water-factsheetno35.html.

¹³¹ See *id.* at 1 (“Adopting its General Comment No. 15 on the right to water.”).

¹³² See generally Fact Sheet, U.N. Human Rights Office of the High Comm’r for Human Rights, *Human Rights Fact Sheet No. 27 Seventeen Frequently Asked Questions About the U.N. Special Rapporteurs 4-5*, at 8-11 (April 2001), *available at* <http://www.ohchr.org/Documents/Publications/FactSheet27en.pdf> (providing background information on the U.N. Human Rights Office of the High Commissioner for Human Rights).

¹³³ See generally U.N. SPECIAL RAPPORTEUR ON THE HUMAN RIGHT TO SAFE DRINKING WATER AND SANITATION, *REALISING THE HUMAN RIGHTS TO WATER AND SANITATION: A HANDBOOK BY THE U.N. SPECIAL RAPPORTEUR CATARINA DE ALBUQUERQUE*, INTRODUCTION 16 (2014) (explaining the intervention that occurs with governments on behalf of individuals suffering human rights violations. The U.N. Special Rapporteur offers recommendations or technical cooperation).

conditions that exist and learn how families cope with the problem.¹³⁴ Ms. de Albuquerque's findings and recommendations helped to promulgate California's AB 685 through its introduction, the discussions, and its final adoption.¹³⁵

IV. CALIFORNIA'S HUMAN RIGHT TO WATER: MORE IS NEEDED TO ENFORCE A RIGHT AND FILL THE GAP

On September 25, 2012, California attempted to fill the gaps to ensure all had access to clean, affordable water.¹³⁶ AB 685 was passed and became effective January 1, 2013.¹³⁷ It was added as section 106.3 to the Water Code, to read:

- (a) It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.
- (b) All relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water described in this section.
- (c) This section does not expand any obligation of the state to provide water or to require the expenditure of additional resources to develop water infrastructure beyond the obligations that may exist pursuant to subdivision (b).
- (d) This section shall not apply to water supplies for new development.
- (e) The implementation of this section shall not infringe on the rights or responsibilities of any public water system.¹³⁸

Although AB 685 was thought to provide a solution for contaminated water users, it simply does not.¹³⁹ No legal avenue exists for the millions of Californians who rely on unregulated water sources to ensure this right is not violated.¹⁴⁰ Sections (a) and (b) of the Water Code section 106.3 clearly state the policy and considerations to be

¹³⁴ See U.N. Human Rights Office of the High Comm'r for Human Rights, *supra* note 122.

¹³⁵ See *id.*

¹³⁶ See generally Assemb. B. 685, *supra* note 25 (showing that when Governor Brown signed AB 685 on September 25, 2012, the legislation was codified as CAL. WATER CODE § 106.3).

¹³⁷ *Id.*

¹³⁸ See CAL. WATER CODE § 106.3(b) (2013).

¹³⁹ See *id.*; see discussion *infra* Part IV.A.1-2.

¹⁴⁰ See *id.*

given; however, no enforceable right is provided.¹⁴¹ California's water regulatory framework neglects small and private well users resulting in a persistent water contamination problem.¹⁴² Sections (c), (d), and (e) protect the State by preventing a citizen, such as a Seville resident, from holding the State accountable to enforce regulation of their right to safe, clean, affordable and accessible water.¹⁴³ Unless the language of AB 685 is amended, it will not provide a solution to the water contamination problem faced by so many vulnerable Californians.¹⁴⁴

A. Legal Implications of AB 685

AB 685 does *not* create a legal remedy for those relying on contaminated drinking water, contrary to Governor Schwarzenegger's suspicions when he vetoed it in 2009.¹⁴⁵ The language of AB 685 sets the standard that State agencies shall consider when "revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations and criteria are pertinent to the uses of water described," but does not create a duty by the State.¹⁴⁶

The plain language of AB 685 is no more binding than the SDWA, which declares, "every citizen of California has the right to pure and safe drinking water."¹⁴⁷ It could be argued that AB 685 further qualifies the policy established by the 1943 Act—that water for domestic purposes is the highest priority use of water.¹⁴⁸ California residents seeking to enforce their right to safe drinking water may do so by filing a lawsuit against the State under a Government Claims Act or a Traditional Mandate.¹⁴⁹ However, as explained below, AB 685

¹⁴¹ See TINA CANNON LEAHY, CON. S. AMENDMENTS, CAL. ASSEMB. B. 685, ASSEMBLY FLOOR ANALYSIS (Aug. 24, 2012), available at http://leginfo.ca.gov/pub/11-12/bill/asm/ab_0651-0700/ab_685_cfa_20120824_205242_asm_floor.html (noting that the Senate amended AB 685 to remove a potential claim of right).

¹⁴² See discussion *supra* Part II.

¹⁴³ See Water Code § 106.3(b). See generally LEAHY, *supra* note 141 and accompanying text (noting that the Senate amended AB 685 to remove a potential claim of right).

¹⁴⁴ See *id.* See discussion *supra* Part III.

¹⁴⁵ *Contra* Schwarzenegger, *supra* note 20 (stating the legislation would cause constant litigation).

¹⁴⁶ See WATER CODE § 106.3(b).

¹⁴⁷ See CAL. HEALTH & SAFETY CODE, § 116270(a) (1997).

¹⁴⁸ See CAL. WATER CODE § 106 (1943).

¹⁴⁹ See CAL. GOV'T CODE § 815.6 (1963).

does not create a duty enforceable under the Government Claims Act or a Traditional Mandate.¹⁵⁰

1. A Government Claims Act Suit Would Fail

The State is not required to enforce clean water for all Californians by AB 685 and as such, the State does not acquire a mandatory duty.¹⁵¹ Therefore a claim seeking a private right of action because the State did not meet a mandatory duty would fail.¹⁵² Government Claims Act states that a claim may be brought against a public entity:

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.¹⁵³

Citizens have brought claims against the State seeking to create a mandatory duty by the public entity for safe drinking water; however, these claimants have been unsuccessful in stating their claim under the California Tort Claims Act (now called the Government Claims Act).¹⁵⁴ *In re Groundwater Cases*, 154 Cal.App.4th 659 (1st Dist. Ct. App. 2007), involved water customers that appealed a denial of their claim against the California Public Utilities Commission (“PUC”), as the regulatory body, and public water providers.¹⁵⁵ The claim stemmed from a series of actions filed in 1997 and 1998 by a number of residents in Los Angeles County against four water companies regulated by the PUC and other water providers.¹⁵⁶ As the claim progressed, the parties to the action grew to over 2,000 and claimed causes of action for negligence, strict liability, trespass, public and private nuisance, fraudulent concealment, and in some instances,

¹⁵⁰ See discussion *infra* Part IV.A.1-2.

¹⁵¹ See LEAHY, *supra* note 141 and accompanying text. See also *supra* Part II.

¹⁵² See CAL. GOV'T CODE § 815.6.

¹⁵³ *Id.*

¹⁵⁴ *Id.* See also *In re Groundwater Cases*, 154 Cal.App.4th 659 (1st Dist. Ct. App. 2007).

¹⁵⁵ See *In re Groundwater Cases*, 154 Cal.App.4th, at 673.

¹⁵⁶ See *id.* at 667.

wrongful death.¹⁵⁷ Plaintiffs alleged that the defendants provided contaminated water.¹⁵⁸

Plaintiffs unsuccessfully argued that the PUC and public water providers owed a mandatory duty to provide water that met a “pure, wholesome and potable water” standard in addition to minimum contaminant levels (“MCLs”) set by a numeric standard.¹⁵⁹ In their appeal, plaintiffs argued that the trial court misapplied the law.¹⁶⁰ Plaintiffs contended, in relevant part, that the trial court adopted overly narrow definitions of the terms “federal and state drinking water standards” and “violations”¹⁶¹ and the trial court erred in concluding that plaintiffs failed to identify any enactment imposing a “mandatory duty” on the public entity defendants within the meaning of the Government Claims Act.¹⁶² The appeals court was not persuaded and affirmed the denial of their suit.¹⁶³

On first argument, plaintiff’s sought to have the “pure” or “wholesome potable, and healthful” standard be applied to create a duty by the defendants.¹⁶⁴ After reviewing the history of water regulation set by both federal and state regulators, the court recognized that the SDWA and the State’s Legislature gives the State regulators deference in enforcing water regulations as long as they are not less stringent than those set by the EPA.¹⁶⁵ The court concluded that standards defined as “pure, wholesome, and potable” are not enforceable to create a duty by the defendants and give rise to liability.¹⁶⁶ Furthermore, the court concluded that to impose liability on water suppliers for failing to provide “pure” or “wholesome and potable water” would impose a standard impossible to achieve and recognized that this type of term is merely an expression of legislative or public policy goals and not objective standards by which the performance and liability of water suppliers can be measured.¹⁶⁷ Next the court looked at the Government Claims Act and the three-pronged

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 673.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See id.* at 695.

¹⁶⁴ *See id.* at 674.

¹⁶⁵ *See id.* at 677-679.

¹⁶⁶ *See id.* at 682.

¹⁶⁷ *See id.* at 683.

test for determining whether liability may be imposed on a public entity:

- (1) the enactment in question must impose a mandatory, not discretionary, duty;
- (2) the enactment must be intended to protect against the kind of risk of injury suffered by the party asserting the statute as the basis of liability;
- and (3) breach of duty must be a proximate cause of the plaintiff's injury.¹⁶⁸

Under the first prong, the plaintiff must specifically identify the statute or regulation alleged to create a mandatory duty.¹⁶⁹ The enactment must be obligatory, rather than merely discretionary or permissive.¹⁷⁰ Plaintiffs did not specifically identify a particular statute or regulation on which they based their argument, but referred to various enactments.¹⁷¹ The reviewing court concluded that the enactments referred to do not create a mandatory duty, but actually gave water suppliers *discretion* regarding how to formulate testing and reporting standards, or state a policy goal or objective.¹⁷² As plaintiffs failed to identify a statute creating a mandatory duty, the other prongs were not analyzed and their argument failed.¹⁷³

Similarly, if a plaintiff were to bring a Government Claims Act suit for clean and affordable water against the State under provisions created by AB 685 it would fail because the statute does not create a duty on the part of the State.¹⁷⁴ The statute merely defines the State's policy for the kind of water provided and directs regulatory agencies to consider this policy while conducting their discretionary duties; it does not create a duty to provide water that meets a standard of being "clean" or "affordable."¹⁷⁵ The statute is not intended to protect against any injury suffered by not having "clean" and "affordable domestic water."¹⁷⁶ Further, AB 685 does not impose a breach because there is no duty created to provide "clean" and "affordable water."¹⁷⁷

¹⁶⁸ See *id.* 688-689.

¹⁶⁹ See *id.* at 689.

¹⁷⁰ *Id.*

¹⁷¹ See *id.* at 690-691.

¹⁷² See *id.* at 691-693.

¹⁷³ See *id.* at 692.

¹⁷⁴ See CAL. WATER CODE § 106.3(b) (2013).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Therefore, a claim would not succeed under the Government Claims Act because it cannot meet the three-prong test.¹⁷⁸

2. A Challenge Under Traditional Mandate Would be Unsuccessful

Since a lawsuit under the Government Claim Act would be defeated, a claimant may bring a nonmonetary suit seeking declaratory or injunctive relief from a public entity requiring it to perform or not perform a statutory duty through a traditional mandate or an administrative mandate.¹⁷⁹ Legislative and ministerial acts are reviewed under a traditional mandate.¹⁸⁰ An administrative mandate is required to review certain types of quasi-judicial decisions made after a hearing in which the agency received evidence.¹⁸¹

A legislative action is the formation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts, as is done when establishing primary drinking water standards that include the MCLs of contaminants.¹⁸² In *Western Petroleum Association v. State Department of Health*, 99 Cal.App.4th 999 (3rd Dist. Ct. Apps. 2002), the court reviewed the case under a traditional mandate because the legislature required the establishment of a secondary drinking water standard for methyl tertiary-butyl ether, commonly known as MTBE.¹⁸³ Acting on that mandate, a series of studies were conducted to determine the appropriate MCLs for MTBE regulation.¹⁸⁴ Plaintiff, Western States Petroleum Association and the California Chamber of Commerce, unsuccessfully sought declaratory relief and a petition for writ of mandate. On appeal, the plaintiffs held two overlapping contentions.¹⁸⁵ They asserted that the Department does not have the statutory authority to establish the standard and that the standard is arbitrary and capricious and does not have evidentiary support.¹⁸⁶

¹⁷⁸ See *In re Groundwater Cases*, 154 Cal.App.4th 659, 688-89 (1st Dist. Ct. App. 2007).

¹⁷⁹ See CAL. CIV. PRO. CODE § 1085 (West 2011).

¹⁸⁰ *Id.*

¹⁸¹ See CAL. CIV. PRO. CODE § 1094.5(b) (2012).

¹⁸² See *id.*; *W. States Petroleum Ass'n v. Dept. of Health Serv.*, 99 Cal.App.4th 999, 1002 (3rd Dist. Ct. Apps. 2002).

¹⁸³ See *W. States Petroleum Ass'n*, 99 Cal.App.4th, at 1006.

¹⁸⁴ See *id.* at 1003-05.

¹⁸⁵ See *id.* at 1002.

¹⁸⁶ *Id.*

The reviewing court determined that the Department had authority to establish the standard because it was required to do so by express legislative direction.¹⁸⁷ The court recognized that this is a “distinctively legislative process, and a court does not have the authority to exercise its independent judgment with respect to the performance of legislative functions.”¹⁸⁸ Due to the legislative function, the court limited its review to a determination of whether the Department reasonably interpreted its legislative mandate.¹⁸⁹

On the contention that the regulatory standard is arbitrary and capricious, calling into question “the Department’s determination and weighing of the facts and policy considerations relevant to the regulatory standard,” the court recognized that the regulation comes to the court with “a strong presumption of validity.”¹⁹⁰ Therefore, the party challenging the regulation has the burden of demonstrating its invalidity by showing the regulation is arbitrary and capricious.¹⁹¹

In its review of the arguments made, the court looked to the rational basis in which the SDWA and the Local Drinking Water Protection Act are remedial acts intended to protect the public from contaminated drinking water.¹⁹² Through the Acts, the Legislature delegated the primary authority and resultant responsibility for establishing drinking water standards to the Department.¹⁹³ Furthermore, the Legislature required the Department to establish a secondary drinking water standard for MTBE in a “reasonably prompt manner” and mandated that the standard “not exceed a consumer acceptance level for MTBE.”¹⁹⁴ Therefore, the Department was expressly given authority to consider any factor that may negatively affect the public welfare, specifically including the possibility that the presence of a contaminant “may adversely affect the order or appearance of the water and may cause a substantial number of persons served by the public water system to discontinue use.”¹⁹⁵ The Department was able to show it

¹⁸⁷ *Id.* at 1006, 1011.

¹⁸⁸ *Id.* at 1006.

¹⁸⁹ *Id.* at 1007.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 1008

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1009.

¹⁹⁵ *Id.*

conducted several surveys and technical tests when considering the Legislative objectives in determining the standard.¹⁹⁶

The plaintiffs complained that the Department did not give more weight to EPA guidance, which prescribed a reasonable range less stringent than the Department's regulatory standard.¹⁹⁷ They did not convince the court since the Legislature established its intent to improve laws governing drinking water quality, and to improve upon the minimum requirements of the federal SDWA.¹⁹⁸ The plaintiffs did not show that the Department's decision was so lacking in evidentiary and legal support as to be arbitrary and capricious.¹⁹⁹

Much like the *Western States Petroleum Association* case, a traditional and administrative mandate may be filed against the State to force a legislative, ministerial, or quasi-judicial decision with regard to AB 685.²⁰⁰ However, the challenger must show that the policy was arbitrary and capricious, and that the agency considering the policy in its administrative and quasi-judicial decisions abused its discretion.²⁰¹ AB 685 expands on the Legislature's intent, as discussed in *Western States Petroleum Association*, of improving on the minimum requirements of the federal SDWA by charging agencies to consider the State's policy that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking and sanitary purposes."²⁰² Therefore, the court will give deference to the agency imposing the regulation as long as it is not arbitrary and capricious, but protects the public from contamination in its drinking water.²⁰³

In reviewing AB 685 against the Government Claims Act and the traditional and administrative mandamus, it is apparent that AB 685 does not create a legal remedy for citizens who are not provided safe drinking water.²⁰⁴ AB 685 does not create a duty by the State to provide "clean" or "affordable" water; however, it does provide agencies with direction to consider the State's policy when

¹⁹⁶ See *id.* at 1012-14.

¹⁹⁷ *Id.* at 1015.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1016-1017.

²⁰⁰ *Id.* at 1002.

²⁰¹ *Id.* at 1017.

²⁰² See CAL. WATER CODE § 106.3(b) (2013).

²⁰³ See *W. States Petroleum Ass'n v. Dept. of Health Serv.*, 99 Cal.App.4th 999, 1017 (3rd Dist. Ct. Apps. 2002).

²⁰⁴ See discussion *supra* Part IV.A.1-2.

establishing their policies, regulations, or grants for drinking water.²⁰⁵ It is no more stringent than the SDWA in protecting the State's drinking water.²⁰⁶ It merely states that regulators must consider the new policy.²⁰⁷ It is unmistakable; the law does not create a legal remedy for those who are not provided safe drinking water.²⁰⁸ Therefore, a solution must be created so that every Californian has access to clean and affordable drinking water.

V. RECOMMENDATIONS: CLOSING THE GAPS TO ENSURE CLEAN WATER

Although drinking water standards exist, millions of Californians continue to rely on unregulated water and fall through a regulatory gap.²⁰⁹ Current statutes do not require the State to regulate small water providers (those with less than five connections) or private well users and they leave these classes of users without recourse for improved water quality.²¹⁰ In addition to the unregulated wells, widespread inconsistent testing and reporting presents a false account of the State's water quality.²¹¹

One reason for the inaccurate accounting is due to the fact that water quality regulation does not extend to those small well providers or to private well owners, and it does not create a private right of action making the State accountable to those millions of Californians who rely on contaminated drinking water.²¹² Although the State has an intricate and complex system for regulating water, it falls short and any new policy is merely policy to be considered, without teeth to enforce, and consequently lacks the ability to create real change to water quality.²¹³

A. Revising the Framework to Include Small and Private Water Systems

²⁰⁵ See WATER CODE § 106.3(b).

²⁰⁶ See CAL. HEALTH & SAFETY CODE § 116270 (1997).

²⁰⁷ *Id.*

²⁰⁸ See WATER CODE § 106.3(b).

²⁰⁹ See CAL. HEALTH AND SAFETY CODE § 116275(n) (1995).

²¹⁰ *Id.*

²¹¹ See GOVERNOR'S DRINKING WATER STAKEHOLDER GRP., *supra* note 113, at 2.

²¹² See CAL. HEALTH AND SAFETY CODE § 116275(n).

²¹³ See discussion *supra* Part II.A.

When the State does not include smaller water providers and private wells in the regulatory scheme, the State does *not* have an accurate picture of California's water quality and, thus, achieving water quality is an unattainable goal.²¹⁴ The State has determined that wells with five to fourteen connections are the smallest type that will be regulated by State testing.²¹⁵ The State has reported that twenty-two million California residents use contaminated water, and over two million of those users are exposed to nitrate contaminated water.²¹⁶

Including small water providers and private wells into the State's regulatory purview would offer these water users more protections and would provide the State with opportunities to better regulate the State's water.²¹⁷ Furthermore, having an accurate account of the water quality would reduce the number of California residents who rely on contaminated water. The information would make the State aware of the dire water quality and provide State regulators with the necessary data to implement a water quality program that provides non-contaminated drinking water more in line with its policy.²¹⁸ An accurate account of California's water quality will allow resources to be directed to the State's most vulnerable citizens;²¹⁹ regulated water providers are required to correct water quality problems and bring water into compliance.²²⁰

B. Amend AB 685 to Create an Enforcement Mechanism

Closing the gap to include small water providers and private well owners within the State's regulatory purview may not be enough without providing them a legal path to enforce their right to safe drinking water.²²¹ AB 685 simply created another policy that expanded upon existing legislative policies that water for domestic use is a priority, or that "pure, wholesome and potable water" is the policy

²¹⁴ See discussion *supra* Part II.A.

²¹⁵ See CAL. HEALTH AND SAFETY CODE § 116275(n).

²¹⁶ STATE WATER RES. CONTROL BD., *supra* note 7, at 13; STATE WATER RES. CONTROL BD., *supra* note 41, at 4.

²¹⁷ See discussion *supra* Part II.A.

²¹⁸ See discussion *supra* Part II.

²¹⁹ See discussion *supra* Part III.

²²⁰ See discussion *supra* notes 32-37.

²²¹ See CAL. HEALTH AND SAFETY CODE § 116275(n) (1995). See discussion *supra* Part IV.A.1-2.

standard for water quality.²²² By falling short of a mandate or creating a duty, millions of Californians must continue to rely on contaminated water running through their faucets.²²³ These Californians do not have access to affordable drinking water because they purchase additional replacement water to supplement the contaminated water they already pay for.²²⁴ This problem will persist until the statute codified by AB 685 is amended to create a *mandatory* duty by the State to ensure clean, safe, affordable and accessible water for all Californians through regulation and funding.²²⁵

C. Public Goods Charge for Water

By including small water providers and private wells into the purview of the State, the regulatory population will necessarily rise.²²⁶ If the regulatory population increases, financing to support the regulation would need to expand as well.²²⁷ More stable funding streams will be necessary to ensure the State's policy is successfully implemented.²²⁸ In order to provide the essential additional funding, a public goods charge for water, similar to that imposed by the electric industry, should be put into effect.²²⁹

The energy public purpose fund was created in 1997 when California underwent a deregulation of the electricity industry.²³⁰ The intent of deregulation was to ensure "a more competitive electricity market structure . . . that provides competitive, low cost and reliable electric service . . . and preserves California's commitment to developing

²²² See CAL. HEALTH AND SAFETY CODE § 106 (1943). See also LEAHY, *supra* note 141.

²²³ See STATE WATER RES. CONTROL BD., *supra* note 7, at 13, 22.

²²⁴ See CHRISTIAN-SMITH ET AL., *supra* note 9, at 8.

²²⁵ See CAL. WATER CODE § 106.3(b) (2013).

²²⁶ See discussion *supra* Part V.A.

²²⁷ See discussion *supra* Part II.D.

²²⁸ *Id.* See WATER CODE § 106.3(b).

²²⁹ See generally LEGIS. ANALYST'S OFFICE, FUNDING PUB.-PURPOSE WATER-RELATED ACTIVITIES (2011), available at http://www.lao.ca.gov/handouts/resources/2011/Funding_Public_Purpose_Water_Related_Activities_42811.pdf (providing analysis on the potential of a water public purpose charge).

²³⁰ See Assemb. B 1890, 1996 Assemb. (Cal. 1996), available at http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1851-1900/ab_1890_bill_960924_chaptered.html.

diverse environmentally sensitive electric resources.”²³¹ As part of the transition, the legislature directed the PUC to order the three large investor-owned utilities²³² to collect a public goods charge; a nonbypassable²³³ surcharge collected from consumers to create a fund managed by the PUC.²³⁴ The express purpose of the public goods charge was to provide funding for programs that enhance reliability of the State’s electric system and to provide Californians with the benefits of energy efficiency and conservation, research and development, and the creation of new and renewable resource technologies.²³⁵ The resulting success of the public goods charge is well documented.²³⁶ California has reduced its energy consumption significantly.²³⁷

The legislated public goods charge had a sunset date of 2012, and in 2011 Governor Brown requested that the PUC “take action under the PUC’s authority to ensure that programs like those supported by the Public Goods Charge are instituted – and hopefully at their current levels.”²³⁸ At that request, the PUC initiated the process to implement and adopt a new public goods charge program called Electric Program Investment Charge (“EPIC”), which requires electric utility corporations serving California to collect a surcharge on their ratepayers’ electricity bills to fund renewable energy research, development, and demonstration projects, with the aim of making

²³¹ *Id.*

²³² *See id.* *See also* CAL. PUB. UTIL. COMM’N, 2014 ANNUAL REPORT 26 (2014), available at http://www.cpuc.ca.gov/NR/rdonlyres/9E7AB362-19B5-41BD-98C9-96A28C3D58C3/0/CPUC2014AnnualReport_forPrint_v001.pdf (stating the state’s three investor-owned utilities include: Pacific Gas and Electric Company, Southern California Edison, and San Diego Gas & Electric).

²³³ *See* CAL. PUB. UTIL. CODE § 399(b)(1) (2008) (defining the nonbypassable charge as a flat-fee-per-kilowatt-hour of usage and is a separate component of the electric bills, segregated from other revenue, to be used for public goods benefits).

²³⁴ PUB. UTIL. CODE § 399(c)(1).

²³⁵ PUB. UTIL. CODE § 399(a).

²³⁶ *See* CAL. PUB. UTIL. COMM’N, *supra* note 232, at 28, 29 (noting a component of the public goods program, energy efficiency, has resulted in “enough energy savings to power nearly 1.5 million homes for a year and offset a significant proportion of summer peak electricity generation.” This is estimated as a reduction of “CO₂ emissions by 5.4 million tons, the equivalent of removing one million cars from California roads”).

²³⁷ *Id.*

²³⁸ *See* S. Cal. Edison Co. v. PUC, 277 Cal.App.4th 172, 181 (2nd Dist. 2014).

electricity service cheaper, safer, and more reliable for the corporations' own ratepayers.²³⁹

In 2014, Southern California Edison ("SCE") challenged the PUC's decision to create EPIC and petitioned for a writ of review.²⁴⁰ SCE unsuccessfully argued that the PUC illegally went around the legislature and imposed a tax.²⁴¹ The PUC demonstrated it was within its authority to implement EPIC along with other statutes that promote renewable energy and research development and distribution programs.²⁴² The court agreed with the PUC, citing the ruling in *Griffith v. City of Santa Cruz*, 207 Cal.App.4th 982 (2012), which clarified that a "special tax" under article XIII of the California Constitution does not "embrace fees charged in connection with regulatory activities and do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and are not levied for unrelated revenue purpose."²⁴³ *Griffith's* rule was applied to show a fee is not a tax:

... the State must show that (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity.²⁴⁴

The court was satisfied that the PUC met the requirements that the estimated cost of the service or regulatory activity for EPIC did not exceed what was necessary.²⁴⁵ The PUC further demonstrated that EPIC bears a reasonable relationship to ratepayer's benefits because the charge is designed to benefit the ratepayers only "by making their electricity cheaper, safer, and more reliable."²⁴⁶ As far as the administrative component, the PUC tightly controls that aspect of the program and is able to describe how EPIC's revenues will be allocated.²⁴⁷ The PUC was able to clearly show how the fees charged are directly "linked to the activity" performed under EPIC and the

²³⁹ *See id.*

²⁴⁰ *See id.* at 185.

²⁴¹ *Id.* at 185, 192.

²⁴² *See id.* at 182, 186, 191-194.

²⁴³ *See id.* at 199.

²⁴⁴ *See id.*

²⁴⁵ *See id.* at 200.

²⁴⁶ *See id.*

²⁴⁷ *See id.*

scope of EPIC is related to the “overall cost of the government regulation.”²⁴⁸

1. Implementing A Water Public Goods Charge

The electricity public goods charge was a response to the State’s policy to provide competitive, low-cost, and reliable electric service and its success is evident in the significant reduction in energy use and generation.²⁴⁹ The impetus for the State’s deregulation and public goods charge was the energy crisis the United States faced as a result of the 1978 oil embargo.²⁵⁰ California was experiencing negative implications such as high costs for energy.²⁵¹ The public goods charge has successfully stabilized reliable energy distribution and has shaped energy efficiency.²⁵²

Much like the State’s intent to meet policy goals and manage a crisis with the energy public goods charge, the State could benefit by implementing a public goods charge for water.²⁵³ AB 685 provides that State agencies must consider the State’s policy to provide the human right to safe, clean, affordable and accessible water.²⁵⁴ This policy, along with the water crisis, drought conditions, required emergency interim solutions, inaccurate or incomplete data on small and private wells, and a persistent dependence on contaminated waters, can serve as the impetus for a public goods charge for water.²⁵⁵

The State can ensure the public goods charge for water is not a tax by guaranteeing the structure of the program meets the *Griffith*

²⁴⁸ *See id.*

²⁴⁹ *See* Assemb. B 1890, *supra* note 230. *See also supra* note 236 and accompanying text.

²⁵⁰ *See generally* S. OFF. OF RES., AN OVERVIEW: HOW WE GOT HERE, HISTORICAL LOOK AT CALIFORNIA’S RESTRUCTURING OF ELECTRICITY REGULATION, available at <http://www.sor.govoffice3.com/vertical/sites/%7B3BDD1595-792B-4D20-8D44-626EF05648C7%7D/uploads/%7B4275BA2A-DC48-49A3-81FE-3A3896930788%7D.HTM> (last visited Oct. 4, 2014) (discussing the influences that lead to federal orders that lead to energy deregulation).

²⁵¹ *Id.*

²⁵² *See* CAL. PUB. UTIL. COMM’N, *supra* note 232. *See also supra* note 236 and accompanying text (showing documented results of the electricity public goods charge).

²⁵³ *See* discussion *supra* Part V.C.

²⁵⁴ *See* CAL. WATER CODE § 106.3(b) (2013).

²⁵⁵ *See* discussion *supra* Parts II., III.

requirements.²⁵⁶ The State must show that (1) the estimated costs of the service or regulatory activity does not exceed what is necessary to meet program goals, and (2) the program bears a reasonable relationship to ratepayers' benefits by making water safe, clean, affordable and accessible by regulating small and private well owners, providing a more accurate account of water quality, establishing water quality public education campaigns, and creating water conservation research to develop technologies to reduce overall water consumption to ease drought concerns.²⁵⁷ Additionally, the State must establish which of its regulatory agencies would implement the program; however, it would likely fall under a combination of the PUC and the State Water Board, as both have regulatory authority over the State's water providers and could impose a regulatory fee upon them.²⁵⁸

By creating a public goods charge for water, California can ensure its citizens are provided with safe drinking water because the necessary funding would be available to include small water providers and private wells into the regulatory purview of the State.²⁵⁹ The public goods charge would offer other benefits such as research and development for water conservation efforts and the ability to implement a manageable water quality data collection system providing a clearer picture of the State's water quality.²⁶⁰

VI. CONCLUSION

Over twenty-one million Californians live, and ultimately try to survive, with contaminated drinking water.²⁶¹ California's small, rural communities instrumental in feeding the world are unfortunately left with nitrate-contaminated water as a result of the agricultural activity.²⁶² The community of Seville is just one example of Californians who rely on water that has been degraded to the point

²⁵⁶ See *S. Cal. Edison Co. v. PUC*, 277 Cal.App.4th 172, 199 (2nd Dist. 2014).

²⁵⁷ *Id.*

²⁵⁸ See discussion *supra* notes 242-244 (stating that the PUC has authority as a utility regulator); see generally STATE WATER RES. CONTROL BD., ABOUT THE WATER BOARD (FEB. 11, 2015), [HTTP://WWW.SWRCB.CA.GOV/ABOUT_US/](http://www.swrcb.ca.gov/about_us/) (noting that California's Safe Drinking Water Act is administered by the California State Water Resource Board).

²⁵⁹ *Cf. supra* notes 249-252 (creating an energy public goods charge provided a solution that allowed new forms of energy and energy efficiency programs).

²⁶⁰ *Id.*

²⁶¹ See *supra* text accompanying notes 7-14.

²⁶² See *Brown, supra* note 6.

where it cannot be consumed.²⁶³ Since the community's water provider is too small to receive funding to fix their water problems there is little to no remedy for its citizens.²⁶⁴ The State's interactive tool is hopeful in providing an indication that a nearby well is contaminated to alert testing of wells.²⁶⁵ Unfortunately, the data necessary to make this tool truly useful is lacking because small and private well owners are not required to test their wells and when wells are tested the submission of data to the State is inconsistent.²⁶⁶ The passage of AB 685 was encouraging, but it falls short in creating an enforcement mechanism to mandate California to fix the problem of water contamination—millions of Californians fall through the regulatory gap and continue to rely on contaminated drinking water.²⁶⁷

By including the small well and private domestic well owners into the regulatory scheme, the State can receive information that will provide regulators a better picture of the State's water quality status.²⁶⁸ Furthermore, having an accurate account of water quality will help target areas with the most need, allocate grant dollars to those communities that are the most vulnerable, and create opportunities to educate residents about water quality and conservation.²⁶⁹ These communities may also serve as sites for new water conservation technologies or remedial technologies to bring water quality up to standards.²⁷⁰

Bringing these small and private domestic well owners into the regulatory scheme will, without a doubt, put a strain on current financing structures that the State Water Board already manages.²⁷¹ Therefore, a water public goods charge should be implemented to create a funding mechanism to help solve the current water contamination problems and help educate all water users about conservation.²⁷² A productive program would additionally ensure an accurate data collection system of water quality; create a program for research and development for water conservation technologies at the

²⁶³ See Brown, *supra* note 6.

²⁶⁴ See discussion *supra* notes 10-12.

²⁶⁵ See discussion *supra* notes 44-45.

²⁶⁶ *Id.*

²⁶⁷ See CAL. WATER CODE § 106.3(b) (2013).

²⁶⁸ See discussion *supra* Part V.A.

²⁶⁹ See discussion *supra* Part II.A., III.A.

²⁷⁰ *Id.*

²⁷¹ See discussion *supra* Part II.D.

²⁷² See discussion *supra* Part III.A.

end users location; establish water quality public education campaigns; and provide remedial programs for contaminated wells and technical assistance and infrastructure to small well providers.²⁷³

A three-prong approach to fixing the problem of too many Californians relying on contaminated water would include: (1) an amendment to the regulatory framework to include small and private water systems, (2) an amendment of AB 685 to create a mandatory duty by the State to enforce water quality, and (3) the creation of a water public goods charge to provide crucial funding.²⁷⁴ This three-prong approach would bring necessary comfort to families, such as those who live in Seville.²⁷⁵ By bringing them into the regulatory framework and creating a duty by the State that little boy and girl running in for a drink of water at the school water fountain will have access to clean, safe drinking water.²⁷⁶ A public goods charge would create the necessary funding to support the regulation, improve water infrastructure and clean up efforts, as well as provide education on water conservation.²⁷⁷ Seville just might be a prime location where new water technologies can be introduced and tested.²⁷⁸ If these solutions were implemented, the school children of Seville could drink freely from the water fountain.²⁷⁹ Feeding the world would not leave these Californians living in thirst with the fear of consuming contaminated water.²⁸⁰

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²⁷³ See discussion *supra* Parts V.

²⁷⁴ See generally *S. Cal. Edison Co. v. PUC*, 277 Cal.App.4th 172, 199 (2nd Dist. 2014) (stating the PUC could implement a public goods charge).

²⁷⁵ See generally Brown, *supra* note 2 (reporting on contaminated water).

²⁷⁶ *Id.*

²⁷⁷ See discussion *supra* Parts II., III, V.

²⁷⁸ See discussion *supra* notes 11-14.

²⁷⁹ *Id.*

²⁸⁰ See discussion *supra* Part III.

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