

UNILATERAL CURTAILMENT OF WATER RIGHTS: WHY THE STATE WATER RESOURCE CONTROL BOARD IS OVERSTEPPING ITS JURISDICTION

I. INTRODUCTION

California water rights are unrivaled by anything in California's government or politics in terms of its complexity.¹ The Water Commission Act of 1913 created California's current system of water rights, including the critical distinction between junior and senior appropriative water users.² It established the State Water Commission and entrusted it with the power to grant permits for the appropriation of unappropriated water.³ Permits granted by the State Water Commission gave the applicants priorities as to the use of water.⁴ Under this system, California recognized two types of water rights, riparian and appropriative water rights.⁵ Appropriator rights are further subdivided into pre-1914 and post-1914 water rights.⁶ Post-1914 appropriative right holders are known as junior right holders while pre-1914 appropriative right holders are known as senior right holders.⁷

In the fifth year of the record-breaking California drought, it has become important to clarify the scope of water rights and modify them for the future to prevent the State Water Resource Control Board's ("SWRCB") unilateral curtailment of water rights.⁸ The SWRCB began issuing curtailment orders in early 2014 to over 5,000 junior water right holders.⁹ Since April 2014, the

¹ Dan Walters, Opinion: *Drought shows need to untangle California water rights*, SACRAMENTO BEE (June 28, 2015), <http://www.sacbee.com/news/politics-government/dan-walters/article25682590.html>.

² *Mojave River Irr. Dist. v. Superior Court of State of California in & for San Bernardino Cnty.*, 202 Cal. 717, 720-21 (1927).

³ *Id.*

⁴ *Id.*

⁵ *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1478, (2014), *as modified on denial of reh'g* (July 11, 2014), *review denied* (Oct. 1, 2014).

⁶ *Id.*

⁷ Sammy Roth, *Even in drought, CA water rights politically toxic*, THE DESERT SUN (October 5, 2015), <http://www.desertsun.com/story/news/environment/2015/09/30/even-drought-ca-water-rights-politically-toxic/73065384/>.

⁸ Walters, *supra* note 1.

⁹ State Water Resource Control Board, Notice of unavailability of water and need for immediate curtailment for those diverting water in the Sacramento-San Joaquin

SWRCB has issued curtailment notices to all post-1914 appropriative right holders in the Sacramento and San Joaquin River watersheds.¹⁰ Then, on January 23, 2015 and again on April 2, 2015, the SWRCB issued notices of water shortages and the potential for further curtailment due to dry conditions throughout the State.¹¹ On June 12, 2015, the SWRCB notified pre-1914 water right holders for the Sacramento to San Joaquin watersheds and the Delta with priority dates of 1903 and later, of insufficient water in the system to service their claims of right.¹²

In late June 2015, a Sacramento County Superior Court directed the SWRCB to halt enforcement of curtailment notices.¹³ However, the court's decision did not affect the SWRCB's enforcement of fines for unauthorized diversions.¹⁴ On July 15, 2015 the SWRCB clarified the June 12, 2015 curtailment notices and partially rescinded the notices.¹⁵ The rescission of the curtailment notices characterized the previous notices as advisory in nature.¹⁶ The SWRCB reinforced the notion that there was insufficient water in the rivers and watersheds to serve all water right holders.¹⁷ The SWRCB also stated, "diversion of water when there is no available water is an unauthorized diversion and use and is subject to enforcement by the SWRCB."¹⁸ On September 18, 2015, the SWRCB lifted restrictions for some Sacramento Valley and Delta farmers because there was sufficient water to meet demand.¹⁹ The decision affected 238 right holders who received curtailment orders in June.²⁰ There has been a pattern of issuing curtailment orders during drought

Watersheds and Delta with a pre-1914 appropriative claim commencing during or after 1903 (2015).

¹⁰ Kathryn Oehlschlager, *California Drought Prompts Bout Among Regulators and Farmers*, BARG COFFIN LEWIS & TRAPP, LLP JDSUPRA, (Aug. 17, 2015), <http://www.jdsupra.com/legalnews/california-drought-prompts-bout-among-54523/>.

¹¹ State Water Resource Control Board, *supra* note 9.

¹² *Id.*

¹³ Kerry Shea, *California State Water Board Flexes Its Enforcement Muscle With Water Diverters*, ENERGY & ENVIRONMENTAL LAW BLOG (July 24, 2015), <http://www.energyenvironmentallaw.com/2015/07/24/california-state-water-board-flexes-its-enforcement-muscle-with-water-diverters/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Elizabeth Warmerdam, *Water Flowing Again for Some Calif. Farmers*, COURTHOUSE NEWS SERVICE (September 18, 2015, 5:34 AM), <http://www.courthousenews.com/2015/09/18/water-flowing-again-for-some-calif-farmers-htm>.

²⁰ *Id.*

conditions and rescission when water conditions improve.²¹ SWRCB enforcement program manager Kathy Mrowka said, “[i]t’s a seasonal thing.”²² Droughts, although sporadic, have been plentiful.²³

This Comment will show that the SWRCB lacks the authority to curtail pre-1914 water rights, and the SWRCB’s actions in unilateral curtailment of water rights was a violation of the Due Process Clause and an unconstitutional taking under the Fifth Amendment of the United States Constitution. Part II will outline riparian and pre- and post-appropriative water rights and their limitations. Next, Part II will delve into a comprehensive history of California droughts, water conditions, and the extent of the SWRCB’s authority. Part III will discuss whether or not the SWRCB’s curtailment notices afforded the recipients proper due process and whether or not such curtailments constitute a taking under the Fifth Amendment. Part IV of this Comment will recommend that with a possible multi decadal drought looming over the heads of the residents of the State of California, the water rights must be better managed. Part V will conclude that in California’s complex water law jurisprudence, redefining surface water rights is long overdue.

II. FACTUAL BACKGROUND

A. *Overview of Water Rights Law*

1. *Riparian*

Riparian users are those who possess water rights by virtue of owning the land by or through which flowing water passes.²⁴ The riparian proprietor does not own the water of a stream, but rather owns a usufructuary right to the use of the water.²⁵ The riparian status is determined by three criteria: (1) the land in question must be contiguous to the stream, (2) the riparian right extends only to the smallest tract held under one title in the chain of title leading to the present owner, and (3) the land in order to be riparian must be within the watershed of the stream.²⁶ This right is shared with all other riparian right

²¹ Shelby Grad and Scott Harrison, *California Retrospective 3 crippling droughts that changed California*, LA TIMES (April 13, 2015, 7:55 AM), <http://www.latimes.com/local/california/la-me-california-retrospective-20150413-story.html>.

²² Ken Broder, *Some Senior Rights Holders Get Their Water Back, for Now*, ALLGOV (September 22, 2015), <http://www.allgov.com/usa/ca/news/controversies/some-senior-rights-holders-get-their-water-back-for-now-150922?news=857475>.

²³ *Id.*

²⁴ *Light v State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1478 (2014), *as modified on denial of reh’g* (July 11, 2014), *review denied* (Oct. 1, 2014).

²⁵ *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806, 824 (S.D. Cal. 1958).

²⁶ *Rancho Santa Margarita v. Vail*, 11 Cal.2d 501 (1938).

holders on the same stream of water.²⁷ The right to use is limited to reasonable use of the water on the land when it is needed.²⁸ Riparian right holders are not limited to a specific amount of water.²⁹ All rights to the use of water, including riparian rights, are limited to such water as is reasonably required for the beneficial use to be served.³⁰ Water rights do not extend to the waste, unreasonable use, or unreasonable method of diversion of water.³¹ The riparian right is not lost by non-use; however, to the extent that water is not utilized by riparian proprietors, it is subject to the appropriation and beneficial use by others.³² Riparian water rights vest when the three criteria are met and are only lost upon severance from land bordering the stream by conveyance.³³ By contrast, appropriative water rights are more complex.

2. *Pre and post appropriative rights*

Appropriators are those who hold the right to divert the water for use on noncontiguous lands.³⁴ Prior to December 1914, there were two ways to establish a right to appropriate water.³⁵ The first was established at statehood: once a diverter acted with the intent to appropriate water, that diverter held a claim to the volume of water necessary to serve a purpose.³⁶ As long as the water was diverted within a reasonable time and used for a beneficial purpose, the claim had priority over any other established claim.³⁷ The second was established by the passage of Civil Code sections 1415 through 1421, under which a person intending to establish a claim of appropriation was required to post a notice and record a copy of the notice with the county.³⁸

Under both claims, the right is limited to beneficial use of water rather than the amount claimed or diverted.³⁹ Pre-1914 appropriators, or senior water right

²⁷ *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806, 824 (S.D. Cal. 1958).

²⁸ CAL. CONST. art. X, § 2.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806, 824 (S.D. Cal. 1958).

³³ *See Rancho Santa Margarita v. Vail* 11 Cal.2d 501 (1938); *Miller & Lux, Inc. v. J.G. James Co.* 179 Cal. 689 (1919).

³⁴ *Light v State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1478 (2014), *as modified on denial of reh 'g* (July 11, 2014), *review denied* (Oct. 1, 2014).

³⁵ *Millview County Water District v. State Water Resource Control Board* 229 Cal.App.4th 879, 890-91 (2014), *as modified on denial of reh 'g* (Oct. 14, 2014), *review denied* (Dec. 17, 2014).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Hufford v. Dye*, 162 Cal. 147, 153 (1912).

holders, can withdraw such water as is reasonably beneficial.⁴⁰ While pre-1914 appropriators and riparian users do not need a permit or other governmental authorization to exercise their water rights, post-1914 junior right holders can only access and possess water through a permit and license issued by the SWRCB.⁴¹ They must go through the administrative process and are subjected to the regulation of the SWRCB to obtain their rights.⁴²

While junior right holders are required to report how much water they're using once a year, senior right holders only have to report their water use once every three years.⁴³ Sporadic reporting of how much water is used makes it difficult for the SWRCB to determine how much water is being used and how much is being stolen.⁴⁴ Senior appropriative water rights vest upon initial diversion of water because the claim of right is established by the year the water was first diverted.⁴⁵ Once appropriators divert the water, they hold a right to use water for a beneficial purpose.⁴⁶ On the other hand, junior water rights vest after the SWRCB appropriates the water.⁴⁷ California's water rights system has increased in complexity with each drought.

B. Drought Background

1. Historic trends

California has endured water scarcity numerous times over the last century and each occasion has brought challenges and lessons for the State.⁴⁸ California farmers, ranchers, and residents have lived with tremendous year-to-year variable precipitation and crippling droughts marking almost every

⁴⁰ *California Farm Bureau Fed'n v. State Water Resources Control Bd.*, 51 Cal.4th 421, 428–429 (2011) *as modified* (Apr. 20, 2011).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Roth, *supra* note 7.

⁴⁴ *Id.*

⁴⁵ *See Millview County Water District v. State Water Resource Control Board*, 229 Cal.App.4th 879, 890-91 (2014), *as modified on denial of reh'g* (Oct. 14, 2014), *review denied* (Dec. 17, 2014).

⁴⁶ *See id.*

⁴⁷ *See generally* *California Farm Bureau Fed'n v. State Water Resources Control Bd.*, 51 Cal.4th 421, 428–429 (2011) *as modified* (Apr. 20, 2011) (junior water right holders do not have authority to use water until the SWRCB has appropriated the water to the junior water right holders).

⁴⁸ Adam Kotin and Dru Marion, *A History of Drought in California: Learning From the Past, Looking to the Future*, CIVIL EATS (February 5, 2014), <http://civileats.com/2014/02/05/a-history-of-drought-in-california-learning-from-the-past-looking-to-the-future/>.

decade.⁴⁹ In the 1920s, farmers relied largely on ground water and small reservoirs to survive drought years; however, the 1924 drought renewed interest in irrigation systems along with larger storage systems.⁵⁰ During the Dust Bowl era, between 1928 and 1935, there was a desire for storage of water on a grander scale and construction of dams and canals to move water.⁵¹ Then, the multi-year droughts that occurred from 1947 to 1950 and 1959 to 1960 helped justify the investment in the State Water Project to irrigate the Central Valley.⁵²

After a below average wet season in 1976, reservoirs were depleted along with the elimination of the snowpack in the Sierras, marking a stark similarity to the current drought conditions.⁵³ In 1977, forty-seven of the fifty-eight California counties declared a local drought emergency, marking one of the driest years on record.⁵⁴ This prompted significant cuts to some of the State's strongest water right holders.⁵⁵ Additionally, it sparked a trend toward water conservation rather than water projects.⁵⁶ The 1987 to 1993 dry conditions led to mandatory conservation measures once again.⁵⁷ The drought was finally declared over in 1993 after reservoir levels reached acceptable levels; however, cities had already begun loosening restrictions.⁵⁸

During the 1977 drought, Governor Jerry Brown decided that it was time to tackle the subject of water rights.⁵⁹ Governor Brown established a commission to review the water rights laws because "the existing law include[d] impediments to the fullest beneficial use of California's water."⁶⁰ While the commission crafted recommendations, the drought ended due to high rainfall in 1978.⁶¹

From 2007 to 2009, a mild drought brought issues of unsustainable groundwater use to light.⁶² Legislators passed reforms to require groundwater

⁴⁹ Adam Kotin and Dru Marion, *Amidst Severe Winter Drought, California Farmers Ask: Is This the New Normal?*, CIVIL EATS (January 17, 2014), <http://civileats.com/2014/01/17/amidst-severe-winter-drought-california-farmers-ask-is-this-the-new-normal/>.

⁵⁰ Adam Kotin and Dru Marion, *supra* note 48.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Grad and Harrison, *supra* note 21.

⁵⁴ Adam Kotin and Dru Marion, *supra* note 48.

⁵⁵ Will Houston, *Rio Dell preps for potential water rights curtailment*, TIMES-STANDARD (April 06, 2015, 10:39 PM), <http://www.times-standard.com/article/NJ/20150406/NEWS/150409876>.

⁵⁶ *Id.*

⁵⁷ Grad and Harrison, *supra* note 21.

⁵⁸ *Id.*

⁵⁹ Roth, *supra* note 7.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Adam Kotin and Dru Marion, *supra* note 48.

monitoring and plans for conservation.⁶³ Then began the current and worst drought on record.

2. *Current and future water conditions*

It is no secret that since 2011 California has been enduring the worst drought on record: the severe shortages of rain and snowfall have now entered into a fifth consecutive year.⁶⁴ State officials, primarily the SWRCB, announced water right cuts for the first time since 1977 by ordering cities and towns to cut water use by thirty-six percent.⁶⁵ California generally relies on few, yet significant, storms during the winter months to supply the State's water.⁶⁶

Farmers and ranchers are no strangers to drought, which has severely impacted costs for farmers and ranchers, who are now paying hundreds of dollars a day to feed livestock instead of the winter pastures they usually use this time of the year.⁶⁷ Further, dry wells and ponds are forcing some ranchers to haul water to their livestock at a cost of thousands of dollars or risk losing their animals.⁶⁸ However, the prospect of dry winters in the years to come is what is "most disquieting."⁶⁹

Although the current drought is the worst since the State began record keeping in the late 1800s, scientists suggest that California has had even worse droughts in the ancient past.⁷⁰ California may be in the grip of a "mega drought" that has the potential to last two decades or longer.⁷¹ Scientists discovered ancient droughts by looking at growth rings in tree trunks.⁷² A thin ring means stunted growth while a thick ring means a period of strong growth and therefore healthy rainfall.⁷³ B. Lynn Ingram, a paleoclimatologist at the University of California, Berkley, looked at tree rings around the State to help her gauge rainfall over the last hundred years.⁷⁴ Ingram found that much of the American southwest has had a history of mega-droughts that can last for years,

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Houston, *supra* note 55.

⁶⁶ Adam Kotin and Dru Marion, *supra* note 49.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Bryan Walsh, *Hundred Years of Dry: How California's Drought Could Get Much, Much Worse*, TIME (Jan. 23, 2014), <http://time.com/1986/hundred-years-of-dry-how-californias-drought-could-get-much-much-worse/>.

⁷¹ *Id.*

⁷² Henry Fountain, *In California, a Wet Era May Be Ending*, N.Y. TIMES (April 13, 2015), www.nytimes.com/2015/04/14/science/californias-history-of-drought-repeats.html.

⁷³ *Id.*; Walsh, *supra* note 70.

⁷⁴ Walsh, *supra* note 70.

decades, or even centuries.⁷⁵ Tree ring data analyzed by Richard Seager and other scientists has shown multi-decadal droughts between 800 A.D. and 1500 A.D.⁷⁶ The current drought and the possibility of a multidecadal drought highlight the imperative to continue improving water conservation and water use efficiency measures.⁷⁷

C. Regulating Water

The SWRCB administers California's system of water rights and is authorized to prevent unauthorized diversions of water.⁷⁸ It is responsible for efficient administration of water resources and regulatory functions of the State.⁷⁹ The SWRCB has permitting authority over all water not otherwise properly diverted or used under a riparian or pre-1914 right.⁸⁰ The Water Commission Act of 1913 ("the Act") authorized the appropriation and use of unappropriated water.⁸¹ It was enacted for the purpose of arbitrating and resolving the State's water battles.⁸² The Act established the State Water Commission ("the Commission") and also the permitting process.⁸³ The Commission later evolved into the SWRCB through the merger of two previous boards, the State Water Quality Control Board and State Water Rights Board.⁸⁴ Under the statutory system, the SWRCB exercises the adjudicatory and regulatory functions of the State in the field of water resources.⁸⁵ The SWRCB exercises its management responsibilities by granting permits for appropriation of water if the proposed water use is consistent with the public interest.⁸⁶ The SWRCB also has the authority to expand water curtailment

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Adam Kotin and Dru Marion, *supra* note 48.

⁷⁸ State Water Resource Control Board, Water Right Curtailment Update (2015).

⁷⁹ California Farm Bureau Fed'n v. State Water Res. Control Bd., 51 Cal. 4th 421, 428 (2011), *as modified* (Apr. 20, 2011).

⁸⁰ Young v. State Water Res. Control Bd., 219 Cal. App. 4th 397, 404 (2013), *as modified* (Sept. 20, 2013), *review denied* (Nov. 13, 2013)

⁸¹ Stats. 1913. C. 586, p. 1012.

⁸² STATE WATER RESOURCE CONTROL BOARD, *The Early years of Water Rights*, http://www.swrcb.ca.gov/about_us/water_boards_structure/history_water_rights.shtml (last updated Sep. 20, 2011).

⁸³ *Id.*

⁸⁴ STATE WATER RESOURCE CONTROL BOARD, *History of the Water Boards*, http://www.swrcb.ca.gov/about_us/water_boards_structure/history.shtml (last updated Sep. 20, 2011).

⁸⁵ CAL. WATER CODE § 174 (2014).

⁸⁶ *Id.* §§ 1253-1256 (2014).

powers.⁸⁷ However, this authority cannot be expanded to apply to senior water right holders.⁸⁸ Under new emergency drought regulations, the SWRCB has the executive authority to issue and immediately enforce curtailment orders against junior water right holders only.⁸⁹ The new regulation exempts senior water right holders. The original draft of the regulation presented to the SWRCB was altered because the SWRCB lacked statutory authority over pre-1914 and riparian right holders.⁹⁰

Under California Water Code section 1201, all water flowing in any channel is public water of the State and is subject to appropriation under the water code unless it is being used for a beneficial purpose on riparian lands or is otherwise appropriated.⁹¹ The SWRCB does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.⁹² The SWRCB does have authority to prevent illegal diversions and to prevent waste or unreasonable use of water regardless of the water right held.⁹³ Unauthorized diversions include exercise of water rights at times when there is insufficient water available under the priority of right held by the diverter.⁹⁴

1. *Who is being regulated*

The State's first mandatory cuts in urban water use also highlight the withering hold of a disastrous drought.⁹⁵ Urban cities and towns have been ordered to decrease water use by as much as thirty-six percent, and those who fail to comply face fines.⁹⁶ Farmers like Paul Simoni near Tracy, California

⁸⁷ See Brian Pearson, *Board expands water curtailment powers; New regulations exempt pre-1914 rights holders but make orders immediately enforceable*, APPEAL DEMOCRAT (July 16, 2014, 12:15 AM), http://www.appeal-democrat.com/colusa_sun_herald_board-expands-water-curtailment-powers-new-regulations-exempt-pre-1914-rights-holders-but-make-orders-immediately-enforceable/, article_9a9274e0-0c90-11e4-8b31-0017a43b2370.html.

⁸⁸ *California Farm Bureau Fed'n v. State Water Resources Control Bd.*, 51 Cal.4th 4221, 429 (2011), *as modified* (Apr. 20, 2011).

⁸⁹ Pearson, *supra* note 87.

⁹⁰ *Id.*

⁹¹ WATER CODE, § 1201

⁹² *California Farm Bureau Fed'n v. State Water Resources Control Bd.*, 51 Cal.4th 4221, 429 (2011).

⁹³ *Id.*

⁹⁴ State Water Resource Control Board, *supra* note 78.

⁹⁵ Bettina Boxall, *California moves to restrict water pumping by pre-1914 rights holders*, L.A. Times (June 12, 2015, 5:01 PM), <http://www.latimes.com/local/lanow/lame-In-drought-water-rights-20150612-story.html>.

⁹⁶ Abraham Lustgarten and Amanda Zamora, *The California Drought: All You Need to Know*, NEWS WEEK, (June 27, 2015), <http://www.newsweek.com/california-drought-all-you-need-to-know-347337>.

fear the potential impact from the curtailment orders.⁹⁷ Simoni employs 125 individuals and fears they will all be out of work if the water is cut off.⁹⁸ To Simoni, the implications of the drought extend from his farm to the entire agricultural community.⁹⁹ Simoni gets water from the Byron Bethany Irrigation District, one of the right holders cut off by the SWRCB's curtailment order.¹⁰⁰ Byron Bethany Irrigation District serves 160 farmers and is the sole provider for 12,000 residents including a newly established community, Faraz Haider.¹⁰¹ It is unclear where the new community will get its water.¹⁰² Farmers like Simoni rely solely on surface water instead of ground water, because they believed pre-1914 water rights could never be taken away.¹⁰³

The curtailment notices do not only affect farmers.¹⁰⁴ In 2014, the small town of Rio Dell, one of the junior right holders who obtained their appropriative rights after 1914, had their rights curtailed by the SWRCB.¹⁰⁵ Rio Dell's wells have been contaminated with heavy metals and have been forced to rely on Eel River as the only source of water.¹⁰⁶ As a result of the SWRCB's curtailment notices, the residents were only allowed to use fifty gallons of water per person per day.¹⁰⁷ Although the curtailment was rescinded in early August of 2014, City Manager Kyle Knopp has no illusions that "the State's recent announcement of imminent curtailments won't affect them again."¹⁰⁸ This raises the question of the SWRCB's authority to regulate.¹⁰⁹

2. *Can the SWRCB regulate water rights?*

The SWRCB does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.¹¹⁰ However, the SWRCB is empowered to enact necessary judicial, legislative, or administrative proceedings to prevent illegal

⁹⁷ Nick James, *California Farmers Worry Senior Water Rights Cuts in Drought Could Be Devastating*, CBS (June 12, 2015, 11:56 PM), <http://sacramento.cbslocal.com/2015/06/12/california-farmers-worry-senior-water-rights-cts-in-drought-could-be-devastating/>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See generally*, Houston, *supra* note 55. (The curtailment notices generally effect water districts that serve towns, cities, and farmers.)

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *California Farm Bureau Fed'n v. State Water Res. Control Bd.*, 51 Cal. 4th 421, 429 (2011).

diversions, waste, or unreasonable use of water regardless of the basis under which the right is held.¹¹¹

In November of 1928, section 3 of Article XIV of the California Constitution became effective.¹¹² The amendment's purpose was to modify and apply a reasonable use doctrine to both riparian owners and appropriators.¹¹³ Under this new approach, it became imperative to consider the needs of all water users and determine if the owners are putting the water to any reasonable beneficial uses.¹¹⁴ Water use by riparian users and appropriators are governed by the rule of reasonableness.¹¹⁵ The right to use water from any natural stream in the State of California is limited to that which is reasonably required for beneficial use.¹¹⁶ The California Constitution requires that the water resources of the State be put to beneficial use to the extent capable.¹¹⁷ It also requires that unreasonable use and waste be prevented in the interest of the public welfare.¹¹⁸ The amendment applied the rule of reasonable use to "all water rights enjoyed or asserted in this State whether the same be grounded on the riparian right, or the appropriative right."¹¹⁹ Reasonable use of water depends on the circumstances of each case.¹²⁰ Under the new approach, it is necessary to determine not only if the riparian user is putting the water to any reasonable beneficial use but also to find expressly the quantity required and used.¹²¹ Future beneficial use can be declared paramount to any appropriative right but cannot be fixed in amount until the need for the use arises.¹²²

Early in the twentieth century, Congress passed the Reclamation Act of 1902 ("the Act of 1902").¹²³ The Act of 1902 created a national program to reclaim arid lands in certain States by creating irrigation projects.¹²⁴ Under section 8 of the Act of 1902, irrigation is a beneficial use because the right to use the water attaches to the land that is irrigated, not the land through which the water

¹¹¹ *Id.*

¹¹² Tulare Irr. Dist. V. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 524 (1935).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Light v. State Water Res. Control Bd., 226 Cal. App. 4th 1463, 1478, 173 Cal. Rptr. 3d 200, 210 (2014), *as modified on denial of reh'g* (July 11, 2014), *review denied* (Oct. 1, 2014); Tulare Irr. Dist. V. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 524 (1935).

¹¹⁶ Light v. State Water Res. Control Bd., 226 Cal. App. 4th 1463, 1478 (2014), *as modified on denial of reh'g* (July 11, 2014), *review denied* (Oct. 1, 2014).

¹¹⁷ CAL. CONST. art. X, § 2.

¹¹⁸ *Id.*

¹¹⁹ Joslin v. Marin Mun. Water Dist, 67 Cal. 2d 132, 138 (1967).

¹²⁰ Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 695 (1933).

¹²¹ Tulare Irr. Dist. V. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 524 (1935).

¹²² *Id.*

¹²³ San Luis Unit Food Producers v. United States, 772 F. Supp. 2d 1210, 1233 (E.D. Cal. 2011) *aff'd.*, 709 F.3d 798 (9th Cir. 2013).

¹²⁴ *Id.*

passes.¹²⁵ The right to use the water acquired under the Reclamation Act "shall be appurtenant to the land irrigated, and beneficial use shall be the limit of that right."¹²⁶ The SWRCB's curtailment orders affect both pre- and post-1914 water right holders, including farmers.¹²⁷ The SWRCB's curtailment orders provided:

NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER IN THE SACRAMENTO-SAN JOAQUIN WATERSHEDS AND DELTA WITH A PRE-1914 APPROPRIATIVE CLAIM COMMENCING DURING OR AFTER 1903.¹²⁸

Nothing in the curtailment notice proscribed unreasonable use of water.¹²⁹ The notice communicated that, based on most recent reservoir storage and inflow projections, the existing water supplies are insufficient to meet the needs of only some pre-1914 claims of right.¹³⁰ It requires immediate decrease of water diversion under a 1903 or later priority.¹³¹ Further, it limits water right holders from accessing water even if it is physically available at the point of diversion because the water must continue in stream to serve its intended beneficial use.¹³² However, the Reclamation Act of 1902 designated irrigation as a beneficial use.¹³³ Farmers like Paul Simoni who were affected by the SWRCB's curtailment notices were limited in their water use even without having made unreasonable or non-beneficial use of water.¹³⁴ Residents of Rio Dell were limited to fifty gallons a day when the SWRCB curtailed the city's water rights.¹³⁵ Again, the limitation curtailment did not hinge on unreasonable use.¹³⁶

¹²⁵ United States v. Alpine Land & Reservoir Co., 340 F. 3d 903, 924-25 (9th Cir. 2003).

¹²⁶ *Id.*

¹²⁷ State Water Resource Control Board, *supra* note 9.

¹²⁸ *Id.*

¹²⁹ *See generally id.* (The curtailment notices provide for immediate curtailment and not curtailment based on the use of the water such as unreasonable use).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ United States v. Alpine Land & Reservoir Co., 340 F. 3d 903, 924-25 (9th Cir. 2003).

¹³⁴ James, *supra* note 97.

¹³⁵ Houston, *supra* note 55.

¹³⁶ *See id.*

III. VIOLATIONS OF THE CONSTITUTION

A. *Due Process*

Under the United States Constitution, Due Process claims hinge on proof of two elements.¹³⁷ First, there must be a protectable liberty or property interest at stake.¹³⁸ Second, there must be a deprivation of the interest by some decision or act of the government.¹³⁹ The Due Process Clause also requires that, where there is a deprivation of life, liberty, or property at the hands of the government, such deprivation must be preceded by notice and an opportunity to be heard.¹⁴⁰ The notice must be reasonably calculated, under the circumstances, to inform the interested parties of the action and afford them the opportunity to mount a defense.¹⁴¹

1. *Property interest*

The holders of water rights have a property interest in the water, which includes a right to the use of water on their land.¹⁴² Post-1914 appropriators possess no diversion rights apart from those granted by the SWRCB.¹⁴³ The SWRCB has authority to regulate unappropriated and appropriated water not put to beneficial use; however, it does not have the authority to regulate water being put to reasonable and beneficial use.¹⁴⁴ In 2014, the SWRCB adopted new emergency drought regulations to expand its authority to issue immediately enforceable curtailment orders against junior water right holders.¹⁴⁵ Prior to the new emergency regulations, water diverters were entitled to an evidentiary hearing before any curtailment orders could take effect.¹⁴⁶ The emergency regulation does not allow for curtailment orders to be issued against pre-1914 water right holders.¹⁴⁷ As previously explained, the California legislature has deemed irrigation as a beneficial use, which is what

¹³⁷ *Foss v. National Marine Fisheries Service*, 161 F.3d 584, 588 (9th Cir. 1998).

¹³⁸ *Duarte Nursery, Inc. v. United States Army Corps of Engineers*, 17 F. Supp.3d 1013, 1018 (2014); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

¹³⁹ *Id.*

¹⁴⁰ *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

¹⁴¹ *Id.*

¹⁴² *See generally*, *Fullerton v. State Water Resource Control Board* 90 Cal.App.3d 590, 598 (1979); *See also* *Roth*, *supra* note 7.

¹⁴³ *California Farm Bureau Fed'n v. State Water Resources Control Bd.*, 51 Cal.4th 421, 428–429 (2011).

¹⁴⁴ *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1478 (2014), *as modified on denial of reh'g* (July 11, 2014), *review denied* (Oct. 1, 2014).

¹⁴⁵ *Pearson*, *supra* note 89.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

the farmers were utilizing the water for.¹⁴⁸ Although water rights only confer a usufructuary right, that right is only vested if there is some possessory right in the water.¹⁴⁹ The right to appropriate water has been uniformly defined as a possessory interest that entitles the appropriator to quiet enjoyment of the use of water.¹⁵⁰

2. Denial of property interest

The curtailment letters state, “[w]ith this notice, the State Water Board is notifying pre-1914 appropriative claims of right with a priority date of 1903 and later within the Sacramento-San Joaquin watersheds and Delta of the need to immediately stop diverting water with exceptions.”¹⁵¹ The curtailment notice plainly states that the recipient must “immediately stop diverting water.”¹⁵² It does not explain whether there has been any illegal conduct or unreasonable use of water, nor does it provide for possible, as opposed to compulsory, curtailment of water rights.¹⁵³ The curtailment letter requires immediate curtailment of water diversion for anyone with a right commencing during or after 1903, which deprives the users of their rights.¹⁵⁴ This action by SWRCB deprives appropriative water right holders' property interest in the use of water in the Sacramento to San Joaquin watersheds and Delta.¹⁵⁵

After a Sacramento County Superior Court directed the SWRCB to stop enforcing curtailment notices, the SWRCB rescinded the curtailment notice issued in June 2015.¹⁵⁶ However, the SWRCB maintained the right to enforce unauthorized diversions and use by users when there is no water available to service their right.¹⁵⁷ “Even with the rescission of the curtailment notice, the SWRCB has attempted to wield an unlawful stick by seeking penalties against the diverters.”¹⁵⁸ This is a clear deprivation of the property interest water right

¹⁴⁸ United States v. Alpine Land & Reservoir Co., 340 F. 3d 903, 924-25 (9th Cir. 2003).

¹⁴⁹ Fullerton v. State Water Resource Control Board, 90 Cal.App.3d 590, 598 (1979).

¹⁵⁰ *Id.*

¹⁵¹ STATE WATER RESOURCE CONTROL BOARD, NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER IN THE SACRAMENTO-SAN JOAQUIN WATERSHEDS AND DELTA WITH A PRE-1914 APPROPRIATIVE CLAIM COMMENCING DURING OR AFTER 1903 (2015).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ Shea, *supra* note 13.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

holders have in the water because they cannot exercise their rights without interference from the SWRCB.¹⁵⁹

3. Notice

A fundamental requirement of Due Process is the opportunity to be heard, which must be granted in a meaningful time and manner.¹⁶⁰ When the SWRCB issued the curtailment notices, there was no opportunity to be heard because the notice provided that the recipient must immediately stop diverting water if their claim of right was secured after 1903.¹⁶¹ Additionally, the curtailment notices sent out to water right holders did not provide an opportunity for the recipients to challenge the decisions of the SWRCB.¹⁶² Here, the curtailment notices were an attempt to deprive legitimate water right holders of their rights to water without any opportunity to challenge the decision.¹⁶³ The SWRCB cannot impose liability under the Water Code section 1052, or issue a cease and desist order under Water Code section 1831, but instead "it must either file a suit in superior court or hold an evidentiary hearing to satisfy a right to be heard."¹⁶⁴ The curtailment notices deprived water right holders of a property interest in water and did not provide due process to the water right holders. However, that is not the only violation of the constitution.

B. The Takings Clause

The Takings Clause of the Fifth Amendment of the United States Constitution bars the government from taking private property for public use without just compensation.¹⁶⁵ Private property is generally characterized as a "bundle of sticks."¹⁶⁶ The bundle includes the right to sell, transfer, possess, and use property, and when a State infringes upon private property, it is considered a taking and compensation is required.¹⁶⁷ Takings claims come in

¹⁵⁹ See *id.*; see State Water Resource Control Board, *supra* note 9.; see Dennis Wyatt, *we were just kidding*, MANTECA BULLETIN (June 24, 2015), <http://www.mantecabulletin.com/archives/125337/>.

¹⁶⁰ *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

¹⁶¹ State Water Resource Control Board, *supra* note 9.

¹⁶² See *id.*

¹⁶³ *Id.*

¹⁶⁴ Wyatt, *supra* note 158.

¹⁶⁵ *Tahoe-Sierra Pres. Council. Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 (2002).

¹⁶⁶ *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

¹⁶⁷ See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); see also *Andrus v. Allard*, 444 U.S. 51 (1979); see also *Hodel v. Irving*, 481 U.S. 704 (1987); see also *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); see also *International Paper Co. v. United States*, 282 U.S.399 (1931).

several forms: per se physical occupation, categorical claims where the deprivation of all economically beneficial use is alleged, and applied taking claims.¹⁶⁸

1. *Physical occupation*

The most clearly defined area of takings jurisprudence is that of physical takings.¹⁶⁹ A permanent physical occupation of private property that has been authorized by the government is a taking without regard for the public interests that it may serve.¹⁷⁰ Physical takings are all treated as "per se" takings for purposes of the Fifth Amendment, which requires just compensation regardless of the State's intended use of the property.¹⁷¹ When the State physically intrudes or authorizes intrusion on private property, it prevents the private owners from exercising their right to exclude others.¹⁷² In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868 (1982), the State of New York passed a statute prohibiting owners of rental property from challenging the presence of cable television wires on their property.¹⁷³ However, landlords were still permitted to charge reasonable fees for cable providers to access the property.¹⁷⁴ The United States Supreme Court held that the cables constituted a permanent physical occupation, negating the public interests served.¹⁷⁵ Permanent physical occupation of land is less prevalent than other forms of takings.

2. *Categorical takings*

Takings claims are not confined to physical invasions but also include regulatory takings.¹⁷⁶ If a regulation deprives the owner of all economically beneficial use of his property, the courts may require compensation from the government.¹⁷⁷ To determine whether such deprivation exists, both of the following must be met: (1) there must be a regulation or government action

¹⁶⁸ See generally *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); see also *Agis v City of Tiburon*, 100 S. Ct. 2138 (1980); see also *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); see also *Third & Catalina Associates v. City of Phoenix*, 182 Ariz. 203 (Ct. App. 1994).

¹⁶⁹ *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 251, 107 (1987).

¹⁷⁰ *Id.*

¹⁷¹ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992).

¹⁷² See *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992).

¹⁷⁷ *Id.*

that advances a legitimate State interest and (2) the regulation denied the private owner of all economic and beneficial use of the land.¹⁷⁸

In *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 314 (2001), irrigators in the San Joaquin Valley claimed that the Bureau of Reclamation had effected a taking when water deliveries to them were reduced in response to the Endangered Species Act (“ESA”).¹⁷⁹ *Tulare Lake* compared the government’s action in *Tulare Lake* to low flying military aircrafts over Causby’s property.¹⁸⁰ The government imposed such a burden on the property that it was left in the same position as it if had been physically taken.¹⁸¹ The court further equated the restrictions on water use with the impoundment of water behind a dam and noted seizure of water rights does not have to be a physical invasion of land.¹⁸² It can occur upstream and the result was a deprivation of profitable use of the land, which “constitutes an appropriation of property for which compensation should be made.”¹⁸³

Although the decision in *Tulare Lake* has been affirmed in other decisions, *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261, 1275 (2006), disagreed with the court’s rationale.¹⁸⁴ *Allegretti & Co.* reasoned that the court’s rationale in *Tulare Lake* was flawed because “the passive restriction, which required the water users to leave water in the stream, did not constitute a physical invasion or appropriation liked the low flying planes in *Causby*.”¹⁸⁵ The court further asserted that *Tulare Lake*’s reasoning was flawed because it disregarded a categorical physical taking hallmark: the “actual physical occupation or physical invasion of a property interest.”¹⁸⁶ Despite *Allegretti & Co.*’s disagreement with the decision in *Tulare Lake*, other courts have reaffirmed the decision.¹⁸⁷

The SWRCB imposes water use restrictions due to unavailability of water just as the federal government imposed in *Tulare Lake*.¹⁸⁸ The curtailment orders issued by the SWRCB affected thousands of farmers and residents such as the residents of Rio Dell and farmer Paul Simoni, who face substantially the same intrusion upon their water rights.¹⁸⁹ Here, the government action is

¹⁷⁸ *Id.*

¹⁷⁹ *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 314 (2001).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261, 1275 (2006).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Washoe County, Nev. V. United States*, 319 F.3d 1320, 1327 (Fed. Cir. 2003)

¹⁸⁸ *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 314 (2001).

¹⁸⁹ See James, *supra* note 97.

clear.¹⁹⁰ When the SWRCB issued curtailment notices to all pre-1914 water right holders, it took an action that affected the rights of all appropriative right holders with a priority date of 1903 or later because they all must immediately stop diverting water from the river.¹⁹¹ Further assessment is required to determine whether that action denied all economically beneficial use of the land.¹⁹² "This is the day from hell," Simoni said after finding out his nearly century old water rights had been taken away.¹⁹³ Simoni never relied on ground water wells because he believed his pre-1914 water rights could never be taken away.¹⁹⁴ Without his pre-1914 water rights, Simoni can no longer carry his crop to fruit.¹⁹⁵ He continued, "[i]f somebody would've said something . . . we never would've planted anything."¹⁹⁶ Without water, farmers risk fields of withering crops.¹⁹⁷ Although Simoni's farm loses economic and beneficial use, it is hard to believe it loses all economic and beneficial use.¹⁹⁸ Simoni can still drill a well and utilize ground water.¹⁹⁹ Considering farmers such as Simoni may not lose *all* economically beneficial use, further analysis is required to determine the existence of an "as applied" partial taking.²⁰⁰

3. *As Applied partial takings*

Partial takings include circumstances where the application of a regulation affects a partial interest in property.²⁰¹ To determine whether a taking has occurred, the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 57 L. Ed. 2d 631 (1978), set forth the following analytical framework for determining whether a taking has occurred: (1) the character of the government's action, (2) the diminution in value, and (3) the extent of interference in reasonable investment backed expectations.²⁰²

¹⁹⁰ State Water Resource Control Board, *supra* note 9.

¹⁹¹ *Id.*

¹⁹² *See James, supra* note 97.

¹⁹³ *See id.*

¹⁹⁴ *See id.*

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*

¹⁹⁹ Bettina Boxall, *California moves to restrict water pumping by pre-1914 rights holders*, LA times (June 12, 2015, 5:01 PM), <http://www.latimes.com/local/lanow/la-me-in-drought-water-rights-20150612-story.html>.

²⁰⁰ *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

²⁰¹ *Id.*

²⁰² *Id.*

The character of the invasion is assessed by weighing the government's action and determining whether it was proper under the circumstances.²⁰³ The curtailment notices are not within the SWRCB's proper role under the circumstances because the SWRCB does not have the authority to regulate pre-1914 water rights.²⁰⁴ Although the SWRCB amended its police power to issue and immediately enforce curtailment letters against post-1914 water right holders, it stopped just shy of applying the new regulations to pre-1914 water rights because the SWRCB "does not have clear statutory authority over those rights."²⁰⁵

Next, the value of the property from before the regulation is compared to its value after the regulation's interference.²⁰⁶ California has a fifty billion dollar agricultural industry.²⁰⁷ This lucrative trade is gravely threatened by the curtailment orders because farms are left virtually valueless as they sit barren due to the lack of water available.²⁰⁸ Ranchers are forced to pay two hundred and sixty dollars a ton for alfalfa to feed their herd while others consider ways to cover costs of feed and irrigation by charging a drought surcharge to beef.²⁰⁹ With the curtailment notices, farmers like Simoni cannot just stop watering their crop and pick up where they left off once water becomes available.²¹⁰ The time, effort, and money put into the crops already planted is lost and unrecoverable due to the required curtailment of water use.²¹¹

Finally, the government's action must not interfere with the plaintiff's investment backed expectations.²¹² Reasonable investment backed expectations must be more than just abstract need.²¹³ Pre-1914 water right holders' reasonable investment-backed expectations were frustrated because their expectations were not unilateral.²¹⁴ Before curtailment notices were sent out, farmers like Simoni tilled their fields and planted crops, reasonably believing that the crop would be ready for harvest.²¹⁵ Investment backed expectations may be determined by the nature and extent of permitted

²⁰³ Florida Rock Industries, Inc. v. U.S., 45 Fed. Ct. 21 (1999).

²⁰⁴ California Farm Bureau Fed'n v. State Water Res. Control Bd., 51 Cal. 4th 421, 429 (2011).

²⁰⁵ Pearson, *supra* note 89.

²⁰⁶ Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

²⁰⁷ Fountain, *supra* note 72.

²⁰⁸ James, *supra* note 97.

²⁰⁹ Adam Kotin and Dru Marion, *supra* note 49.

²¹⁰ James, *supra* note 97.

²¹¹ *See generally id.* (Without water the crops that have already been planted cannot be carried to fruit and thus will be lost).

²¹² Florida rock Industries, Inc. v. U.S., 45 Fed. Ct. 21, 39 (1999).

²¹³ Allegretti & Co. v. Cty. of Imperial, 138 Cal. App. 4th 1261, 1279, (2006).

²¹⁴ *Id.*

²¹⁵ James, *supra* note 97.

development under the regulatory regime.²¹⁶ A farmer is entitled to the reasonable expectation that he will have water to irrigate his crops from a claim of right going back over one-hundred years because the regulatory regime of the State of California has limited the SWRCB's authority to curtail pre-1914 water rights.²¹⁷ There was a partial taking by the SWRCB because there was a lack of the authority to curtail pre-1914 water rights, diminished value of the affected land, and interference with farmer's investment backed expectations of a full crop exist under the curtailment notice. The SWRCB did effectuate a taking and compensation should accordingly be paid.

IV. RECOMMENDATION

The SWRCB's ability to enforce water rights effectively is far from clear.²¹⁸ The California water rights system is broken but there is no political desire to fix it.²¹⁹ Some of the State's oldest water right holders resist change to a system that has benefited them for decades.²²⁰ As stated earlier right holders can pump water with little oversight and there is no efficient way to determine how much water has been used.²²¹ However, limiting pre-1914 water rights is not the only way to improve the state's water condition.²²² The problem is scarcity.²²³ California's elaborate system of canals, reservoirs and wells that supply the State's water are failing.²²⁴ We must examine ways to increase water supplies to meet the State's growing needs by installing desalination plants, dams, and other methods to increase supply.²²⁵ Finding new sources or examining ways to increase water supplies would keep farm advocates happy and more willing to change the way water rights are managed.²²⁶

²¹⁶ Palazzolo v. Rhode Island, 533 U.S. 606, 634, (2001).

²¹⁷ California Farm Bureau Fed'n v. State Water Res. Control Bd., 51 Cal. 4th 421, 429 (2011).

²¹⁸ Roth, *supra* note 7.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Jonathan Benson, *California water infrastructure on verge of historic collapse*, NATURAL NEWS (September 01, 2014), http://www.naturalnews.com/046690_drought_water_infrastructure_California.html

²²⁵ Roth, *supra* note 7.

²²⁶ *See generally id.* (California farmers have been reluctant to change water rights because water is a finite resource. If a source of water is discovered or created, the farmers would be guaranteed their share of water).

V. CONCLUSION

California's water law is complex and unique. The California Legislature and Governor Jerry Brown took an essential step toward more efficient regulation by enacting the State's first ever system of regulating ground water.²²⁷ However, no such changes have been made in the surface water rights.²²⁸ As complex as groundwater may be, surface water rights are largely more complex.²²⁹ Senior rights, some dating back over a century had long been inviolable, but a five-year drought has called them into question.²³⁰ Years of legal conflicts loom, but redefining surface water rights is long overdue.²³¹

KULJIT SINGH²³²

²²⁷ Walters, *supra* note 1.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² J.D. Candidate, San Joaquin College of Law, 2017. Kuljit Singh would like to thank the San Joaquin Agricultural Law Review Board for all of their support as well as Professor Gregory Olson for his guidance. This comment would not be possible without the support and encouragement of my family, friends, and loved ones.