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# Improving Efficiency in Water Use: An Overview of the Recommendations of the Governor's Commission to Review California Water Rights Law

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## **Improving Efficiency in Water Use: An Overview of the Recommendations of the Governor's Commission to Review California Water Rights Law**

Kimberly A. Felix\*

### I. INTRODUCTION

When the Governor's Commission to Review California Water Rights Law ("Commission") issued its Final Report in 1978, California was facing a potentially crippling water crisis. California's net demand for water exceeded net dependable supply by 2.4 million acre-feet.<sup>1</sup> In an attempt to combat the substantial water deficit, continued groundwater pumping was occurring in excess of natural recharge, thus further depleting California's water resources.<sup>2</sup> While the development of new water supply projects offered some promise of reducing the water deficit, the extraordinary financial and environmental costs highlighted the need for additional steps to resolve California's water supply crisis.<sup>3</sup> In response to the State's crisis, attention shifted to the reformation of existing water rights law to foster the more efficient use of California's strained water supply.

### II. BACKGROUND

At the time of the Final Report, existing regulatory water law offered a broad framework for efficient water use. However, the state of the law at the time failed to provide the certainty, flexibility, and security that was needed regarding water rights. Further, the then-existing water law failed to provide efficient, streamlined processes for water permit applications and petitions for changes in existing water rights. The following is a brief overview of the state of the law and its complexities at that time.

The Commission expressed great concern about the lack of clear definition in the language of the California Constitution with regards to water rights. Article X, Section 2 of the California Constitution restricts water use to amounts reasonably necessary for beneficial uses.<sup>4</sup> The sweeping language of Section 2

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1. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 50 (Dec. 1978) [hereinafter FINAL REPORT].

2. *Id.*

3. *Id.* at 51.

4. CAL. CONST. art. X, § 2. Section 2 states:

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

offers little guidance in determining whether the reasonable beneficial use requirement has been met. While the Legislature has classified particular, isolated uses as beneficial uses, neither the Legislature nor the judicial branch acted to define the parameters of “reasonable and beneficial” water use.<sup>5</sup> Rather, the courts relied heavily on local custom to determine whether the reasonable beneficial use requirement had been met.<sup>6</sup> When disputes arose as to the reasonable beneficial use element, the courts looked to the local customs and then made a case-by-case determination of the reasonableness and the benefit of the particular use.<sup>7</sup>

In the area of enforcement of water rights, then-existing law granted the State Water Resource Control Board (“SWRCB”) the authority to revoke any permit or license for violation of any of its terms or conditions.<sup>8</sup> This remedy applied even for minor infractions.<sup>9</sup> The harshness of this enforcement tool resulted in its minimal and rare use.<sup>10</sup> In addition to its power of revocation, the SWRCB was also authorized to seek injunctive relief to stop unauthorized diversions, and to hold any proceedings or take any actions necessary to prevent the unreasonable use of water.<sup>11</sup> However, the SWRCB’s authority to seek injunctive relief was often illusory due to the amount of time necessary to file and obtain an injunction.<sup>12</sup>

Another long-standing principle of water law is the forfeiture doctrine. At the time of the Final Report, the forfeiture doctrine provided a five-year forfeiture period for individuals who appropriated water prior to the Water Commission Act 1914.<sup>13</sup> Water users who appropriated water post-1914 were subject to a three-year forfeiture period.<sup>14</sup> Any appropriated water that was not used by the end of the three or five-year period was forfeited.<sup>15</sup>

Under existing law when the Final Report was issued, salvage water appropriation discouraged water conservation.<sup>16</sup> Salvage water included “new water introduced into a watercourse that would not have been available for beneficial use but for the salvage

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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.

*Id.*

5. FINAL REPORT, *supra* note 1, at 57.

6. *Id.* at 57-58.

7. *Id.* at 57.

8. *Id.* at 58.

9. *See id.* (“This Board may revoke a water rights permit or license upon violation of *any* term or condition by the water user.”) (emphasis added).

10. *Id.*

11. SENATE DEMOCRATIC CAUCUS, BILL ANALYSIS OF AB 1147, at 1 (July 1, 1990).

12. FINAL REPORT, *supra* note 1, at 58.

13. *Id.* at 60.

14. *Id.*

15. *Id.*

16. *Id.*

effort.”<sup>17</sup> However, the law at the time was unclear as to whether a person who salvages water must obtain a permit and a license from the SWRCB in order to hold a valid right to the salvage water.<sup>18</sup> Further, it was unclear what priority a salvager received after salvage and diversion.<sup>19</sup> This stream of uncertainty with regard to salvage water and its attendant rights largely discouraged salvage efforts.<sup>20</sup>

In the area of treated wastewater, or reclaimed wastewater, existing law was unclear as to whether the original water supplier or the owner of the treatment plant owned the water.<sup>21</sup> Parties had been settling these conflicts through private agreement.<sup>22</sup>

The existing water code also created ambiguity as to whether the owner of a wastewater treatment plant was required to obtain permission from the SWRCB to change the place of use, point of diversion, or purpose of use of the treated wastewater.<sup>23</sup> Additionally, the water code was unclear as to whether downstream users were permitted to appropriate treated wastewater discharged into a stream for the purpose of enhancing instream beneficial uses.<sup>24</sup> These ambiguities further discouraged the sale and distribution of treated wastewater and increased the disputes that arose from such transfers.

At the time of the Final Report, voluntary transfers of water rights created by SWRCB license or permit required the transferor to file a petition with the SWRCB.<sup>25</sup> Such petitions were required for any water transfer involving a change of place of use, point of diversion, or purpose of use, regardless of the length of the transfer.<sup>26</sup> The SWRCB was authorized to grant the petition so long as no injury was imposed on the rights of legal users.<sup>27</sup> However, any injury, even the most minute, mandated denial of the petition for transfer regardless of the benefit that was to be gained.<sup>28</sup> Existing law did not provide for trial transfers to determine the severity of injury to third parties, nor did the state of the law at the time allow for temporary transfers for those situations where the parties involved sought transfers that were not permanent.<sup>29</sup> In addition to the rigid transfer laws, a common misconception existed that the voluntary transfer of

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17. *Id.* at 60-61.

18. *Id.* at 61.

19. *Id.*

20. *Id.* at 60.

21. ASSEMBLY WATER, PARKS AND WILDLIFE COMMITTEE, COMMITTEE ANALYSIS OF AB 1147, at 2 (Apr. 25, 1979).

22. FINAL REPORT, *supra* note 1, at 63.

23. ASSEMBLY WATER, PARKS AND WILDLIFE COMMITTEE, COMMITTEE ANALYSIS OF AB 1147, at 2 (Apr. 25, 1979).

24. *Id.*

25. FINAL REPORT, *supra* note 1, at 67.

26. *Id.*

27. *Id.*

28. *Id.* Note, however, that it was usually possible to impose conditions to prevent injury.

29. *See id.* (discussing the Commission's proposals with regard to water rights transfers).

water rights constituted an admission of waste.<sup>30</sup> While this misconception had no roots in the law, the myth discouraged voluntary water transfers.<sup>31</sup>

In addition to the rights and limitations detailed above, the existing water code placed restrictions on the sale of district water.<sup>32</sup> More specifically, “[m]ost general and special district acts restrict the sale of district water outside of district boundaries to ‘surplus’ water.”<sup>33</sup> The affected districts were thus unable to transfer water to other districts that were unable to meet their water supply needs unless all water needs were met in the transferring district first.<sup>34</sup> While the restriction on the sale of district water was encompassed in the state’s water code, the authority to make decisions to distribute water within a district was vested in the governing bodies of local districts.<sup>35</sup> While the Commission noted the import of local districts retaining the authority to distribute water according to the district’s needs, the export restrictions fostered the inefficient use of water.<sup>36</sup>

Beyond the restriction on the sale of district water, Water Code sections 1392 and 1629 imposed further restrictions on the sale of water.<sup>37</sup> These code sections restricted “the valuation of appropriative rights held under permit or license for purposes of sale or condemnation by public entities.”<sup>38</sup> More specifically, these sections limited the valuation of rights to the actual amount paid to the state for the permit or license.<sup>39</sup> Sections 1392 and 1629 entirely excluded the consideration of fair market value in the valuation process.<sup>40</sup> These sections were criticized as restricting transfers by completely eliminating the incentive for trade.<sup>41</sup>

Finally, at the time of the Final Report, the SWRCB had adopted administrative reforms increasing the speed with which water rights applications were processed and decided.<sup>42</sup> Previously, the average permit applicant waited nearly three years for the SWRCB to process an application.<sup>43</sup> With the reforms in place, the backlog of unprocessed applications was significantly reduced, but there was still an estimated eight-hundred applications that awaited processing.<sup>44</sup> Given the extraordinary delay in the processing of applications, California’s water use continued to prove inefficient.

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30. ASSEMBLY WATER, PARKS AND WILDLIFE COMMITTEE, COMMITTEE ANALYSIS OF AB 1147, at 3 (Apr. 25, 1979).

31. *Id.*

32. See CAL. WATER CODE § 22259 (West 1984) (restricting districts to the sale of surplus water).

33. FINAL REPORT, *supra* note 1, at 68.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 69.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

### III. RECOMMENDATIONS

Recognizing that the gravity of the water crisis in California required a complex solution, the Commission outlined a comprehensive method encompassing focused approaches to improving efficiency: the regulatory approach, the market approach, and the administrative approach.<sup>45</sup> The regulatory approach focused on achieving efficiency by prohibiting or restricting particular behavior that led to inefficient and non-beneficial water use.<sup>46</sup> In contrast, the market approach emphasized the use of incentives to encourage efficient water use.<sup>47</sup> Finally, the administrative approach sought to further streamline the water rights application process.<sup>48</sup> Within each of these approaches, the Commission offered several specific recommendations intended to foster more efficient water use.

#### A. *The Regulatory Approach*

As part of the regulatory approach to improving efficiency in water use, the Commission explored the benefits of defining reasonable beneficial use and of improving the enforcement of surface water rights.<sup>49</sup> After studying the advantages, disadvantages, and costs of attempting to thoroughly define reasonable beneficial use, the Commission concluded that the determination was very fact-specific and region-specific.<sup>50</sup> Thus, the Commission decided against developing a standard definition of reasonable beneficial use and instead opted to leave the courts with discretion to make a case-by-case determination.<sup>51</sup> However, the Commission formally recommended that local custom not be determinative in the reasonable beneficial use analysis.<sup>52</sup> Hence, rather than allowing great deference to local custom in making the reasonable beneficial use determination, the Commission recommended making local custom but one of many factors to be considered.<sup>53</sup>

In addition to decreasing the emphasis of local custom in reasonable beneficial use inquiries, the Commission also targeted the area of enforcement of water rights as a potential avenue for increasing water use efficiency.<sup>54</sup> The three enforcement methods in place at that time had proved unsatisfactory and ineffective.<sup>55</sup> The Commission recommended granting the SWRCB the power to issue administrative cease and desist orders as a way of combating unauthorized

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45. *See id.* at 57-70 (detailing the Commission's approaches to improving efficiency).

46. *Id.* at 57.

47. *Id.* at 59.

48. *Id.* at 69.

49. *Id.* at 57-59.

50. *Id.* at 57.

51. *Id.*

52. *Id.* at 58.

53. *Id.*

54. *Id.*

55. *Id.*

use.<sup>56</sup> More specifically, the Commission recommended that the SWRCB be given the power to issue cease and desist orders where a water user was found to be making unauthorized diversions or was in violation of a term or condition of his permit or license.<sup>57</sup> In the event the valid cease and desist order was subsequently violated, the Commission recommended that the SWRCB have authority to seek injunctive relief and civil penalties against the violator.<sup>58</sup>

### B. The Market Approach

Under the market approach, the Commission considered several proposals regarding water conservation and voluntary transfers as key tools for increasing efficiency.<sup>59</sup> The Commission's recommendations were all geared toward encouraging voluntary participation by water users in conservation efforts and transfers of surplus water.<sup>60</sup>

The first of the Commission's recommendations involved modifying the existing forfeiture doctrine discussed above.<sup>61</sup> As explained in the Final Report, "[t]he forfeiture doctrine threatens holders of appropriative rights with the loss of all or part of their rights where the right holder has not put the water to beneficial use."<sup>62</sup> The Commission issued a two-part recommendation. The first part recommended modification of the forfeiture doctrine to allow appropriators to retain their full rights when the failure to use the full amount of water was due to conservation efforts.<sup>63</sup> The second part of the Commission's recommendation was the adoption of a uniform forfeiture period of five years so as to eliminate any uncertainty as to when the forfeiture would occur.<sup>64</sup> Moreover, the forfeiture would occur automatically at the end of the forfeiture period.<sup>65</sup>

In addition to modifying the forfeiture doctrine, the Commission also recommended modification of the existing law regarding the appropriation of salvage water to reverse the disincentive to conserve water.<sup>66</sup> The recommendation also responded to the ambiguity regarding the appropriation of salvage water. Under existing law it was unclear whether a salvager needed a permit and license to appropriate salvage water.<sup>67</sup> The Commission concluded that salvagers should be required to obtain a permit or license from the SWRCB and further suggested

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56. *Id.* at 59.

57. *Id.*

58. *Id.*

59. *Id.*

60. *See id.* at 60-69 (discussing the Commission's proposals under the market approach).

61. *Id.* at 60.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 60-61.

67. *Id.* at 61.

that salvagers be granted a right to the water they salvaged superior to the rights of all other users along the stream.<sup>68</sup> The Commission also suggested that salvage efforts be limited to those that did not injure any “lawful user of surface water or ground water” and did not “unreasonably affect fish, wildlife, or other instream beneficial uses.”<sup>69</sup>

In conjunction with creating incentives to conserve water, the Commission proffered several sets of recommendations intended to encourage the voluntary transfer of water rights.<sup>70</sup> The Commission identified water rights security as an essential requirement for an efficient system for the transfer of water rights.<sup>71</sup> In response to the need for more security, the Commission recommended several modest revisions to the water transfer laws. The first group of recommendations related to voluntary transfers of treated wastewater.<sup>72</sup> Under existing law, it was unclear whether treated wastewater was owned by the owner of the wastewater treatment facility or the water suppliers.<sup>73</sup> To encourage the sale and distribution of reclaimed wastewater, the Commission strongly recommended that the owner of the water treatment plant be given the right to sell or distribute the reclaimed water unless otherwise agreed.<sup>74</sup> Further, the Commission suggested that where return flow of reclaimed wastewater is dedicated to instream uses by the return flow producer, the SWRCB should not be allowed to grant permits or licenses for the appropriation of such water.<sup>75</sup> Dedication of return flow of wastewater would also preclude existing water right holders from claiming rights to the water under their existing rights.<sup>76</sup>

In addition to examining the state of treated wastewater and beneficial uses, the Commission also examined the misconception that the transfers of water rights evidence the non-beneficial use of water.<sup>77</sup> The Commission highlighted the need for clarification of the concept of waste and its relation to water transfers.<sup>78</sup> The Commission strongly recommended the enactment of legislation clearly and explicitly stating that “the transfer or exchange of water or water rights, in itself, should not be considered as evidence of waste and unreasonable use.”<sup>79</sup> The new legislation would also make clear that the voluntary transfer would constitute neither waste nor forfeiture.<sup>80</sup>

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68. *Id.*

69. *Id.*

70. *Id.* at 62-69.

71. *Id.* at 62.

72. *Id.* at 63.

73. *Id.*

74. *Id.* at 64.

75. *Id.* at 65-66.

76. *Id.*

77. *Id.* at 66.

78. *Id.*

79. *Id.*

80. *Id.*

In conjunction with ensuring the security of the water right, the Commission also considered proposals to ensure the flexibility of the existing water rights.<sup>81</sup> The Commission also made two recommendations, one relating to temporary transfers, and the other addressing trial transfers and long-term transfers.<sup>82</sup> With regard to long-term transfers, the Commission recommended that the SWRCB be given the authority to allow trial transfers of water to determine whether the transfer will work any negative impact on other users.<sup>83</sup> The ability to assess the scope of the injury to third parties before making the transfer permanent would allow the SWRCB to impose conditions to prevent minor injuries.<sup>84</sup>

The Commission also recognized that some rights holders only intend to transfer water on a temporary basis.<sup>85</sup> In order to encourage these short-term exchanges, the Commission suggested the development and adoption of an expedited temporary transfer process.<sup>86</sup> This recommendation was in response to the complete lack of any procedure or mechanism for the approval of temporary changes in place of use, point of diversion or purpose of use.<sup>87</sup>

The final two recommendations under the market approach involved proposals to repeal certain water laws that were ineffective or unenforced. The first of these involved restrictions on the sale of district water.<sup>88</sup> According to the Final Report, most districts have restrictive water export provisions that reduce the district's ability to transfer water.<sup>89</sup> The Commission noted that "[m]ost general and special district acts restrict the sale of district water outside of district boundaries to 'surplus' water."<sup>90</sup> While the Commission recognized that the decision to export is rightfully a local decision, the Commission suggested the removal of export restrictions from all general and district acts to encourage the transfer of water within local districts that exceed the district's local needs.<sup>91</sup>

The second recommendation involving repealing provisions of the Water Code focused on Water Code sections 1392 and 1629.<sup>92</sup> These code sections restricted the valuation of appropriative water rights.<sup>93</sup> The Commission commented that, "[i]f enforced, these sections would restrict the sale or condemnation price of transferred appropriative rights to the cost of the permit or the license."<sup>94</sup> In other words, fair

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81. See *id.* at 62-66 (outlining proposed revisions in the law designed to enhance the transferability of water).

82. *Id.* at 67.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 67-68.

87. *Id.* at 67.

88. *Id.* at 68.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 69.

93. *Id.*

94. *Id.*

market value would not be a factor at all in the determination of price.<sup>95</sup> Given these considerations, the Commission recommended repealing these provisions.

C. *The Administrative Approach*

At the time of the Final Report, numerous administrative reforms had recently been adopted by the SWRCB in an attempt to remedy the substantial delays in the water rights application process.<sup>96</sup> However, even the battery of administrative reforms already in place did not satisfactorily reduce the backlog of unprocessed permit applications.<sup>97</sup> The Commission considered two proposals to streamline the water rights application process: one proposal involved certifying small, unauthorized diversions, and the other proposal modified the SWRCB's investigation procedure to encourage the private settlement of protested applications.<sup>98</sup> The Commission rejected the former proposal and endorsed the latter proposal.<sup>99</sup> More specifically, the Commission recommended revising the investigation procedures to require the SWRCB to conduct field investigations for permit applications and for petitions for change in place of use, point of diversion, and purpose of use involving small amounts of water.<sup>100</sup> The Commission noted that such field investigations tend to increase the likelihood that the parties will privately settle any disputes.<sup>101</sup>

IV. IMPLEMENTATION: LEGISLATIVE RESPONSE

In its Final Report, the Commission set forth twelve recommendations for improving efficiency in water use.<sup>102</sup> In addition to enumerating recommendations, the Commission also included in its Final Report the text of proposed legislation encompassing the twelve recommendations.<sup>103</sup> In the year following the release of the Final Report, Assemblymember William J. Filante authored and introduced Assembly Bill 1147, a bill containing nearly identical language to that of the Commission's proposed legislation.<sup>104</sup>

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 70.

100. *Id.*

101. *Id.*

102. *Id.* at 71-72.

103. *Id.* at 73-96.

104. A.B. 1147 (Cal. 1980).

In its original form, AB 1147 addressed ten of the twelve recommendations made by the Commission, including the recommendation regarding salvage water.<sup>105</sup> AB 1147 did not incorporate the Commission's recommendations to repeal any restrictions on local districts selling surplus water or the recommendation to repeal Water Code sections 1392 and 1629. In its chaptered form, AB 1147 ultimately enacted nine of the twelve recommendations aimed at improving efficiency in water use in California.<sup>106</sup> The provisions regarding salvage water, however, were removed by subsequent amendments to the bill due to concerns about environmental costs and quality.

## V. CONCLUSION

In response to California's substantial water deficit, the Final Report of the Governor's Commission to Review California Water Rights identified more efficient water use to be a major avenue for reducing California's water crisis and made twelve specific recommendations for legislative action. Enactments of nine of the twelve Commission recommendations indicate that the Legislature was responsive to the Commission's suggestions in this area.

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105. Act of Sept. 18, 1980, ch. 933, 1980 Cal. Stat. 2954.

106. *Id.* The recommendations that were not enacted include the measures regarding salvage water, the measures pertaining to surplus water, and the proposal to repeal sections 1392 and 1629 of the Water Code.