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The Uncertain Future of Water Rights in California: Reflections on the Governor’s Commission Report

Brian E. Gray*

I. INTRODUCTION

In the midst of the worst acute drought in California’s recorded history, Governor Edmund G. Brown, Jr., created the Governor's Commission to Review California Water Rights Law (the “Commission”). The Commissioners, together with their staff and technical advisors, comprised a luminous group of experts. They included the recently retired Chief Justice of the California Supreme Court (and author of one of the most important water rights opinions in the court’s history), the Dean of Stanford Law School (and one of the most respected academic experts in the field of western water law), the Chairman of the State Water Resources Control Board (and future C.E.O of one of California’s largest public utilities), the Director of the Department of Water Resources (now an Associate Justice of the California Court of Appeal), the principal designer of the State Water Project and other civil and water supply engineers, an array of California water lawyers (among them the dean of the state’s water bar), an assortment of water managers and hydrologists, and a phalanx of young staff attorneys (several of whom would go on to become influential water attorneys in their own right) led by the University of California’s most distinguished professor of water law. It was an impressive collection of expertise and talent.

Governor Brown asked the Commission to review and to evaluate California water rights law, both in light of the stresses caused by the on-going drought and in view of the policies embodied in Article X, Section 2 of the California Constitution. The Commissioners directed their legal staff to prepare six reports

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1. During the 1976-77 drought, runoff in the Sacramento River basin was 37% of average, while runoff in the San Joaquin River basin was 26% of average. See 1 DEPT OF WATER RES., CALIFORNIA WATER PLAN UPDATE 1998, at 3-7 (Bulletin 160-98).


3. GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 2 (Dec. 1978) [hereinafter FINAL REPORT]; Article X, Section 2, which was placed in the California Constitution by initiative in 1928, provides:

It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow

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on various aspects of California water rights law. Based on these staff reports, consultations with its technical advisors, and information obtained in a series of public workshops and hearings, the Commission published its Final Report in December of 1978. The Final Report identified four areas of California water law and administration that could be improved by legislative intervention. The Commission urged the California Legislature to amend the Water Code in a variety of ways to enhance the certainty of water rights, to improve the efficiency of water use, to increase the statutory protection of instream uses, and to authorize more effective regional management and adjudication of groundwater.

II. EFFICIENT USE, INSTREAM FLOWS, AND GROUNDWATER

Of the four sets of policy recommendations, only those on the subject of water use efficiency were embraced by the legislature. In the two years following the Final Report, for example, the legislature enacted a variety of statutes that (verbatim in some instances) enacted the Commission’s reform proposals into law. These included: a declaration of “the established policy of this state” that a water right holder’s conformity with local custom shall not be “solely determinative” of the reasonableness of the use under Article X, Section 2 of the Constitution; a finding that the conservation of water “shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use;” a determination that the “sale, lease, exchange, or transfer of water or water rights, in itself, shall not constitute evidence of waste or thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner’s land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

CAL. CONST. art. X, § 2.

4. See generally MARYBELLE D. ARCHIBALD, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, APPROPRIATE WATER RIGHTS IN CALIFORNIA (Staff Paper No. 1, May 1977); ANNE J. SCHNEIDER, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, GROUNDWATER RIGHTS IN CALIFORNIA (Staff Paper No. 2, July 1977); CLIFFORD T. LEE, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, LEGAL ASPECTS OF WATER CONSERVATION IN CALIFORNIA (Staff Paper No. 3, Aug. 1977); DAVID B. ANDERSON, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, RIPARIAN WATER RIGHTS IN CALIFORNIA (Staff Paper No. 4, Nov. 1977); CLIFFORD T. LEE, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, THE TRANSFER OF WATER RIGHTS IN CALIFORNIA (Staff Paper No. 5, Dec. 1977) [hereinafter TRANSFER OF WATER RIGHTS]; ANNE J. SCHNEIDER, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, LEGAL ASPECTS OF INSTREAM WATER USES IN CALIFORNIA (Staff Paper No. 6, Jan. 1978).

5. FINAL REPORT, supra note 3, at 2-5.

6. The Commission’s proposed amendments to the Water Code are set forth in its Final Report. See id. at 73-96.

7. CAL. WATER CODE § 100.5 (West Supp. 2004).

8. Id. § 1011(a).
an unreasonable use;" a declaration of policy "to facilitate the voluntary transfer of water and water rights consistent with the public welfare of the place of export and the place of import;" a detailed set of rules and procedures governing short-term water transfers; and an enhancement of the State Water Resources Control Board’s administrative enforcement authority over permittees, licensees, and unlawful diverters of water by creation of a “cease and desist” regulatory program.

In contrast, the legislature largely ignored the Commission’s recommendations on the remaining three subjects of its Final Report—protection of instream uses, groundwater management, and certainty of water rights.

The Commission proposed two significant statutory additions to provide greater protection for instream uses. It urged the legislature to direct the State Water Resources Control Board (“SWRCB”) to establish instream flow standards for the state’s rivers whenever the Board determined that such standards would be in the public interest. The Commission also recommended that the legislature recognize instream water rights. These instream rights could be based on a new appropriation; or the California Resources Agency could acquire an existing water right by gift, exchange, or purchase, which the Agency would use for recreational uses or for the benefit of fish and wildlife.

The Commission’s groundwater reform proposals ran to eighty pages in its Final Report. One proposed statute would have directed the Department of Water Resources (“DWR”) to identify “groundwater management areas.” This proposal essentially would have divided California’s groundwater basins into discrete geographic components “based, to the extent practical, on the boundaries of local entities concerned with the management of surface water or groundwater, as well as geological and hydrological groundwater basin boundaries.” The Commission then recommended that the Legislature authorize the SWRCB to designate an existing or newly created local governmental entity as the Groundwater Management Authority (“GMA”) for each management area. Each GMA would have significant management powers, including the authority to regulate the storage of water in the basin, manage the conjunctive use of

9. Id. § 1244.
10. Id. § 109(a) (as amended).
11. Id. §§ 1725-1731 (as amended).
12. Id. §§ 1825-1851.
13. The Commission’s proposed instream use recommendations may be found in its Final Report. See FINAL REPORT, supra note 3, at 120-31.
14. Id. at 122.
15. Id. at 129.
16. Id.
17. See generally id. at 170-250.
18. See id. at 179.
19. Id.
20. Id. at 183-88.
ground and surface water resources, buy and sell water and water rights, govern
the export of groundwater from the basin, regulate the extraction of groundwater,
and license the construction of new wells. A related proposal would have
empowered the board of supervisors of the county in which the greatest
percentage of a groundwater management area is located to create a Groundwater
Management District ("GMD"). Modeled on the groundwater management
districts in Southern California, this proposed statute would have granted the
GMDs both the ground and surface water management powers described above
and the additional authority to levy real property taxes and "basin equity
assessments" to create incentives to protect against groundwater overdraft.

A third statute proposed by the Commission would have changed the
substantive law applicable to groundwater adjudications. For overdrafted basins,
the Commission recommended that "rights to the use of the available supply . . .
shall be allocated primarily on the basis of recent use," although the court also
could consider other factors as appropriate "to avoid placing inequitable or undue
burdens on any party." The dormant rights of overlying landowners—to the
extent not exercised at the time of the adjudication or preserved in a prior
declaratory judgment—would be extinguished. All groundwater users,
regardless of priority of right, would "share proportionately in any aggregate
reduction in extractions" required to bring total pumping within the safe yield of
the aquifer. Consistent with the California Supreme Court's decision in City of
Los Angeles v. City of San Fernando, however, pueblo right holders and
the owners of groundwater imported into the basin would be exempt from this pro
rata allocation system.

The instream use and groundwater recommendations were controversial and
ahead of their time. Popular support (at least as manifested in the legislature) for
enhanced protection of fish and wildlife, recreation, water quality, and other
instream beneficial uses of California's streams and rivers began to coalesce only
in the mid-1980s following Governor Jerry Brown's and Secretary of the Interior
Cecil Andrus' inclusion of five Northern California rivers in the National Wild
and Scenic Rivers system, the voters' rejection of the Peripheral Canal, and

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21. Id. at 208-09.
22. Id. at 194-96.
23. Id. at 205-27.
24. Id. at 237.
25. Id.
26. Id. at 238.
27. 537 P.2d 1250 (Cal. 1975). The co-chair of the Commission, former Chief Justice Donald Wright,
was the author of the opinion of the court in this case.
28. Final Report, supra note 3, at 238. For groundwater basins that are not in a condition of long-term
overdraft, the Commission's proposal was simply to codify the existing hierarchy of water rights and the
allocation principles set forth in Katz v. Walkinshaw, 141 Cal. 116 (1903), City of Pasadena v. City of
Alhambra, 207 P.2d 27 (Cal. 1949), and City of Los Angeles v. City of San Fernando, 537 P.2d 1250 (Cal.
29. See County of Del Norte v. United States, 732 F.2d 1462 (9th Cir. 1984).
the California Supreme Court’s recognition of the public trust as a potential limitation on the exercise of water rights in *National Audubon Society v. Superior Court*.31 This trend continued into the late 1980s and early 1990s with the California Court of Appeal’s landmark *Delta Water Cases* decision, which explicated the relationship between California’s water rights and water quality laws,32 and its application of section 5937 of the Fish and Game Code to the streams that feed Mono Lake in the *Cal Trout* litigation.33 The federal government joined the fray through the listing of the Sacramento River Winter Run Chinook Salmon34 and the Delta Smelt35 for protection under the Endangered Species Act36 (and the consequent changes in the operation of the Central Valley Project and State Water Project37) and with EPA’s 1991 veto of California’s water quality standards and its subsequent promulgation of federal standards pursuant to section 303(c)(3) of the Clean Water Act.38 Public recognition of the importance of instream flows, water quality, fisheries, and other in situ uses of water was formally manifested in Congress’ enactment of the Central Valley Project Improvement Act of 199239 and the Bay-Delta Accord of 1994.40 Throughout most of this time, the California Legislature was content to defer decisions on the subjects of stream flow standards and instream water rights to the federal government and the other two branches of the state government. Only in 1991 did the legislature finally adopt one of the Commission’s recommendations—albeit in more modest form—by authorizing the dedication of water previously appropriated for consumptive use to the purposes of “preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water.”41

The Commission’s groundwater proposals have had a more checkered fate. Although the legislature initially ignored all of the Commission’s recommendations,
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and there remain significant gaps and ambiguities in California’s groundwater laws, the legislature did enact three laws that are consistent with one of the Commission’s principal goals—to foster regional and conjunctive management of ground and surface water resources to prevent (and in some areas to correct) conditions of long-term overdraft. As part of its 1984 area-of-origin legislation, the legislature declared that “[n]o groundwater shall be pumped for export from within the combined Sacramento and Delta-Central Sierra Basins . . . unless the pumping is in compliance with a groundwater management plan” adopted by the county or counties with jurisdiction over the groundwater basin. A second statute, enacted in 1992, applies to surface water that is made available for transfer by increased pumping and use of groundwater. This statute requires such transfers to be “consistent with a groundwater management plan adopted pursuant to state law for the affected area” or approved by the water supply agency from which the water is transferred based on the agency’s finding that the transfer “will not create or contribute to conditions of long-term overdraft.” The legislature enacted this law in response to concerns that “groundwater substitution transfers” to the 1991 Drought Water Bank caused or exacerbated conditions of groundwater overdraft in the lower Sacramento River basin.

The third statute, also enacted in 1992, authorizes local agencies to adopt groundwater management plans. Consistent with the Commission’s earlier recommendations, Assembly Bill 3030 grants local groundwater management agencies significant planning and regulatory authority—including the power to adopt conjunctive use programs, to protect against groundwater pollution, to monitor changes in the groundwater table, and to impose “equitable annual fees and assessments for groundwater management based on the amount of groundwater extracted from the . . . basin.” The legislation also authorizes these agencies “to limit or suspend extractions” if the agency determines that

42. As Norris Hundley, Jr., has observed:
   Despite significant progress in [ground] water management in the Santa Clara Valley and in parts of southern California the issue remains grave virtually everywhere . . . and at the crisis stage in the San Joaquin Valley. There planning is in a shambles, water is allocated on the basis of location rather than need, and overdrawn basins in many locales frequently result in land subsidence so serious that aquifers collapse and cannot be refilled. . . . The problem remains essentially as described more than two decades ago by the Governor’s Commission to Review California Water Rights Law: “California’s groundwater is usually available to any pumper, public or private, who wants to extract it, regardless of the impact of extraction on neighboring groundwater pumpers or on the general community.”

HUNDLEY, supra note 30, at 530 (quoting FINAL REPORT, supra note 3, at 136).

43. CAL. WATER CODE § 1220(a) (West Supp. 2004).
44. Id. § 1745.10.
45. Id.
48. Id. §§ 10753.8, 10754.2(a).
“groundwater replenishment programs or other alternative sources of water supply have proved insufficient or infeasible to lessen the demand for groundwater.”

The Commission’s instream use and groundwater proposals also had little influence with the courts. In 1979, for example, separate districts of the California Court of Appeal held that neither the Department of Fish and Game nor private parties were authorized to appropriate water for instream uses. And in its most recent water rights decision, the California Supreme Court unanimously rejected the argument that, in cases of long-term overdraft, responsibility for reducing aggregate pumping to the safe yield of the aquifer should be based on principles of “equitable apportionment.”

The Commission’s recommendations in the fourth policy area—certainty of water rights—received perhaps the most interesting reaction from the three branches of state government. As with the topics of instream use and groundwater management, the legislature has largely ignored the Commission’s proposal to improve the certainty of water rights and water rights administration. The SWRCB took the initiative and implemented two of the Commission’s recommendations without waiting for the legislature’s imprimatur, however, and the courts subsequently embraced these reforms. Indeed, the Commission’s greatest influence may have been its contributions to the California Supreme Court’s contemporary water law jurisprudence.

III. TOWARD GREATER CERTAINTY OF WATER RIGHTS

The Commission began its analysis by declaring that “relative uncertainty... is the distinctive attribute of water rights and water law in California.” It then observed that uncertainty has plagued the exercise and administration of California water rights since the 19th Century and “was one of the major problems identified by the Conservation Commission, whose recommendations led to the adoption of the Water Commission Act of 1913.” Although the

49. Id. § 10753.9(c).
50. This should not be seen as a mark of failure on the part of the Commission. In all of the cases described in this paragraph, the courts based their decisions on the existing law—both statutory and common law—which the Commission urged the legislature to change to address the deficiencies that the Commission identified in its Final Report.
51. Cal. Trout v. State Water Res. Control Bd., 153 Cal. Rptr. 672, 674-75 (Ct. App. 1979); Fullerton v. State Water Res. Control Bd., 153 Cal. Rptr. 518 (Ct. App. 1979). The Legislature’s enactment of section 1707 of the Water Code in 1991 only partly modified these decisions. As noted above, section 1707 allows water right holders to ask the SWRCB for permission to change the purpose of use from the existing use (e.g., municipal and industrial or agricultural water supply) to instream uses. See supra text accompanying note 41. Section 1707 does not authorize new appropriations of water for instream uses, however.
53. See infra Part III.
54. FINAL REPORT, supra note 3, at 16.
55. Id.
permit and license system established by that legislation has enabled the state to
gain administrative control over much of the state’s appropriated surface water,
the Commission identified three continuing sources of uncertainty: inadequate
recording and quantification of other types of water rights; water rights that
contain an unspecified future use component; and the doctrine of reasonable use
set forth in Article X, Section 2 of the California Constitution.\textsuperscript{56} According to the
Commission, these uncertainties impair both state and regional administration of
water rights. “Lack of knowledge of water use by non-statutory right holders
[i.e., water rights that are not based on permits or licenses issued by the SWRCB]
affords decisions to grant permits, because the availability of water for
appropriation and the existence and extent of other beneficial uses of water are
uncertain.”\textsuperscript{57} Uncertainty also leads to “recurrent and costly litigation,”\textsuperscript{58} and it
can deter water transfers because potential purchasers need to know that the
seller has rights to the water offered for transfer and third parties must have
reasonable confidence that their interests will be protected during and after the
term of the transfer agreement.\textsuperscript{59}

To address the problems associated with uncertainty of water rights, the
Commission proposed four substantive amendments to the Water Code. In
statutory adjudications, the SWRCB would have authority to adjudicate the rights
both to surface water and to “interconnected groundwater supplies the inclusion
of which is essential to a fair and effective determination of the rights to other
water of the stream system.”\textsuperscript{60} In statutory adjudications, the trial court would be
required to relegate unexercised riparian rights to the lowest priority (i.e., below
that of existing appropriators and new appropriations commenced before the
activation of the dormant riparian right).\textsuperscript{61} Water right holders who fail to file
statements of diversion and use as required by section 5101 (i.e., riparians, pre-
1914 appropriators, users claiming under a prescriptive right, and other surface
water rights not based on a permit or license) would be subject to civil penalties
of up to $1,000 and lose the right to protest applications to appropriate water
before the SWRCB.\textsuperscript{62} Prescriptive rights to surface water would be prospectively
abolished, both \textit{vis-à-vis} other water users and “as against the paramount interest

\begin{itemize}
  \item \textsuperscript{56} \textit{Id.} at 17-21.
  \item \textsuperscript{57} \textit{Id.} at 22.
  \item \textsuperscript{58} \textit{Id.}
  \item \textsuperscript{59} \textit{Id.} at 25. One of the staff reports to the Commission explained:
  An effective market system requires definite and certain property rights. Lack of security may
  reduce investment in the resource by reducing the value of the right. . . . To the extent that the
  existing water rights system creates property rights which are uncertain and inflexible, it
  reduces the potential for water transfers.
  \textbf{TRANSFER OF WATER RIGHTS, supra note 4, at 11.}
  \item \textsuperscript{60} \textit{FINAL REPORT, supra note 3, at 33.}
  \item \textsuperscript{61} \textit{Id.} at 38.
  \item \textsuperscript{62} \textit{Id.} at 45-46.
\end{itemize}
of the people of the State."\(^{63}\) Although the Commission had identified Article X, Section 2 itself as a source of uncertainty, it did not recommend any changes to the Constitution or to the California courts’ interpretations of the doctrine of reasonable use.

For the most part, the legislature spurned these proposals. Integrated adjudication of surface and groundwater rights in statutory adjudications—perhaps the most controversial of the Commission’s recommendations—has not been on the legislative agenda since 1971, when the legislature defined the Scott River system to include “ground water supplies which are interconnected with the Scott River” and authorized the statutory adjudication of both ground and surface water rights.\(^{64}\) Thus, the legislature ignored the Commission’s conclusion that the Scott River system is not the only hydrologic basin where integrated water rights adjudication would be “essential to the fair and effective determination of rights on the stream.”\(^{65}\)

The legislature did address the third of the Commission’s certainty proposals. In 1983, it amended the statement of diversion and use requirements to increase the penalty for willful misstatements from $500 to $1,000, but it rejected the Commission’s recommendation to penalize riparians, pre-1914 appropriators, or other surface water right holders who fail to file statements of diversion and use as required by existing law.\(^{66}\) There were no significant constitutional questions associated with the Commission’s proposed statutory amendment. The United States Supreme Court has upheld, against both takings and due process challenges, laws that require property rights holders to file periodic notices of their continuing assertion and exercise of their rights, even where the penalty for failure to file is forfeiture of the right.\(^{67}\) The civil penalty for noncompliance proposed by the Commission would easily have satisfied the constitutional standard set forth in these cases.

On the other two recommendations, the legislature took no action. This may have been the product of its long-standing unwillingness to extend state regulatory authority to surface water right holders not subject to the SWRCB’s permit and license jurisdiction as established by the Water Commission Act of 1913. The legislature’s inaction also may have been a result of the California Supreme Court’s decision to venture into the breach. In rapid succession, the court exercised its authority under Article X, Section 2 of the Constitution and

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63.  *Id.* at 47.


67.  *See* United States v. Locke, 471 U.S. 84 (1985) (rejecting a due process challenge to the forfeiture of an unpatented mining claim under a provision of the Federal Land Policy and Management Act that requires the claim holder annually to file a notice of intent to continue working the claim); Texaco, Inc. v. Short, 454 U.S. 516 (1982) (upholding a state statute pursuant to which a severed mineral interest that had not been used for twenty or more years automatically lapsed and reverted to the current surface owner of the property unless the mineral owner filed a statement of claim in the county recorder’s office within two years of the enactment of the recording statute).
adopted two of the Commission’s remaining three recommendations to improve the certainty of water rights.68

In 1979, in its review of the statutory adjudication decree in In re Waters of Long Valley Creek Stream System,69 the court ruled that the SWRCB and the trial court that enters the adjudication decree have the power:

to decide that an unexercised riparian claim loses its priority with respect to all rights currently being exercised. Moreover, to the extent that an unexercised riparian right may also create uncertainty with respect to permits of appropriation that the Board may grant after the statutory adjudication procedure is final, . . . the Board may also determine that the future riparian right shall have a lower priority than any uses of water it authorizes before the riparian in fact attempts to exercise his right.70

The court thus adopted the Commission’s proposal that in statutory adjudications the trial court “shall quantify riparian rights . . . and shall accord unexercised riparian rights priorities lower than those it accords to active users of water if necessary to secure the reasonable beneficial use of water within the meaning of California Constitution, Article X, Section 2.”71

The following year, in People v. Shirokow,72 the court held that nonriparian users of surface water whose impoundments or diversions commenced after December 19, 1914 (the effective date of the Water Commission Act) may not claim prescriptive rights vis-à-vis the state.73 Pursuant to section 1052 of the Water Code, the SWRCB therefore has authority to enjoin such non-permitted, non-licensed uses of surface water despite the defendant’s claim that he or she has rights to the water based on prescription.74 Although the court emphasized that its decision “will not result in the destruction of all beneficial uses of water originally undertaken in reliance on prescription,”75 Shirokow represented a significant step toward the Commission’s recommendation that “prescription ought to be abolished prospectively and . . . the recognition or regulation of existing prescriptive claims should await judicial clarification.”76

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68. See In re Waters of Long Valley Creek System, 599 P.2d 656 (Cal. 1979); People v. Shirokow, 605 P.2d 859 (Cal. 1980). In both cases, the court affirmed (for the most part) legal and policy decisions made by the SWRCB. The SWRCB thus took the initiative to implement the Governor’s Commission’s recommendations without waiting for additional legislative authorization.

69. 599 P.2d 656 (Cal. 1979).

70. Id. at 668-69.

71. FINAL REPORT, supra note 3, at 38.

72. 605 P.2d 859 (Cal. 1980).

73. Id. at 865-66.

74. Id. at 865.

75. Id. at 866.

76. FINAL REPORT, supra note 3, at 31.
The California Supreme Court’s opinions, both authored by the late Justice Stanley Mosk, were replete with references to the Governor’s Commission’s Final Report and were premised on the Commission’s conclusion that the water rights in question created uncertainty and therefore were destabilizing to the state’s administration of its water resources system. In *Long Valley*, for example, the court observed that the continued recognition of dormant riparian rights following a statutory adjudication would be inconsistent with the legislature’s goal of determining and quantifying “all rights in a stream system . . . with the final decree assuring certainty to the existing economy and reasonable predictability to the uses of water in [the] system.”77 If a water user subject to the decree could activate a dormant riparian at some point in the future and claim water at the highest priority in the system, the “expanded riparian use [would have] the potential to preempt an inferior appropriative right where the supply [of] water originally was sufficient to satisfy both uses.”78 The court concluded that the:

pernicious effects of uncertainty provide strong support for the conclusions of the Governor’s Commission . . . that comprehensive determination of water rights has salutary results because it (1) provides “valuable information for water rights administration and for planning purposes,” (2) “prevents recurrent litigation and gives the certainty of official recognition to private property rights,” and (3) creates “the basis for the orderly control and management of water on a stream.”79

The supreme court echoed this analysis in *Shirokow*. The SWRCB must have the power to enjoin post-1914 nonriparian uses of surface water not authorized by permit or license because the contrary conclusion would substantially impair the board’s ability to comply with the legislative mandate that appropriations be consistent with the public interest. For example, the salutary effects of the comprehensive system of water rights administration would be imperiled if the board were powerless to enjoin an adverse use of water which the board had previously otherwise allocated, or desired to allocate, in the public interest. Moreover, the board is hindered in its task by any uncertainty as to the availability of water for appropriation. The problem is compounded by nonsanctioned uses which make it difficult for the board to determine whether the waters of the state are being put to beneficial use for the greatest public benefit.80

78. *Id.* at 666 n.10 (quoting *FINAL REPORT*, supra note 3, at 21).
79. *Id.* at 667.
80. *Shirokow*, 605 P.2d at 865-66 (citing *inter alia* *FINAL REPORT*, supra note 3, at 21-25).
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The court concluded its analysis by agreeing with the Commission that "'prescription exacerbates the lack-of-knowledge problem which hinders effective planning, management, and enforcement of water and water rights.'"

IV. A SCORECARD

All in all, it was not a bad record for the Commission—especially given the complexities of California water law and the intractable controversies endemic to efforts to reform the state’s water policies. The legislature enacted most of the Commission’s recommendations on efficiency. Indeed, the early statutes that declared it to be the policy of the state to promote conservation and water transfers—as well as the legislature’s adoption of specific rules and procedures to govern short-term transfers—helped to usher in a sea change in water resources management that has made conservation and transfers two of the cornerstones of modern California water policy. The list of success stories is now an impressive one—extending from the 1984 long-term transfer of 100,000 acre-feet annually (“afa”) of conserved water from the Imperial Irrigation District to the Metropolitan Water District;\(^82\) to the panoply of short-term transfers that helped sustain farmers, industry, and domestic users during the 1986-1992 drought;\(^83\) to the 2003 long-term agreement between the Imperial Irrigation District and the San Diego Water Authority to transfer 200,000 afa of conserved agricultural water;\(^84\) to the ongoing efforts of the CALFED Bay-Delta Program to create incentives to retire irrigated land in the drainage problem area of the western San Joaquin Valley and to purchase water from voluntary sellers for use in the Environmental Water Account.\(^85\)

Although the Legislature rejected most of the Commission’s proposals to improve the protection of instream uses, the Commission’s Final Report drew attention to the fact that fish and wildlife, water quality, whitewater recreation, and other in situ beneficial uses of the state’s rivers and lakes had been neglected historically in favor of full exploitation of the available water for consumptive uses. As noted above, the Commission’s work set the stage for the environmental revolution in California water policy that began in earnest in the early 1980s and which continues to the present day. Similarly, while the Legislature generally has been content not to wade into the politically sensitive area of state groundwater management, it did incorporate many of the Commission’s suggestions into

81. NEL at 866 n.12 (quoting FINAL REPORT, supra note 3, at 32).


Assembly Bill 3030, the legislation that authorizes local agencies to manage their groundwater resources on a regional basis. The Commission’s focus on the benefits of conjunctive management of ground and surface water resources also contributed to the development of groundwater banks and other conjunctive use programs, especially in the San Joaquin Valley.

The Commission’s recommendations on the subject of certainty of water rights have had the most intriguing legacy. As described above, the Commission’s proposals on dormant riparian rights and prescription played a significant role in the California Supreme Court’s Long Valley and Shirokow opinions. But these were not the only water rights cases decided by the court in the aftermath of the Governor’s Commission’s work. The court issued two other important water rights decisions in the early 1980s, and it was in these cases that the court revealed something that the Commission had overlooked—that not all uncertainties are alike and that some of the uncertainties that inhere in California water rights law are worth preserving.

V. Two Certainties

Although it made no legislative recommendations on the topic, the Commission included in its analysis a critique of the doctrine of reasonable use. The Commission acknowledged that the reasonable use doctrine is both an intrinsic component of all water rights and a mandate of Article X, Section 2 of the California Constitution. Although the Constitution grants the legislature the power to “enact laws in the furtherance of the policy” of reasonable use, the Commission noted that the legislature has seldom exercised this authority and instead has left the enforcement of Article X, Section 2 to the courts and to the SWRCB. In the Commission’s judgment, this deference has been a significant source of uncertainty, because “the reasonableness of a particular use of water will vary with the facts and circumstances of each case. As in the case of the riparian doctrine, what is at present a reasonable use of water may not be one in the future.” The Commission concluded that this form of uncertainty cast[s] a shadow over questionably reasonable uses of water. With increased demand for water in general, changing ideas of what is reasonable, and the vagaries of climate and other factors involved in the ad hoc determination of reasonable use, the shadow of uncertainty may envelop increasing numbers of water uses.

87. See DEPT’T OF WATER RES., CALIFORNIA’S GROUNDWATER UPDATE 2003 (Bulletin 118).
88. See FINAL REPORT, supra note 3, at 21.
89. See id.
90. Id.
91. Id.
92. Id.
While the Commission accurately characterized the nature and scope of the reasonable use doctrine, and correctly concluded that Article X, Section 2 itself is a source of significant uncertainty, its analysis ignored a critical distinction between different types of uncertainties. Some uncertainties—those addressed in Long Valley and Shirokow, for example—hinder the state’s ability to administer its water rights system to protect the general public interest in conservation, efficiency, and protection of the natural environment. Other uncertainties—the type that inhere in the reasonable use doctrine—enhance the state’s authority to accomplish these policies. It was the California Supreme Court, rather than the Commission, that recognized this crucial distinction.

In 1980, a week before it decided Shirokow, the supreme court handed down its decision in Environmental Defense Fund v. East Bay Municipal Utility District. At issue was EDF’s claim that East Bay MUD’s contract with the United States Bureau of Reclamation for water that the Bureau would divert at Folsom Dam on the lower American River violated the reasonable use requirement of Article X, Section 2, because the reduction in flows caused by the diversions would injure fish and wildlife, recreational uses, and water quality. EDF argued that East Bay MUD should have been required to receive the water from a point of diversion located downstream on the Sacramento River below its confluence with the American. The supreme court held that EDF stated a valid cause of action under Article X, Section 2 and was not required to exhaust administrative remedies with the SWRCB before suing in court. The greater significance of the court’s decision, however, was its reaffirmation—in a case that pitted a proposed consumptive use of water for municipal and industrial supply against the state’s interest in protecting fisheries, recreation, water quality, and other instream beneficial uses—of California’s expansive and dynamic definition of reasonable use. Writing for a unanimous court, Justice William Clark declared that “[t]he scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts. What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes.”

93. 605 P.2d 1 (Cal. 1980).
94. Id. at 3-4.
95. Id. at 4.
96. Id. at 9-10.
97. Id. at 6 (emphasis added) (quoting Environmental Defense Fund v. East Bay Municipal Utility District, 572 P.2d 1128, 1137 (Cal. 1977)). The court also quoted from its opinion in Joslin v. Marin Municipal Water District, 429 P.2d 889, 894 (Cal. 1967), in which it explained that “what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved in vacuo from statewide considerations of transcendent importance.”
It is difficult to imagine a definition of water rights that introduces more uncertainty than does the italicized sentence. The right to impound, divert, or use water—indeed, the property right in water itself—is defined not simply by the reasonableness of the water user’s own practices, but also by reference to an array of other relevant factors (including, for example, the user’s access to alternative sources of supply, its reasonable ability to conserve, competing demands for water, and the effects of the diversion and use on the environment). Moreover, the water user’s rights may vary over time as the “current situation changes”—for example, as hydrologic conditions change, as new demands are added to the system, as water use technologies develop, as new scientific information becomes available about the effects of the impoundment and diversion of water on the ecosystem of the river, and as new species are listed for protection under the Endangered Species Act. The uncertainties that are associated with dormant riparian rights and non-permitted claims based on prescription pale in comparison to this dynamic and relativistic conception of water rights.

Three years later, the supreme court issued its landmark opinion in National Audubon Society v. Superior Court, holding that the City of Los Angeles’ licenses to appropriate water from the Mono Basin may be reconsidered and adjusted as required to protect the public trust in Mono Lake. In an opinion written by Justice Jules Broussard, the Court unanimously concluded that the public trust is an integral component of California water rights law. Just as the doctrine of reasonable use serves as an inherent limitation on the exercise of all water rights, the court declared that the public trust doctrine “prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.” Although the court noted that the state

99. Id. at 722-23. A long-recognized doctrine of California natural resources law, the public trust grants the public certain rights in the navigable waters of the state. These rights include navigation, commerce, fishing, boating, and other forms of water recreation. Id. at 718-20. More importantly, the doctrine also confers on the public the right to preserve the navigable waters and adjacent lands embraced within the public “in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.” Id. at 719 (quoting Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971)). The supreme court’s decision to incorporate the public trust into California’s water rights system was based on the work of a number of legal scholars, including the staff director of the Governor’s Commission. See Harrison Dunning, The Significance of California’s Public Trust Easement for California’s Water Rights Law, 14 U.C. DAVIS L. REV. 357 (1980).
100. National Audubon Society, 658 P.2d at 727-29. Justice Frank Richardson disagreed with the court’s conclusion that the California public trust claimants are not required first to bring their claims to the SWRCB before suing in court. Id. at 733-35 (Richardson, J., concurring in part and dissenting in part). Justice Otto Kaus wrote a concurring opinion, which stated that he agreed with Justice Richardson on this question but was bound by Environmental Defense Fund v. East Bay Municipal Utility District to join the majority’s decision that the courts have concurrent, original jurisdiction over public trust claims. Id. at 733 (Kaus, J., concurring). Both Justices joined the opinion of the court on the definition of the public trust doctrine and its holding that the public trust and the water rights systems form an integrated body of law.
101. Id. at 727.
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has the power to authorize water right holders “to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream.”102 It also ruled that these decisions could be reevaluated and revoked as circumstances change:103

Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.104

The court concluded that “[t]he state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.”105

Read in tandem, Environmental Defense Fund and National Audubon express a judicial policy preference that is seemingly at odds with the emphasis on certainty of water rights that was the raison d’être of the decisions in Long Valley and Shirokow. Yet, there is a logic to the court’s quest to minimize uncertainty in the latter cases and its decision to foster (or at least to countenance) far greater uncertainty in the former.

The uncertainty produced by the persistence of dormant riparian rights and claims to water based on prescription is harmful both to other water users and to the state’s supervisory authority over the water rights system, because new uses based on these types of water rights may preempt existing beneficial uses, force a reallocation of water, and do so outside the regulatory jurisdiction of the SWRCB. The only parties that benefit from the continued recognition of dormant riparian and prescriptive water rights are the holders of those rights.

In contrast, the uncertainty created, or exacerbated, by the supreme court’s expansive and flexible definitions of reasonable use and the public trust enhances state supervisory power over the water rights system and ultimately promotes the public interest by conferring on the courts and the SWRCB tools to require reasonably efficient water use, to create incentives for water conservation, and to promote more efficient allocation of developed water resources. It also enhances the power of the courts and the Board to accommodate the rights of consumptive water users and the general interest in protection of fish and wildlife, water quality, and other instream beneficial uses of the rivers and lakes that are the sources of the state’s developed water supplies. Although the decisions in Environmental Defense Fund and National Audubon unquestionably render water rights less certain for the individual user, in the supreme court’s judgment this

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102. Id.
103. See id. at 728.
104. Id.
105. Id.
uncertainty is outweighed by the benefits—to water users and the public alike—produced by the express reservation of assertive and flexible state regulatory power over the exercise of water rights based on reasonable use and the public trust.

There is much to criticize in the California Supreme Court’s water rights jurisprudence in the years immediately following the Commission’s Final Report. For example, in Long Valley, the court overturned the SWRCB’s decision to extinguish unexercised riparian rights on the ground that such action might be in violation of the express recognition of riparian rights—including the dormant component of the right—in Article X, Section 2.106 Yet, by relegating unexercised riparian rights to the lowest priority in water systems that are fully appropriated, the court de facto extinguished the dormant rights. Following Long Valley, a riparian who seeks to commence a new use of water must obtain permission from the SWRCB; and, if the right is granted, the riparian’s priority will be below that of all existing water right holders. In other words, the riparian will be no better off than if he or she were a new appropriator.

In Shiromow, although the court held that nonriparian, post-1914 surface water appropriators cannot acquire prescriptive rights vis-à-vis the SWRCB’s regulatory jurisdiction,107 it left open an array of questions. For example, in his dissenting opinion, Justice Clark argued that the majority’s decision was inconsistent with “[n]umerous cases [that] have recognized and enforced property rights by prescription in surface and subterranean streams based on post-1913 conduct.”108 In response, the majority asserted:

Our holding that the state is entitled to an injunction against defendant’s unauthorized diversion of water will not result in the destruction of all beneficial uses of water originally undertaken in reliance on prescription. The board’s broad discretion to act on appropriation applications is not unfettered; while it is true the issuance of permits depends on questions of policy and judgment, the board may not arbitrarily and capriciously reject an application.109

Yet, the court did not explain how the SWRCB should evaluate permit applications based on prior prescriptive use. Is the Board required to prefer such an application over a competing application that seeks to initiate a new use of water? If the SWRCB grants a prescriptive water right holder a permit, what is the priority date—the date of the application, the date on which the user obtained the prescriptive right, or the priority date of the water right holder whose rights were prescripted? Nor did the court address the more fundamental question

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108. Id. at 871-72.
109. Id. at 866.
whether, following Shirokow, a surface water user may obtain prescriptive rights against another water right holder. And, if so, what would be the value of a “private” prescriptive right that is not recognized by the state? The questions raised by the Shirokow decision may have created more uncertainty than the court resolved.\footnote{Since Shirokow, two surface water rights decisions have addressed some of these questions. In Pleasant Valley Canal Co. v. Borror, 72 Cal. Rptr. 2d 1 (Ct. App. 1998), the California Court of Appeal assumed, without deciding, that a private water user may assert prescriptive rights against another private water user. In In re Waters of the San Gregorio Creek Stream System, No. 355792 (San Mateo Super. Ct. filed Apr. 28, 1992) (Order Regarding Post-1913/14 Prescriptive Rights), San Mateo County Superior Court Judge Harlan Veal ruled that prescriptive rights may not be asserted in a statutory adjudication. The judge based his conclusion primarily on two provisions of the Water Commission Act of 1913:

1. Section 1(c) of the Act, now codified at \textsc{cal. water code} § 1225, which provides that “no right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with” the permit and license requirements of the Act; and

2. Section 25 of the Act, now codified at \textsc{cal. water code} § 2501, which authorizes the statutory adjudication of “all rights to water of a stream system, whether based upon appropriation, riparian right, or other basis of right.”

Judge Veal reasoned that all water for which a prescriptive right is claimed is water that is “subject to appropriation” within the meaning of section 1225 and therefore no one may acquire a right in such water without obtaining a permit or license from the SWRCB. The judge also argued that the Legislature’s failure to mention prescriptive rights explicitly in section 2501 indicated that it did not intend to allow for the assertion of prescriptive rights in statutory adjudications.}

The supreme court’s Environmental Defense Fund and National Audubon decisions also raise a variety of significant questions. If, for example, the determination whether the exercise of a water right is reasonable “depend[s] upon not only the entire circumstances presented but varies as the current situation changes,”\footnote{Envtl. Defense Fund v. East Bay Mun. Utility Dist., 605 P.2d 1, 6 (Cal. 1980).} what are the relevant circumstances? As the Court later inquired (without providing an answer) in National Audubon: “The dispute centers on the test of unreasonable use—does it refer only to inordinate and wasteful use of water... or to any use less than the optimum allocation of water?”\footnote{Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 728 n.28 (Cal. 1983) (citing Peabody v. City of Vallejo, 40 P.2d 486 (Cal. 1935), and Joslin v. Marin Municipal Water District, 429 P.2d 889 (Cal. 1967)).} It would be helpful for water users to know the criteria by which the exercise of their water rights will be judged.

Similarly, in its incorporation of the public trust doctrine into the water rights system in National Audubon, the court clearly stated that the law “prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust,”\footnote{Id. at 727.} but it did not explain how a particular water use should be evaluated to determine whether it is consistent with the public trust. Indeed, the court articulated five potentially different standards of review of public trust claims, including a feasibility criterion, a public interest test, a rough form of cost-benefit analysis, a balancing approach,
and a purely "considerational" requirement analogous to a NEPA or CEQA analysis of reasonable alternatives.\textsuperscript{114}

As with the doctrine of reasonable use, accommodation of the various interests in public trust cases entails difficult legal and policy questions that center on the relationship between the public interest in supplying the state's consumptive demands for water (which includes both the exercise of water rights for this purpose and recognition of the property right in water) and the public interest in protecting California's natural resources from undue degradation. Yet, the court provided scant guidance on how the SWRCB, the courts, and members of the water-use community should go about reconciling the competing policies. In his opinion for the court, Justice Broussard did say that, under Article X, Section 2, "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use."\textsuperscript{115} But this declaration simply compounds the uncertainties of the reasonable use calculus by injecting into it the uncertainties associated with "reasonable" protection of the public trust.

It is therefore not surprising that \textit{Environmental Defense Fund} and \textit{National Audubon} have garnered their share of criticisms. Water users fear the specter of state-sponsored reevaluation of what they previously thought were "vested" water rights. Economists argue that uncertain definition of water rights deters investment and undermines California's water transfer policies.\textsuperscript{116} Property right advocates believe that the flexible and dynamic definition of water rights embodied in the California Supreme Court's reasonable use and public trust

\textsuperscript{114} Id. at 727-29. As characterized by the Court, the alternative standards are:

1. \textit{Feasibility Criterion}: "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." Id. at 728.

2. \textit{Public Interest Test}: "As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust . . . and to preserve, so far as consistent with the public interest, the uses protected by the trust." Id.

3. \textit{Cost-Benefit Analysis}: "This is not a case in which the Legislature, the Water Board, or any judicial body has determined that the needs of Los Angeles outweigh the needs of the Mono Basin, that the benefit gained is worth the price." Id.

4. \textit{Balancing of Interests}: "Neither has any responsible body determined whether some lesser taking would better balance the diverse interests." Id.

5. \textit{Consideration of the Relevant Factors}: "We recognize the substantial concerns voiced by Los Angeles—the city's need for water, its reliance upon the 1940 board decision, the cost both in terms of money and environmental impact of obtaining water elsewhere. Such concerns must enter into any allocation decision. We hold only that they do not preclude a reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment." Id. at 729.

\textsuperscript{115} Id. at 725.

\textsuperscript{116} See, e.g., \textit{Brent M. Haddad, Rivers of Gold: Designing Markets to Allocate Water in California} 41 (2000) ("If current owners of water rights do not have secure rights—even if the lack of security serves perfectly valid public purposes—they will have a difficult time finding buyers for those rights.")
decisions alter the property right in water and violate the United States Supreme Court’s admonition that “a State, by ipse dixit, may not transform private property into public property without compensation.” In the words of one of the hosts of this symposium:

It is difficult to conceptualize a more fundamental departure from stare decisis and traditional rules of property than evidenced by the [reasonable use and public trust] decisions. California law has truly moved into an era where water use is viewed as a government granted privilege to be monitored by the SWRCB and the courts and, when necessary, reallocated among competing users to achieve the greatest social good.

VI. THE SALUTARY EFFECTS OF UNCERTAINTY

Despite these criticisms—and notwithstanding the court’s sometimes maddening lack of specificity—it is my firm belief that the California Supreme Court got the essentials correct in the Long Valley, Shirokow, Environmental Defense Fund, and National Audubon series of cases. In these decisions, the court took steps to minimize the deleterious form of water rights uncertainty while fostering the beneficial uncertainties that inhere in the doctrines of reasonable use and the public trust. These doctrines—to a greater extent than any other aspect of California water right law—have been the catalyst of some of the most important policy reform initiatives in the past quarter century. Indeed, uncertainty of water rights has contributed to the constructive resolution (at least to date) of the state’s two largest and most important water controversies.

A. Uncertainty as an Inducement to More Efficient Use and Allocation

In 1984, the SWRCB concluded that the Imperial Irrigation District’s ("IID") lack of regulating reservoirs and excessive deliveries of water to farmers produced unreasonable amounts of return flow, which ran off the farmers’ land into the Salton Sea and flooded adjacent land. The Board ruled that IID’s failure to implement “practical measures available to reduce the present losses of water within the District . . . is unreasonable and constitutes a misuse of water under [A]rticle X, [S]ection 2 of the California Constitution.” In its decision affirming the SWRCB’s statutory authority to apply the reasonable use doctrine to IID’s water rights, the court of appeal relied heavily on Long Valley, Shirokow,
Environmental Defense Fund, and National Audubon.¹²¹ It concluded that these cases “establish all-encompassing adjudicatory authority in the SWRCB on matters of water resource management,” which “includes the power to adjudicate the [A]rticle X, [S]ection 2, issue of unreasonable use of water by IID.”¹²² Two years later, with its water rights in jeopardy of reduction based on the SWRCB’s finding of waste and unreasonable use, IID agreed to line its canals, construct regulating reservoirs, and take other actions to conserve 106,000 acre feet annually and to transfer the conserved water to the Metropolitan Water District (“MWD”).¹²³

Two decades later, the threat of loss of additional rights—this time by order of Secretary of the Interior Gale Norton—induced IID to agree to additional conservation measures. In 2003, following years of scrutiny of California’s excessive use of water from the Colorado River, the Lower Colorado Regional Director of the U.S. Bureau of Reclamation made a formal finding that farmers within the IID were wasting water. Based on this finding, the director determined that IID was in violation of the beneficial use requirement of federal reclamation law,¹²⁴ as well as regulations governing deliveries of project water from the Colorado River.¹²⁵ He ordered a reduction in water deliveries by approximately

¹²² Id. at 288, 290. The court of appeal remanded to the superior court for a determination as to whether the SWRCB’s Decision 1600 was supported by substantial evidence. Both the superior court and the court of appeal subsequently affirmed the Board’s findings and conclusions in all respects. See Imperial Irrigation Dist. v. State Water Res. Control Bd., 275 Cal. Rptr. 250 (Cl. App. 1990). In rejecting the District’s claim that the SWRCB’s action violated its vested water rights, the court of appeal stated:

Put simply, IID does not have the vested rights which it alleges. It has only vested rights to the ‘reasonable’ use of water. It has no right to waste or misuse water. The interference by the Board with IID’s misuse (this finding of fact by the Board being accepted for purposes of the present issue) does not constitute a transgression on a vested right.

Id. at 261.

¹²³ See McMorrow & Schwarz, supra note 82, at 149-65.

¹²⁴ Section 8 of the Reclamation Act of 1902 provides: “The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.” 43 U.S.C.A. § 372 (West 2000). The Ninth Circuit has interpreted the federal requirement of beneficial use to include a reasonable use component:

There are two qualifications to what might be termed the general rule that water is beneficially used (in an accepted type of use such as irrigation) when it is usefully employed by the appropriator. First, the use cannot include any element of “waste” which, among other things, precludes unreasonable transmission loss and use of cost-ineffective methods. Second, and often overlapping, the use cannot be “unreasonable” considering alternative uses of the water.

United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 854 (9th Cir. 1982); see United States v. Clifford Matley Family Trust, 354 F.3d 1154, 1163-64 (9th Cir. 2004).

¹²⁵ These regulations require the Regional Director to make an annual recommendation “relating to water conservation measures and operating practices in the diversion, delivery, distribution, and use of Colorado River water,” and to determine “each Contractor’s estimated water requirements for the ensuing calendar year to the end that deliveries of Colorado River water to each Contractor will not exceed those reasonably required for beneficial use under the respective Boulder Canyon Project Act contract or other authorization for use of Colorado River water.” 43 C.F.R. § 417.2 (2003).
eight percent to 2,835,500 acre feet.\textsuperscript{126} This decision broke a decade-long deadlock in negotiations among the Department of the Interior, IID, the MWD, and the San Diego County Water Authority (which is a member agency of the MWD). Two months later, Secretary Norton announced that the Southern California water agencies had agreed to reduce their demands from the Colorado River by 800,000 afa over the next fourteen years to bring California within the 4.4 million afa limits of the Boulder Canyon Project Act and that IID had agreed to a long-term transfer of up to 277,000 afa of conserved water to San Diego.\textsuperscript{127}

In both of these cases, IID was found to be engaged in the unreasonable use of water because its conveyance and irrigation practices were wasteful and were causing harm to third-parties—flooding in 1984 and excessive demands on an overstressed resource in 2003. In both cases, the state and federal authorities applied the doctrine of reasonable use aggressively, but flexibly, to give IID and its members a choice: either forfeit their water rights to the extent of unreasonable use or correct the problem and benefit economically from the conservation and transfer of their previously wasteful practices. Application of the reasonable use doctrine in this context thus served three salutary purposes: (1) it induced the conservation and more efficient conveyance and use of water within the IID; (2) it led to the transfer of the conserved water to higher-valued uses within the MWD, thereby increasing the efficiency of the allocation of this water; and (3) it reduced MWD’s long-term demands for water from other sources—such as the Sacramento-San Joaquin River Delta or new water projects in the Sierra Nevada—and thus contributed to the protection and preservation of California’s natural resources.

B. Uncertainty as an Incentive to Accommodation of Interests and Balanced Water Use

In 1986, the court of appeal reviewed the SWRCB’s 1978 water quality standards for the Bay-Delta Estuary\textsuperscript{128} and its accompanying water rights decision that adjusted the permits of the Central Valley Project and the State Water Project to require the projects to release water, and to adjust the timing of their exports from the Delta, to comply with the Board’s water quality standards.\textsuperscript{129} The court, building on the supreme court’s reasonable use and public trust jurisprudence, confirmed the authority of the SWRCB to alter the water rights of the two projects, as well as those of other users who divert and export water from the Sacramento-San Joaquin River system, to protect fisheries,

\textsuperscript{126} Press Release, Bureau of Reclamation, Bureau of Reclamation Issues Regional Director’s Final Beneficial Use Determination for Imperial Irrigation District (Aug. 29, 2003) (copy on file with the McGeorge Law Review).


\textsuperscript{128} STATE WATER RESOURCES CONTROL BOARD, WATER QUALITY CONTROL PLAN: SACRAMENTO-SAN JOAQUIN DELTA AND SUI SUIN MARSH (Aug. 1978).

water quality, and other beneficial uses in the Delta. The court quoted the
supreme court’s wide-ranging and dynamic articulation of the doctrine of
reasonable use in Environmental Defense Fund and explained that in the present
case “the Board determined that changed circumstances revealed in new
information about the adverse effects of the projects upon the Delta necessitated
revised water quality standards.” Based on this new information, the court held
that the SWRCB “had the authority to modify the projects’ permits to curtail
their use of water on the ground that the projects’ use and diversion of the water
had become unreasonable.” The court observed that “some accommodation
must be reached concerning the major public interests at stake: the quality of
valuable water resources and transport of adequate supplies for needs
southward.” The ultimate decision of reasonable use, however, “is essentially a
policy judgment requiring a balancing of the competing public interests, one the
Board is uniquely qualified to make in view of its special knowledge and
expertise and its combined statewide responsibility to allocate the rights to, and
to control the quality of, state water resources.” It concluded that “the Board’s
power to prevent unreasonable methods of use should be broadly interpreted to
enable the Board to strike the proper balance between the interests in water
quality and project activities in order to objectively determine whether a
reasonable method of use is manifested.” The court added that, although
National Audubon had not been decided when the SWRCB promulgated the
Delta water quality standards and water rights decision, “the Board’s evaluation
process was not only a valid exercise of its reserved jurisdiction but also, in
retrospect, a proper exercise of its public trust authority as confirmed by our high
court.” Moreover, in its next round of Bay-Delta hearings, “the Board will be
guided by the principles discussed in National Audubon and may consider
whether a higher level of protection is necessary and reasonable.” The
“principles set out under National Audubon,” the court concluded, “confirm the
Board’s power and duty to reopen the permits to protect fish and wildlife
‘whenever feasible,’ even without a reservation of jurisdiction.”

The court of appeal’s opinion in the Delta Water Cases confirmed the
responsibility of the SWRCB to ensure that the diversion and export of water
from California’s largest river system to supply consumptive uses throughout the
state do not jeopardize the fish and wildlife, water quality, and other instream

Delta Water Cases].

131. Id. at 187.

132. Id. (emphasis added).

133. Id. at 188.

134. Id.

135. Id.

136. Id. at 202.

137. Id.

138. Id.
beneficial uses that also depend on that system. The court’s application of the expansive definition of reasonable use and the public trust demonstrated that these doctrines may serve as powerful forces of reform of water projects that have become imbalanced over time by their one-sided focus on development of the resource. The Delta Water Cases decision thus established a legal and intellectual foundation for the succession of environmental changes that swept over the Sacramento-San Joaquin River and Delta ecosystem during the late 1980s and 1990s including:

(1) the more comprehensive Bay-Delta hearings conducted by the SWRCB that in 1987 began the long process of providing greater protection for fish, water quality, and other in situ beneficial uses of water, and more fairly apportioned responsibility for the achievement of these improvements in environmental quality;\(^{139}\)

(2) the listing and protection of the Sacramento River Winter-Run Chinook Salmon, the Delta Smelt, and other species of fish that migrate through or inhabit the waters of the Sacramento-San Joaquin Delta under the Endangered Species Act;\(^{140}\)

(3) the Environmental Protection Agency’s 1991 veto of California’s water quality standards and its subsequent promulgation of federal standards pursuant to section 303(c)(3) of the Clean Water Act;\(^{141}\)

(4) Congress’ enactment of the Central Valley Project Improvement Act of 1992 (CVPIA), which inter alia authorizes the operation of the CVP for

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139. See S.W.R.C.B., DECISION 1630, at 85 (Dec. 1992) (draft). This draft decision proposed to establish water quality, temperature, and flow standards for the Bay-Delta Estuary to protect Sacramento River Winter-Run Chinook Salmon and the Delta Smelt, and it would have directed the CVP and the SWP to release water and delay later project operations to protect these species during spawning and migration. Id. at 55-56. The decision also would have required the operators of the 100 largest reservoirs in the Sacramento-San Joaquin River system to release “pulse flows” to facilitate the migration of anadromous fish. Id. at 57. In addition, the SWRCB announced a “mitigation fee” applicable to the major surface water users in the system. For export users, the proposed fees were $15 per acre foot for municipal and industrial use and $3 per acre foot for agricultural use. For in-basin users, the proposed fees were $10 per acre foot for municipal and industrial use and $2 per acre foot for agricultural use. Id. at 144. On orders from Governor Pete Wilson, the SWRCB withdrew this draft decision on April 1, 1993. See Dean E. Murphy, Politics Once Again Dry Up Water Reform Policy, L.A. TIMES, Apr. 5, 1993, at A3.

140. Four species of fish that inhabit or pass through the Sacramento-San Joaquin Delta have been listed for protection under the Endangered Species Act. These are: the Sacramento River Winter Run Chinook Salmon, which was listed as threatened in 1989, 55 Fed. Reg. 12,191 (Apr. 2, 1989), and as endangered in 1994, 59 Fed. Reg. 440 (Jan. 4, 1994); the Delta Smelt, which was listed as threatened in 1993, 58 Fed. Reg. 12,863 (Mar. 5, 1993); the Sacramento Splittail, which the United States Fish and Wildlife Service listed as a threatened species in 1999, 64 Fed. Reg. 5963 (Feb. 8, 1999), and then delisted in 2003, 68 Fed. Reg. 55,139 (Sept. 22, 2003); and the Sacramento River Spring Run Chinook Salmon, 64 Fed. Reg. 50394 (Sept. 16, 1999). The National Marine Fisheries Service ("NOAA Fisheries") has also listed the California Coastal Chinook Salmon as a threatened species. NOAA Fisheries declined to list the Central Valley Fall Run Chinook Salmon in 1999, 64 Fed. Reg. 50394 (Sept. 16, 1999).

“fish and wildlife mitigation, protection, and restoration purposes,” requires
the Bureau of Reclamation “to assist the State of California in its efforts to
protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta
Estuary,” and mandates the annual dedication of 800,000 acre feet of project
yield to implement the environmental purposes of the statute;\footnote{142}

(5) the 1994 Bay-Delta Accord which paved the way for long-term
accommodation of the competing interests in water supply and environmental
protection of the Bay-Delta ecosystem;\footnote{143}

(6) California’s ultimate resumption of authority in May 1995 to establish
and to implement water quality standards for the Bay-Delta ecosystem;\footnote{144}
and

(7) the on-going CALFED process, the purpose of which is “to develop and
implement a long-term comprehensive plan that will restore ecological
health and improve water management for beneficial uses of the Bay-Delta
System.”\footnote{145}

The court of appeal’s reiteration of the reasonable use and public trust
doctrines as limitations on the lawful exercise of water rights also profoundly
influenced the legal and political debate over the Bay-Delta. Its holding that
the SWRCB has the power to alter water rights based on findings that the “use
and diversion of the water [have] become unreasonable”\footnote{146} because of their effects on
fish and wildlife, water quality, and other instream beneficial uses, put all users
on notice that their water rights were at some risk. This uncertainty played a key
role in the resolution (at least to date) of the Bay-Delta controversy.

Two participants in the negotiations that led up to the 1994 Bay-Delta Accord
confirm this thesis.\footnote{147} Each has written that the three major water use constituencies—
urban water supply agencies, agricultural users, and environmentalists—were
motivated to resolve their differences away from the SWRCB and the courts based on
their assessment of the risks to their future supplies and legal claims.\footnote{148} The urban
water supply agencies, led by the MWD, “realized that continued conflict over Delta

\footnote{144} See S.W.R.C.B., Revised Decision 1641 (Mar. 15, 2000).
\footnote{145} CALFED BAY-DELTA PROGRAM, PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT REPORT, EXECUTIVE SUMMARY 5 (July 2000).
\footnote{147} See Fullerton, supra note 143; Rieke, supra note 143.
\footnote{148} See Fullerton, supra note 143; Rieke, supra note 143.
water use augured continued uncertainty for their water supplies. Instead of urging delay, they sought resolution of the conflict. They did not have to be unduly threatened or cajoled; they were ready to deal.”\textsuperscript{149} The agricultural water supply agencies had conflicting positions, although each group was motivated by the uncertainties inherent in the situation:

Upstream agriculture [users located in the Sacramento and San Joaquin Valleys upstream of the Delta] had in the past, demanded that junior users (\textit{e.g.}, the state and federal projects) bear the full burden of protective standards. In practice, [however,] there was as significant likelihood that the SWRCB, in its water rights process, would attempt to reallocate some water from upstream users relying on the public trust doctrine and other authorities.\textsuperscript{150}

By contrast, “export agriculture [principally Central Valley Project and State Water Project contractors located south of the Delta] was subject to the same dynamics as the urban export agencies: without a settlement in the Delta, water supply conditions would only get worse.”\textsuperscript{151} The final constituent group—the participating environmental organizations—took advantage of the legal uncertainties that were at play, but ultimately signed on to the compromise embodied in the accord because of their fear that the law might change.\textsuperscript{152} Specifically, they worried that the newly elected 104th Congress might amend the Endangered Species Act, the Clean Water Act, and the CVPIA to remove the federal mandates for greater protection of fisheries, water quality, and other instream beneficial uses.\textsuperscript{153}

As with the conservation and reallocation of Colorado River water in the IID-MWD and IID-San Diego transfers, the uncertainties at issue in the Bay-Delta were an essential factor in bringing the parties to the negotiating table and in inducing an agreement that ushered in a decade of water resources management that has accommodated the competing interests reasonably well. Although the CALFED Bay-Delta program remains a work-in-progress, the reforms that have occurred since the \textit{Delta Water Cases} decision in 1986 show that legal and political uncertainties can have stabilizing effects as the various water use constituencies decide (each for its own reasons) that compromise is better than casting one’s fate to the vicissitudes of administrative or judicial evaluation of reasonable use and enforcement of the public trust in the state’s water resources.

\textsuperscript{149} Rieke, \textit{supra} note 143, at 350.
\textsuperscript{150} Fullerton, \textit{supra} note 143, at 110.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.} at 109.
\textsuperscript{153} \textit{See id.;} Rieke, \textit{supra} note 143, at 365.
C. Toward Greater Uncertainty of Water Rights?

The Colorado River and Delta controversies demonstrate that not all of the uncertainties of California water rights law are pernicious. The uncertainties fostered by the reasonable use and public trust doctrines have served as powerful forces for reform. Although security of water rights is a factor that may influence the willingness to hold or to transfer a water right, some beneficial uses and some water transfers are the results of insecurity in the right. Water users such as IID may be induced to incorporate conservation and transfer strategies into their water management precisely because of the uncertain legality of their existing water use practices. Presented with the risk of losing some of their rights for waste or unreasonable use, water users rationally will choose to modernize their practices to conform to the evolving standards of reasonable use by conserving water or otherwise increasing the efficiency of their conveyance, management, and use of water. If they can profit from these reforms by transferring the conserved water, so much the better. In these situations, the water right holders benefit by protecting and preserving their rights; the transferees of the conserved water benefit by obtaining water at a lower cost than alternative sources; and the public benefits from the improved efficiencies of water use and water allocation.

The Colorado River and Delta cases also show that the water rights system can be administered in a manner that both fulfills California’s economic demands for consumptives uses of its waters and protects the ecosystems that are the sources of the state’s developed water supplies. The requirements of reasonable use and consistency with the public trust are the essential means by which these interests are accommodated. As California’s economy evolves, as its demographics change, as aggregate demands for water increase, as the available sources of water supply become increasingly scarce, and as new laws (such as the Endangered Species Act, the Clean Water Act, and the CVPIA) are enacted in response to scientific developments and shifting public values, these doctrines will make it possible for state and federal water administrators to ensure that the exercise of existing water and contract rights continues to serve the contemporary needs of society.

It would be a mistake to try to reduce or eliminate these salutary uncertainties in California’s water rights system. Despite the concerns of economists that uncertainty may deter water transfers,¹⁵⁴ there is no evidence that any transfer negotiation has foundered on the belief that the underlying water right or the proposed transfer itself would be unreasonable or contrary to the public trust. To the extent that questions of prior waste or unreasonable use might deter otherwise beneficial water transfers, the legislature has enacted a series of statutes that all but eliminate the risk of an unreasonable use determination in this context.¹⁵⁵

¹⁵⁴ See supra text accompanying note 116.
Moreover, the IID’s transfers of conserved water to MWD and San Diego—which likely would not have occurred were it not for the waste and unreasonable use findings against the District—believe the contention that security of water rights is an essential aspect of water transfer policy. Some water transfers are the product of insecurity and the uncertainties that inhere in the doctrine of reasonable use.

Nor would it be appropriate to alter the reasonable use or public trust doctrines in response to claims that they undermine or distort the property right in water. Reasonable use has been an integral component of water rights in California since the earliest days of statehood, and California has recognized the public trust in the state’s navigable waterways since the Gold Rush era. Today, as the California Supreme Court confirmed in National Audubon, both doctrines rest under the umbrella of Article X, Section 2 of the California Constitution. Modern decisions such as the Delta Water Cases and subsequent Bay-Delta developments, which hold water users to the limitations that inhere in their water rights, are neither contrary to the property right in water nor unfair to the water users who are asked to ensure that the exercise of their consumptive rights remains in balance with the reasonable competing needs of the natural environment from which they derive their water. The incidental uncertainties created by the doctrine of reasonable use and the public trust are the means by which the state exercises effective supervision over its water rights system and maintains the appropriate (and ever-changing) balance between water rights and water quality, consumptive uses and the environment, and private rights and the public interest. All things considered, a little uncertainty is not such a bad thing.

VII. CONCLUSION

In retrospect, the Governor’s Commission’s recommendations to reform California water rights law appear to have been relatively modest. The Commission did not, for example, urge the legislature to amend the Water Code to incorporate the public trust doctrine into the water rights system. Nor did it propose—in contexts other than statutory adjudications—to integrate ground and surface water rights. The Commission did not recommend the adoption of a fee on water use. Nor did it promote the reallocation of water from existing consumptive users to new purposes such as fisheries protection, water quality improvement, preservation of wetlands, and habitat restoration.

But if the Commission’s Final Report appears to be modest from today’s vantage point, it is only because of the myriad changes to the state’s water laws and water resources policy that have occurred in the intervening twenty-five

157. See Dunning, supra note 99.
years. The Governor's Commission was at the vanguard of this revolution in California water policy; and its Final Report was a catalyst for the legislature, the California Supreme Court, and other policymakers. With this symposium, we justly celebrate the Commission's members, their creative work, and their many contributions to the modern era in California water law.