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# Up a Creek: An Introduction to the Commission's Final Report Discussion of Uncertainty in California Water Rights Law

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## *Toward Greater Certainty in Water Rights*

### **Up a Creek: An Introduction to the Commission’s Final Report Discussion of Uncertainty in California Water Rights Law**

Nirav K. Desai\*

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#### I. INTRODUCTION

The California State Water Resources Control Board’s Water Rights Division states that its mission is to “establish and maintain a stable system of

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water rights in California to best develop, conserve and utilize in the public interest the water resources of the State while protecting vested rights, water quality and the environment.”<sup>1</sup> This mission statement succinctly identifies the tension that exists between public and private rights in the context of California water rights administration. A second layer of tension presents itself in the identification and enforcement of water rights between multiple private parties. A seemingly necessary component to the efficient yet equitable administration of water rights is procedural certainty.

In its 1978 Final Report, the Governor’s Commission to Review California Water Rights Law (“Commission”) specifically addressed the problem of uncertainty in water rights in a section entitled “Toward Greater Certainty in Water Rights.”<sup>2</sup> This introductory paper will present the Commission’s findings as to uncertainty in California water rights law including, amongst other things, the sources of uncertainty, the resulting consequences of uncertainty, and proposed recommendations made with the hope of reducing uncertainty. The articles that follow expand on the various aspects of uncertainty in California water rights law as identified in the Commission’s Final Report and those that have arisen since 1978.

## II. BACKGROUND: THE NEED TO MOVE TOWARD GREATER CERTAINTY IN CALIFORNIA WATER RIGHTS AS OF 1978

The Final Report section on certainty opens with the recognition that certainty in water rights is necessary in order to ensure the realization of the property benefits for individuals and society at large.<sup>3</sup> It also identified, however, that as of 1978 relative uncertainty was the “distinctive attribute of water rights and water rights law in California.”<sup>4</sup>

### A. *Early Efforts to Combat Uncertainty*

Uncertainty in California water rights had been a problem long before the Final Report was released in 1978. The California Conservation Commission cited uncertainty as a major problem in its 1912 report.<sup>5</sup> This led to the adoption of the Water Commission Act of 1913, now incorporated into the California Water Code.<sup>6</sup> The Water Commission Act established procedures to aid in the

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1. State Water Resources Control Board, *Division of Water Rights Home Page*, at <http://www.waterrights.ca.gov> (last visited Aug. 20, 2004) (copy on file with the *McGeorge Law Review*).

2. GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 16-49 (Dec. 1978) [hereinafter FINAL REPORT].

3. *Id.* at 16.

4. *Id.*

5. *Id.* (citing CAL. CONSERVATION COMM’N, REPORT 21-26 (1912)).

6. *Id.* at 16.

reduction of uncertainty including “administrative conferral and regulation of appropriative rights, court reference procedures, and statutory adjudications of stream systems to settle and determine all rights.”<sup>7</sup> This legislation provided an administrative system through which unappropriated water could be identified and a permit (and perfected license) granted for the use of a specific quantity of water with a specific date of priority.<sup>8</sup> The system should also have provided a record of all post-1914 appropriative rights.<sup>9</sup>

## B. Sources of Uncertainty

The Commission identified three sources of uncertainty in the Final Report: (1) inadequate quantification and recordation of non-statutory rights; (2) rights of future use including riparian rights; and (3) the 1928 amendment to the California Constitution.<sup>10</sup> Each of these sources of uncertainty will be addressed in turn.<sup>11</sup>

### 1. Inadequate Quantification and Recordation of Non-Statutory Rights

As of 1978, a significant source of uncertainty was the lack of recordation of statutory rights including pre-1914 appropriative rights, prescriptive rights, and riparian rights.<sup>12</sup> Prior to 1914, a water user could obtain appropriative rights by simply diverting water and applying it to a beneficial use.<sup>13</sup> While the California Civil Code contained provisions dictating the means by which an appropriator could record his or her water rights, these filing provisions were optional.<sup>14</sup> Additionally, one could only obtain notice of appropriations by difficult and often unhelpful physical inspections of the entire stream.<sup>15</sup> Even when water rights were recorded, the quantities of water claimed were often exaggerated.<sup>16</sup>

Similarly, no effective recording requirement was in place for riparian and prescriptive rights.<sup>17</sup> In 1965, the California Legislature enacted a statute requiring that claimants whose rights were already not a matter of public record file periodic

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7. *Id.* at 16-17.

8. *See id.* at 17 (discussing the permitting scheme established by the Water Commission Act of 1913).

9. *Id.*

10. *See generally id.* at 17-25 (discussing sources of uncertainty).

11. Note that beyond the sources of uncertainty identified by the Final Report, additional sources of uncertainty pre-existed, or have emerged since, the report that affect California water rights law. Among these additional sources of uncertainty are the provisions of the Clean Water Act of 1972, and the California Supreme Court's discussion of the California water rights system in relation to the Public Trust Doctrine in *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983).

12. FINAL REPORT, *supra* note 2, at 17.

13. *Id.*

14. *Id.* at 17-18.

15. *Id.* at 18.

16. *Id.*

17. *Id.*

statements of diversion and use.<sup>18</sup> The 1978 Final Report estimated compliance at a miniscule 10% due to the fact that the statute provided no legal sanctions for failure to comply.<sup>19</sup>

## 2. Rights to Future Use

In what it called an “uncertainty-producing ‘dormant’ right,” the Commission identified rights to future use as a second source of uncertainty.<sup>20</sup> Simply put, “[p]ersons who appropriate or use the unused water in the intervening period are subject to having their uses preempted when the prior right holder finally does put that water to use.”<sup>21</sup> These dormant rights to future use were relevant to all California surface water rights including statutory appropriative rights, Civil Code appropriative rights, non-statutory appropriative rights, and riparian rights.<sup>22</sup>

The Final Report cited dormant rights as relevant in two places with regard to the statutory appropriation system in place at the time.<sup>23</sup> First, municipalities received an exemption from the due diligence requirement and could have obtained a right to appropriate more water than needed to meet current needs.<sup>24</sup> While other users within the municipal entitlement could have appropriated excess water, those other users risked preemption based on future municipal needs.<sup>25</sup> Second, the Department of Water Resources was able to file for unappropriated water to serve a general plan for the development, utilization or conservation of the state’s water resources.<sup>26</sup> The same preemption problem noted above existed with regard to these state filings. Additionally, the California Civil Code exempted municipal and county appropriators from the due diligence requirement.<sup>27</sup>

The Commission also found troubling the rights of pre-1914 rights holders in light of the “relation back doctrine.” The Final Report stated that “contrary to the

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18. CAL. WATER CODE §§ 5103-5108 (West 1971) (stating in section 5108 that failure to file has no legal ramification).

19. FINAL REPORT, *supra* note 2, at 18.

20. *Id.* at 18-19.

21. *Id.* at 19.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*; *see also* CAL. WATER CODE § 1203 (West 1971) (stating currently that other entitled users may appropriate municipal excess until further municipal need arises).

26. FINAL REPORT, *supra* note 2, at 19; *see also* CAL. WATER CODE § 10500 (West 1992). Section 10500 states that:

[t]he department shall make and file applications for any water which in its judgment is or may be required in the development and completion of the whole or any part of a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the state.

*Id.*

27. FINAL REPORT, *supra* note 2, at 19; CAL. CIV. CODE § 1416 (West 1982).

general rule that appropriative rights are to be quantified and definite, many pre-1914 rights have been subject to indefinite increase.”<sup>28</sup> The only limits cited were “that new or expanded uses were to be within the scope of the original intent of the appropriator, and that additional water must be applied to beneficial use within a reasonable time and with reasonable diligence.”<sup>29</sup> If these requirements were met, the priority of right to the additional water related back to the commencement of the work.<sup>30</sup> The Final Report noted that the relation back doctrine would potentially preempt intervening riparian patentees or appropriators under the California Water Code, but not appropriators under the Civil Code.<sup>31</sup>

Dormant rights are central to the riparian rights doctrine.<sup>32</sup> Given that a riparian right is not a right to a specific quantity of water but an entitlement of a riparian right holder on a stream to make reasonable use of a correlative share of stream flow, actual riparian entitlements vary with regard to time and place.<sup>33</sup> A new riparian use is entitled to share equally with all earlier riparian users.<sup>34</sup> As such, a riparian user is accorded a fixed priority of right as against an appropriator, but the quantity of the riparian entitlement is necessarily unfixed.<sup>35</sup> The Final Report indicated “an expanded riparian use has the potential to preempt an inferior appropriative right where the supply of water originally was sufficient to satisfy both uses.”<sup>36</sup>

### 3. Article X, Section 2: The 1928 Amendment to the California Constitution

In 1928, the California State Constitution was amended in a manner that significantly affected California water rights law. The Final Report cited the amendment, which resulted in Article X, section 2 (“1928 Amendment”), as “an exercise of the police power which substantively redefined water rights.”<sup>37</sup> The 1928 Amendment declared that no right attaches to the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water.<sup>38</sup>

The Final Report indicated that the impact of the 1928 Amendment on water rights was primarily judicial and administrative in nature, leading to the case-by-

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28. FINAL REPORT, *supra* note 2, at 20.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 21.

36. *Id.*

37. *Id.*

38. CAL. CONST. art. X, § 2. Article X, section 2 states (in pertinent part):

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.

*Id.*

case application of a reasonableness standard to particular uses of water.<sup>39</sup> An *ad hoc* determination of reasonableness is required given that the objective reasonableness of any use of water will necessarily vary with the facts of any particular case.<sup>40</sup> According to the Final Report, the 1928 Amendment had “cast a shadow” of uncertainty onto the determination of questionably reasonable water uses given a general increase in demand for water, variance in the idea of reasonableness over time, and other factors such as climate change.<sup>41</sup>

### C. Consequences of Uncertainty<sup>42</sup>

The Final Report presented numerous consequences of the uncertainty present in the California water rights scheme. It first noted that uncertainty “hampers the local management and supervision of water uses.”<sup>43</sup> For instance, the exclusion of riparian rights from early statutory adjudication led to later conflicts with regard to later evolving riparian interests.<sup>44</sup>

This uncertainty problem also “hampers state administration of water rights.”<sup>45</sup> A “[l]ack of knowledge of water use by non-statutory [water] right holders affects decisions to grant permits, because the availability of water . . . and the . . . extent of” use are uncertain.<sup>46</sup> This uncertainty also prevents the State’s ability to set meaningful terms and conditions, and also prevents the effective enforcement and protection of statutory water rights.<sup>47</sup>

Finally, the Final Report stated that historically the “most pernicious result of uncertainty in water rights” was “recurrent and costly litigation.”<sup>48</sup> It noted that a private law suit to quiet title to water binds only the parties to the suit, but that every other water user on the stream could be potentially affected.<sup>49</sup> Shortages in the water supply, new appropriations, or new riparian uses all have the potential to bring all users into conflict.<sup>50</sup> The Final Report noted the decades of litigation on the Kings River (beginning in 1876) as an example of the effect of uncertainty on litigation prevalence and cost.<sup>51</sup>

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39. FINAL REPORT, *supra* note 2, at 21.

40. *Id.*

41. *Id.* (stating also that the “shadow of uncertainty may envelop increasing numbers of water uses”).

42. The Final Report also noted that “the inhibition of water transfers and the resulting inefficient allocation of scarce water resources” were other consequences of uncertainty addressed in Chapter III of the Final Report entitled, “Improving Efficiency in Water Use.” See *generally id.* at 50-98.

43. *Id.* at 21.

44. *Id.* at 21-22.

45. *Id.* at 22.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. See *id.* at 22-25 (citing in depth the litigation on the Kings River as an indicative, but not isolated, example of the effects of uncertainty and litigation). The Final Report also provided further examples of “turn of the century” litigation. *Id.*

The Final Report concluded its section on consequences of uncertainty by noting that “[t]he rampant litigation of the turn of the century has disappeared in many areas” due in part to agreements among water users on particular streams and the organization of users into districts.<sup>52</sup> Another contributing factor was the regulation of water use through contracting procedures of the State Water Project, the Central Valley Project, and similar government projects.<sup>53</sup> Most of all, however, the litigation crisis had been mitigated by the “advent of the statutory appropriation system, the statutory adjudication procedure, and related administrative functions.”<sup>54</sup>

### III. RECOMMENDATIONS

In its section entitled “Means for Achieving Greater Certainty,” the Final Report identified two possible solutions to the certainty problem. First, it suggested the incorporation of all non-permit rights into the statutory permit system.<sup>55</sup> Second, it suggested, and ultimately endorsed, a methodology that would determine water rights on a stream-by-stream basis.<sup>56</sup>

#### A. *Solution #1: Incorporation of All Non-Permit Rights into the Statutory Permit System*

The first potential solution to the uncertainty problem considered by the Commission consisted of the total incorporation of non-permit rights into the statutory permit system.<sup>57</sup> Corollaries to this solution would include “the quantification of riparian rights and . . . limitation [of riparian rights] to actual use and the placing of fixed limits on pre-1914 appropriative rights.”<sup>58</sup>

For a number of reasons, the Final Report ultimately did not endorse the total incorporation solution. First, due to the fact that relatively little un-irrigated, arable riparian land existed in California, uncertainty based on unexercised riparian rights was not significant on a state-wide scale.<sup>59</sup> Second, major uncertainty produced by unfixed pre-1914 appropriative rights appeared to be “limited to discrete areas and to discrete users.”<sup>60</sup> Third the costs of total incorporation would be prohibitive due to the fact that incorporation would

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52. *Id.* at 25.

53. *Id.*

54. *Id.*

55. *See generally id.* at 25-26 (discussing total incorporation of non-permit rights).

56. *See generally id.* at 26-27 (discussing the stream-by-stream determination scheme).

57. *Id.* at 25.

58. *Id.*

59. *Id.* at 26.

60. *Id.*

require the adjudication of every stream in California.<sup>61</sup> Based on cost-benefit concerns, the Commission did not endorse this solution.<sup>62</sup>

*B. Solution #2: Determination of Water Rights on a Stream-By-Stream Basis*

As an alternative to complete incorporation, the Commission recommended a system amenable to the stream-by-stream determination of water rights.<sup>63</sup> Among its reasons for recommending the stream-by-stream approach was that this selective method would allow for the addressing of uncertainty ills where they were most significant and where the benefit would exceed cost.<sup>64</sup>

In addition to the cost and selectivity benefits, the basic mechanisms for this form of determination already existed in the statutory adjudication procedure.<sup>65</sup> A water rights claimant initiated the process by filing a petition with the State Water Resources Control Board (“SWRCB”).<sup>66</sup> If the petition was granted, the SWRCB would notify water rights claimants, investigate the stream system and water uses, and make a preliminary determination of rights.<sup>67</sup> The SWRCB would then enter an order of determination defining all rights on the system and file that order with the superior court of the relevant counties.<sup>68</sup> The order and any exceptions to that order (as filed by claimants) would constitute the basic pleadings of a judicial proceeding, which would result in a court decree determining all claimants’ rights.<sup>69</sup>

*C. Specific Recommendation of a Stream-By-Stream Determination of Water Rights*

In recommending the determination of water rights on a stream-by-stream basis, the Commission made specific recommendations to aid in the solution to uncertainty. The Commission recommended that: (1) greater access be given and wider use be made of an improved statutory adjudication system; (2) the present requirements for statements of diversion and use be strengthened; and (3) further acquisition of rights by prescription be explicitly prohibited.<sup>70</sup> The Final Report

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61. *Id.*

62. *See id.* (noting that a similar incorporation of 70% of Oregon cost \$80 million).

63. *Id.*

64. *Id.* at 26-27.

65. *Id.* at 26; *see generally* CAL. WATER CODE §§ 2500-2783 (West 1971 & Supp. 2004) (addressing statutory adjudications).

66. FINAL REPORT, *supra* note 2, at 26-27.

67. *Id.* at 27.

68. *Id.*

69. *Id.*

70. *Id.*

also includes proposed statutory language for amendments to the California Water Code and the California Civil Code.<sup>71</sup>

1. *Greater Use of Statutory Adjudication*

In connection with its call for greater use of statutory adjudications, the Commission made specific recommendations to facilitate the expansion of the adjudicatory process.

In order to facilitate service to goals of the public interest and necessity, the Commission recommended that the SWRCB be allowed to initiate a statutory adjudication and that the courts be able to transfer private suits to quiet title to the SWRCB for statutory adjudication.<sup>72</sup> Additionally, the Commission proposed the requirement of a mandatory hearing to determine whether the public interest and necessity was satisfied whenever the SWRCB initiated a proceeding, accepted a reference from a court, or granted a petition for adjudication from a private claimant.<sup>73</sup> Finally, whenever the SWRCB received a court reference order and it appeared that the public interest and necessity would be best served by having a full determination of rights instead, it could petition the court to modify its order and order a statutory adjudication.<sup>74</sup>

The Final Report also addressed the Commission's goals of finality and comprehensiveness in its recommendations related to interconnected groundwater and quantification of riparian rights.<sup>75</sup> Specifically, the Final Report recommended that "groundwater which is interconnected with a stream or stream system such that the use of the groundwater substantially affects the use of surface water be included in an adjudication, but only where essential to the fair and effective determination of rights on the stream."<sup>76</sup>

In addressing the riparian rights issue, the Commission proposed that the SWRCB and the court be "expressly authorized to quantify all riparian uses and to accord unexercised riparian rights lower priorities than active uses of water."<sup>77</sup> This authority was to be limited to those adjudications where such prioritizations were required to comply with the beneficial use of water requirement under Article X of the California Constitution.<sup>78</sup> At the time, the issue of riparian rights limitation was before the California Supreme Court.<sup>79</sup>

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71. *Id.* at 33-47.

72. *Id.* at 28.

73. *Id.* at 28-29.

74. *Id.* at 29.

75. *See id.* (noting that at the time of the Final Report, statutory adjudication only addressed surface waters).

76. *Id.*

77. *Id.*

78. *Id.* at 29-30.

79. The constitutionality of limiting riparian rights was before the California Supreme Court in *In re Waters of Long Valley Creek Stream System*, 599 P.2d 656 (Cal. 1979). *See also infra* Part IV (discussing judicial implementation of the Final Report's recommendations).

The Final Report also called for certain procedural modifications to expedite the statutory adjudication process. First, the Commission called for the closer integration of the administrative and judicial stages of the procedure and a more expeditious procedure for modification of a decree.<sup>80</sup> Additionally, the Commission proposed that the SWRCB and claimants be able to seek trial distributions of water at various stages in the proceedings.<sup>81</sup>

Finally, the Final Report addressed the issue of statutory adjudication costs. It recommended generally that the State assume all or part of the costs associated with the process.<sup>82</sup> Specifically, it made three recommendations related to costs. First, if the SWRCB initiated a statutory adjudication, it would bear the entire cost.<sup>83</sup> Second, if a petition or court transfer initiated the adjudication, the SWRCB would have discretion to assume any portion of the cost of adjudication.<sup>84</sup> Third, if the SWRCB held a hearing to determine public interest and necessity, the estimated cost of adjudication as well as apportionment of cost between the State and claimants would be taken into consideration.<sup>85</sup>

The Commission based its call for greater use of statutory adjudication on several rationales. This statutory adjudication procedure would provide an efficient alternative to private litigation in that it would finally bind all claimants on a stream and prevent recurrent litigation.<sup>86</sup> The adjudication would add the certainty of official recognition to private property rights.<sup>87</sup> In addition to formal dispute resolution benefits, this process would provide a framework for compromise and agreement among water users and creates the basis for orderly control and management of water on a stream through watermaster service programs.<sup>88</sup>

This statutory adjudication procedure would potentially provide valuable information for water rights administration and planning purposes.<sup>89</sup> In the permitting scheme, information from adjudications could be used to identify existent water and the extent of “vested rights” that might alter a permit’s scope.<sup>90</sup> Additionally, the proposed process would facilitate the SWRCB’s enforcement obligations.<sup>91</sup> Finally, information from statutory adjudications could be used in planning, conservation, and state/federal projects.<sup>92</sup>

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80. FINAL REPORT, *supra* note 2, at 30.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 27-28.

87. *Id.* at 28.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

## 2. Statements of Diversion and Use

The Commission recommended the strengthening of existing reporting requirements, specifically those sections of the California Water Code that addressed statements of diversion and use.<sup>93</sup> The Commission specifically recommended that each statement of diversion and use state “the legal basis upon which a diverter claims the right to use water.”<sup>94</sup>

Additionally, the Commission proposed that legal sanctions attach upon failure to comply with the relevant requirements of the section.<sup>95</sup> The first sanction would consist of the SWRCB’s refusal to grant “a permit, license, extension of time, or other administrative entitlement” to the delinquent claimant.<sup>96</sup> The second sanction would be the SWRCB’s refusal to consider a protest filed against the approval of a permit application where protestant had not complied.<sup>97</sup> A third sanction would consist of the imposition of a civil penalty of up to \$1,000 for failure to comply or for willful misstatement.<sup>98</sup>

## 3. Prescriptive Rights

The Commission proposed the prospective abolition of the doctrine of prescription.<sup>99</sup> It further proposed that the recognition or regulation of existing prescriptive claims await judicial clarification in a case then before the California courts.<sup>100</sup> The Final Report based its proposal on a few policy rationales. Prescription prevents the people from having a voice in the allocation of scarce resources with an eye toward socially beneficial uses.<sup>101</sup> Prescription also exacerbates the “lack-of-knowledge” problem that hinders effective water planning and management, as well as enforcement water rights.<sup>102</sup> Finally, the Commission felt that it was very doubtful that prescription of water rights advances socially valuable goals.<sup>103</sup>

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93. *Id.* at 31.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* The Final Report noted that since 1914 there was confusion as to whether the prescriptive rights doctrine survived the Water Commission Act. *Id.* The question was before the California Court of Appeal at the time of the Final Report and was addressed in *People v. Shirokow*, 605 P.2d 859 (Cal. 1980). See *infra* Part IV (discussing judicial implementation of the Final Report’s recommendations).

101. FINAL REPORT, *supra* note 2, at 32.

102. *Id.*

103. *Id.*

#### IV. IMPLEMENTATION

In short, the California Legislature did not enact any of the Final Report's proposed recommendations. None of the suggested statutory language proposed in the Final Report was incorporated into the Water Code or the Civil Code.

Although the Legislature did not act in accordance with the Final Report's recommendations, there has been judicial activity that has necessarily reflected, and on some level addressed, the Commission's concerns and recommendations.

As noted above, the Final Report recommended that the SWRCB and the court be "expressly authorized to quantify all riparian uses and to accord unexercised riparian rights lower priorities than active uses of water."<sup>104</sup> In 1979, the California Supreme Court decided *In re Waters of Long Valley Creek Stream System*.<sup>105</sup> The court in *Long Valley* held that consistent with the 1928 Amendment to the California Constitution (Art. X, Section 2), the Legislature may exercise "broad authority in defining and otherwise limiting future riparian rights" and "delegate this authority to the Board."<sup>106</sup> The court supported its holding based on the state constitutional policy of requiring the reasonable and beneficial use of water.<sup>107</sup> However, the court did state that the statutory adjudication procedure did not authorize the SWRCB to extinguish future riparian rights altogether.<sup>108</sup> This holding was in essence consistent with the Commission's request regarding future riparian rights.

Shortly after the Commission released the Final Report, the courts addressed the prescriptive rights issue identified therein. The Final Report called for the prospective abolition of prescriptive rights.<sup>109</sup> In 1980, the California Supreme Court decided *People v. Shirokow*, which discussed and altered the nature of prescriptive water rights.<sup>110</sup> The court held that provisions of the California Water Code enjoin the acquisition of prescriptive rights in circumstances in which "a nonriparian user asserts rights in water based in adverse use initiated after the enactment of the code."<sup>111</sup> This was justified by the SWRCB's "expansive powers to safeguard the scarce water resources of the state," based on the Water Code as read in light of Article X, Section 2 of the California Constitution.<sup>112</sup> The decision was narrow in that it did not affect riparian rights and those rights that had been otherwise appropriated prior to December 19, 1914.<sup>113</sup> The decision was also limited to surface water and subterranean streams flowing through known and definite channels, and

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104. *Id.* at 29.

105. 599 P.2d 656 (Cal. 1979).

106. *Id.* at 663.

107. *Id.*

108. *Id.* at 662-63.

109. *See supra* Part III.C.3.

110. 605 P.2d 859 (Cal 1980).

111. *Id.* at 862.

112. *Id.* at 865.

113. *Id.* (December 19, 1914 was the effective date of the Water Commission Act, which created the California Water Code).

did not address percolating groundwater.<sup>114</sup> As a result of *Shirokow*, prescriptive rights were afforded lesser status in the stable of water rights. This decision at least addressed the Commission's goal regarding the prospective abolition of prescriptive rights.

## V. CONCLUSION

The Final Report represents a bold attempt at gaining some procedural certainty in a fluid and contested area of the law. While the Legislature did not act upon any of the Commission's recommendations regarding certainty, its voice was not ignored. The California Supreme Court saw fit to further some of the Commission's aims in cases like *Long Valley* and *Shirokow*.<sup>115</sup>

The pieces that follow discuss various aspects of certainty in water rights. These commentaries include evaluations of the Commission's Final Report and its legacy. Also included are conceptual analyses of certainty in water rights and the competing policies that a goal of certainty raises.

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114. *Id.* at 862 n.2.

115. *See supra* Part IV.

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