

# Rough Waters: Assessing the Fifth Amendment Implications of California’s Sustainable Groundwater Management Act

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## I. INTRODUCTION

As California’s record-breaking drought enters its fourth year, the demand for groundwater resources only increases.<sup>1</sup> Business is booming for well drilling

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companies as California's Central Valley agricultural industry continues to rely on the water running underneath the earth's surface.<sup>2</sup> For example, in Fresno, Arthur & Orum Well Drilling, Inc. maintains a waiting list that is over a year long.<sup>3</sup> Meanwhile, researchers have demonstrated that over-reliance on groundwater resources leads to adverse and irreversible environmental effects, including groundwater overdraft and land subsidence.<sup>4</sup> To address this troublesome predicament, in late 2014, California lawmakers came together with the goal of making California's groundwater management sustainable and enacted the Sustainable Groundwater Management Act (SGMA).<sup>5</sup>

As eminently laudable and sensible as SGMA may be, when viewed against the backdrop of the existing groundwater regulation framework, the legislation raises important questions.<sup>6</sup> Does the jurisdictional shift contained within the new legislation unfairly upset the expectations of water right holders and property owners?<sup>7</sup> If so, does this shift result in a "taking" of private property without just compensation within the meaning of the Fifth Amendment to the U.S. Constitution?<sup>8</sup>

The development of the law surrounding groundwater management, allocation, and conservation in California has been a power struggle rife with plot twists. Lawmakers, advocates, rights holders, and members of the public have debated for decades about the degree of ultimate oversight that the state should possess over groundwater.<sup>9</sup> Now, as new laws demand sustainable use and grant powers that the state once lacked, a look back through California's groundwater saga provides the context necessary to understand its newest chapter.<sup>10</sup>

The State Water Resources Control Board ("the Board") is a state entity that oversees and protects California's water resources and administers the California

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1. Lesley Stahl, *Depleting the Water*, CBS NEWS, Nov. 16, 2014, <http://www.cbsnews.com/news/depleting-the-water/> (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. See Devin Galloway & Francis S. Riley, *San Joaquin Valley, California: Largest Human Alteration of the Earth's Surface*, 1182 U.S. GEOLOGICAL SURV. CIRCULAR 23 (1999) (demonstrating the connection between groundwater over-draft and land subsidence, an irreversible environmental alteration that has many adverse effects on property).

5. See *infra* Part III (outlining the Sustainable Groundwater Management Act and the push for sustainability in general).

6. See *infra* Part IV (detailing the questions raised by SGMA).

7. See *id.* (posing that question).

8. See *infra* Part IV.C (dealing with the takings question).

9. Reid Wilson, *California Debates New Regulations for Diminishing Groundwater Amid Historic Drought*, WASH. POST, Aug. 6, 2014, <http://www.washingtonpost.com/blogs/govbeat/wp/2014/08/06/california-debates-new-regulations-for-diminishing-groundwater-amid-historic-drought/> (on file with *The University of the Pacific Law Review*).

10. See *infra* Parts II–III (outlining the long history of the Board's jurisdiction and the latest step in its expansion).

permitting system.<sup>11</sup> Section 1200 of the California Water Code establishes the parameters of SWRCB's jurisdiction.<sup>12</sup> The statute provides: "whenever the terms stream, lake, or other body of water . . . occurs in relation to [applications, permits, or licenses to appropriate], such terms refer only to surface water, and to subterranean streams flowing through known and definite channels."<sup>13</sup> As a result, pumping from "subterranean streams" is subject to the SWRCB's permitting authority,<sup>14</sup> but groundwater that does not flow through a "known and definite channel" is not subject to the SWRCB's permitting authority.<sup>15</sup> This latter category is known as "percolating groundwater," and common law principles and the courts regulate the use of such water, rather than the SWRCB.<sup>16</sup>

Also relevant to the discussion is Article X, Section 2 of the California Constitution.<sup>17</sup> In pertinent part, the constitutional amendment<sup>18</sup> mandates that "the water resources of the State be put to beneficial use," 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."<sup>19</sup> The text also grants the legislature power to "enact laws in the furtherance of the policy" it sets forth.<sup>20</sup> Commentators have argued that Article X, Section 2 was an expansion of state jurisdiction over groundwater rights;<sup>21</sup> this Comment will demonstrate that, in fact, there has been a clear trend of increased oversight powers notwithstanding the "subterranean stream" limitation of Water Code Section 1200.<sup>22</sup> The Sustainable Groundwater Management Act further expands the Board's jurisdiction over percolating groundwater, expressly relying on the

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11. See *About the Water Board*, CAL. STATE WATER RES. CONTROL BD., [http://www.swrcb.ca.gov/about\\_us/](http://www.swrcb.ca.gov/about_us/) (last visited Feb. 7, 2015) (on file with *The University of the Pacific Law Review*) (displaying the mission statement of the Board: "To preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations.").

12. CAL. WATER CODE § 1200 (West 2015) [hereinafter "Section 1200"].

13. *Id.*

14. See *Water Rights: Frequently Asked Questions*, CAL. STATE WATER RES. CONTROL BD., [http://waterboards.ca.gov/waterrights/board\\_info/faqs.shtml](http://waterboards.ca.gov/waterrights/board_info/faqs.shtml) (last visited Feb. 7, 2015) [hereinafter *Frequently Asked Questions*] (on file with *The University of the Pacific Law Review*) (stating that "[i]f you have a pre-1914 [appropriative] right, you do not need a water right permit," implying that post-1914 appropriative rights are subject to the Board's permitting jurisdiction).

15. Andrew H. Sawyer, *Subterranean Blues: Groundwater Classification in California*, 6 CAL. WATER L. SYMP. 1, 15 (Jan. 13, 2010), available at [http://www.ourstreamsflow.org/documents/Subterranean%20streams\\_1.pdf](http://www.ourstreamsflow.org/documents/Subterranean%20streams_1.pdf) (on file with *The University of the Pacific Law Review*).

16. *Id.* at 3

17. CAL. CONST. art. X, § 2.

18. *Id.*

19. *Id.*

20. *Id.*

21. See Joseph L. Sax, *We Don't Do Groundwater: A Morsel of California Legal History*, 6 U. DENV. WATER L. REV. 269, 308 (2002) (noting that attorneys for the Board have argued that Article X, Section 2 of the State Constitution allows for the Board's jurisdiction to include unreasonably used groundwater).

22. See *infra* Part II.B.4 (describing the trend of increased Board jurisdictional authority over groundwater).

legislature's prerogative under Article X, Section 2.<sup>23</sup> Under SGMA, the Board will have the ability to limit pumping to achieve sustainability under circumstances that previously would have been within courts' exclusive jurisdiction.<sup>24</sup> If this jurisdictional shift amounts to a taking of private property for public use within the meaning of the U.S. Constitution, then water rights holders should receive just compensation. Likewise, if SGMA's pumping limits require private property owners to bear a burden that is properly borne by the public as a whole, then water right holders should receive just compensation. Unfortunately for opponents of SGMA's passage, existing California law would likely render a facial takings claim unsuccessful. There are, however, certain limited factual scenarios where application of SGMA could create a claim for just compensation.

To reach those conclusions, Part II of this Comment explores the current framework of the Board's jurisdiction over groundwater.<sup>25</sup> Part III describes the Sustainable Groundwater Management Act, passed in late 2014, and the jurisdictional changes contained within that Act.<sup>26</sup> Part IV addresses questions raised by the Act about whether the expanded Board jurisdiction therein is consistent with the protections against uncompensated takings contained within the Fifth Amendment to the U.S. Constitution.<sup>27</sup> Finally, assuming that the expansion of the Board's jurisdiction implicates a takings question, the remainder of this Comment explores whether a takings claim should be recognized if the Board exercises the new authority granted by SGMA to restrict pumping.<sup>28</sup>

## II. THE EXISTING FRAMEWORK: UNDERSTANDING THE SCOPE OF THE BOARD'S JURISDICTION

A statutory framework interpreted by decades of case law governs the power of the Board to limit the pumping of groundwater resources; this framework makes it clear that the Board has limited regulatory jurisdiction over groundwater.<sup>29</sup> This Section examines two of the most distinct aspects of the Board's jurisdiction over groundwater. First, this Section outlines why the Board

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23. See *infra* Part IV.A (concluding that the legislature has expanded Board jurisdiction).

24. *Id.*

25. See *infra* Part II (demonstrating the current limitations on the Board's jurisdiction).

26. See *infra* Part III (outlining the basics of the powers granted to the Board by the Act and the legislation related to it).

27. See *infra* Part IV.C (answering this question in detail).

28. See *infra* Part IV.C.3 (recognizing that a facial takings claim against SGMA as a whole will likely prove unsuccessful, but also noting that California should recognize two specific "as applied" takings arguments).

29. See, e.g., CAL. WATER CODE §§ 1200–1202 (limiting the Board's regulatory jurisdiction to subterranean streams); see also *Katz v. Walkinshaw*, 141 Cal. 116, 119, 141 (1903) (a case interpreting that framework and holding against regulatory jurisdiction over percolating groundwater).

only has jurisdiction over certain types of groundwater rights.<sup>30</sup> Then, this Section explores four developing areas of groundwater law that have expanded the Board's ability to regulate groundwater usage and pumping under certain circumstances.<sup>31</sup> In doing so, this section will outline the general parameters of the Board's jurisdiction over groundwater in California and demonstrate its expansion.<sup>32</sup>

#### A. *Only Some Groundwater*

The California Water Code and the courts interpreting it have together created a distinction between percolating groundwater and subterranean streams.<sup>33</sup> Percolating groundwater is "water held in the earth,"<sup>34</sup> and is not subject to the provisions of the Water Code addressing jurisdiction over groundwater.<sup>35</sup> Because percolating groundwater typically exists in the soil of an overlying landowner's property,<sup>36</sup> it was historically considered "open for exploitation."<sup>37</sup> Thus, in the past, courts would say that "no law will prevent or interfere with" its extraction.<sup>38</sup> However, as the law evolved, courts began to recognize that percolating groundwater is not a purely private property right and that the state may regulate its use in some circumstances.<sup>39</sup>

In contrast, subterranean streams are waters that move underground "in channels with definite beds and banks . . . in definite streams."<sup>40</sup> Because the law subjects water found in a definite channel to appropriation,<sup>41</sup> and due to Water Code Section 1200's unambiguous language,<sup>42</sup> the Board possesses clear jurisdiction over subterranean streams.<sup>43</sup> Section 1200 of the Water Code

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30. See *infra* Part II.A (outlining the difference between percolating groundwater and subterranean streams, and the role that difference plays in determining whether the Board has jurisdiction to regulate).

31. See *infra* Parts II.B.1-4 (addressing these potential limitations).

32. See *id.* (demonstrating the trend).

33. *Katz*, 141 Cal. at 141.

34. *Id.*

35. See CAL. WATER CODE §1200 (stating that the Code applies only to "surface water" and "subterranean streams," while explicitly not mentioning the percolating groundwater in the soil).

36. See *Cross v. Kitts*, 69 Cal. 217, 222 (1886) (holding that "[w]ater percolating in the soil belongs to the owner of the freehold").

37. *Katz*, 141 Cal. at 128.

38. *Id.*

39. See, e.g., *id.* at 134 (noting that percolating groundwater use must be "reasonable").

40. Wells A. Hutchins, *California Groundwater: Legal Problems*, 45 CAL. L. REV. 688 (1953).

41. See CAL. WATER CODE §1201 (stating that "[a]ll water flowing in any natural channel" that has not already been put to beneficial use is "public water of the State and subject to appropriation in accordance with [the Water Code].").

42. See *id.* § 1200 (conferring jurisdiction to the Board over subterranean streams).

43. See, e.g., *North Gualala Water Co. v. State Water Res. Control Bd.*, 139 Cal. App. 4th 1577, 1583 (2006) (noting that the Board argued that the groundwater in question belonged to a subterranean stream, and was thus "subject to [its] jurisdiction.").

expressly grants jurisdiction over the use of such waters, stating that “whenever the [term] . . . water occurs in relation to applications to appropriate water or permits or licenses to such applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels.”<sup>44</sup>

The judiciary has affirmed a legal test that the Board devised for classifying groundwater as either percolating or part of a subterranean stream.<sup>45</sup> Pursuant to this test, a watercourse is a subterranean stream, and therefore subject to the Board’s jurisdiction, when (1) a “subsurface channel [is] present;” (2) that “channel [has] a relatively impermeable bed and banks;” (3) “the course of the channel [is] known or capable of being determined by reasonable inference;” and (4) there is groundwater “flowing in the channel.”<sup>46</sup> This framework limits the scope of the Board’s jurisdiction, because if a party can successfully demonstrate that a given source of groundwater is percolating, then prior to enactment of SGMA, the Board arguably has little, if any, authority over groundwater pumping.<sup>47</sup>

### B. Limited Regulatory Jurisdiction over Percolating Groundwater

This section explores four of the most important contours of the Board’s jurisdiction over groundwater prior to the enactment of SGMA. Subpart 1 explains the Board’s permitting and regulatory jurisdiction, the two possible sources of authority to limit groundwater extraction.<sup>48</sup> Subpart 2 looks at the Water Code’s water quality provisions and the limits they place on the Board’s jurisdiction.<sup>49</sup> Subpart 3 examines how courts have employed the public trust doctrine to regulate groundwater in some situations.<sup>50</sup> Finally, Subpart 4 examines how the legislature and the Board itself have expanded Board jurisdiction by relying largely on Article X, Section 2 of the California Constitution.<sup>51</sup>

#### 1. Permitting vs. Regulatory Jurisdiction

California groundwater law requires water users who pump from a subterranean stream to obtain a permit from the Board before pumping or diverting a supply of water, but the law does not require water users who pump

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44. WATER § 1200.

45. *North Gualala*, 139 Cal. App. 4th at 1585.

46. *Id.*

47. *See id.* (implying that the Board’s jurisdiction is not absolute because of the distinction between percolating groundwater and subterranean streams).

48. *See infra* Part II.B.1.

49. *See infra* Part II.B.2.

50. *See infra* Part II.B.3.

51. *See infra* Part II.B.4.

percolating groundwater to obtain any Board permit.<sup>52</sup> This limited permitting authority begs a question left almost untouched by California's judiciary: does the Board's power to grant permits for water use differ from its power to regulate water use?

No court has directly addressed that issue, although one recent case is relevant: in *Light v. State Water Resources Control Board*, the Board issued a regulation prohibiting certain uses of surface water<sup>53</sup> on the basis that such use was unreasonably and adversely affecting local aquatic habitat.<sup>54</sup> Multiple surface water users sued, asserting that the Board lacked jurisdiction over their riparian and pre-1914 appropriative surface water rights.<sup>55</sup> Despite the fact that the Water Code establishes that the Board does not have permitting authority over riparian and pre-1914 water rights, the court held that "if . . . the [l]egislature has the power to enact general rules governing the reasonable use of water, the Board has a similar regulatory authority" pursuant to Article X, Section 2.<sup>56</sup> In doing so, the court rejected the argument that the Board's authority is limited to enforcement actions and instead reasoned on policy grounds that "[e]fficient regulation of the state's water resources . . . demands that the Board have the authority to enact tailored regulations."<sup>57</sup>

Although the *Light* holding only applies to riparian and early appropriator surface rights, and not groundwater rights, the holding can be extended by analogy to groundwater. For all three types of water rights, the Water Code establishes a lack of Board jurisdiction;<sup>58</sup> likewise, for all three types of water rights, Article X, Section 2 imposes a duty of reasonableness.<sup>59</sup> *Light*'s citation to the broad role of the Board, and the court's concern for efficient regulation applies equally to percolating groundwater as to riparian and pre-1914 rights.<sup>60</sup> *Light* suggests that it is possible to have a water right that is subject to the Board's regulatory power, but not to the Board's permitting authority—a concept rarely invoked prior to the case.<sup>61</sup>

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52. CAL. WATER CODE §§ 1200, 1221.

53. See *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1472 (2014) (explaining that landowners were diverting the water flowing through a stream and using it to irrigate local vineyards and orchards).

54. *Id.*

55. See *id.* (explaining the plaintiffs' argument that they were exempt from Board jurisdiction due to their possession of groundwater rights as "riparian users and early appropriators, whose diversion is beyond the permitting authority of the Board.").

56. See *id.* at 1484–85 (stating that "[t]he Water Code authorizes the Board, in carrying out its statutory duty to administer the state's water resources, 'to exercise the adjudicatory and regulatory functions of the state.'").

57. *Id.* at 1487.

58. *Id.*

59. CAL. CONST. art. X, § 2.

60. See *Light*, 226 Cal. App. 4th at 1487.

61. See *id.* at 1472–73 (referring to permitting and regulatory jurisdiction as two separate possible sources of power over water resources).

Despite the *Light* court's suggestion that permitting and regulatory authority are not necessarily co-extensive, practicalities and policy suggest a more nuanced analysis. As a practical matter, permitting requires a water user to do two things: (1) to affirmatively obtain permission to divert water and (2) to comply with the terms and conditions that the Board may impose.<sup>62</sup> In contrast, a regulatory process without permitting requires a water user to comply with Board rules, but only after the water user establishes a water right.<sup>63</sup> In both cases, a water user's property interest in water is subject to Board rules. In the end, what matters to groundwater pumpers is whether the Board may compel them to limit pumping, which it may do regardless of whether it has permitting jurisdiction.<sup>64</sup> In this regard, exercise of regulatory jurisdiction overwhelms the absence of permitting authority, leaving the question of why the legislature failed to grant such authority in the first place.

As a policy matter, a legal structure that has no upfront permitting requirement, but nonetheless allows regulation of use after the fact, seems to be a recipe for poor planning, chaos, and discontentment. Without a permit requirement, a water user may invest in pumping and rely on pumped water, but thereafter be limited or excluded from realizing that investment due to a regulatory action by the Board. This scenario is arguably inefficient from an economic, social, and water resource perspective. However, the courts may nonetheless trend in the direction of upholding Board jurisdiction, as in *Light*, simply because, without legislative action, management of percolating groundwater basins would continue to be subject to the vagaries of local resources and influences—a practicality that was a driving force behind SGMA.

## 2. *Water Quality Regulation*

In 1969, the California legislature enacted a suite of laws to ensure heightened water quality standards.<sup>65</sup> One of those provisions, Water Code Section 2100, gave the Board the authority to file suit in court in order to limit pumping to protect groundwater quality.<sup>66</sup> Notably, the Board could not impose such pumping cuts directly, much like the scope of authority granted to the Board under other Water Code provisions.<sup>67</sup> The Board has never in fact filed such

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62. *Frequently Asked Questions*, *supra* note 14.

63. *Id.*

64. *See, e.g., Light*, 226 Cal. App. 4th at 1487 (noting that the right holders were outside permitting jurisdiction but nonetheless fell within the rules regarding reasonableness).

65. CAL. WATER CODE §§ 2100–2102.

66. *Id.* § 2100 (“the board may file an action in the superior court to restrict pumping, or to impose physical solutions, or both, to the extent necessary to prevent destruction of or irreparable injury to the quality of [groundwater].”)

67. *See, e.g., id.* § 275 (stating that “[t]he department and board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state”).



adjudication, although there are some examples of the Board invoking its Section 2100 authority in an effort to compel local action.<sup>68</sup>

### 3. *The Public Trust Doctrine*

With roots stretching back to English common law, the public trust doctrine imposes an obligation on the state to protect navigable and tidally influenced waters for common use by the public.<sup>69</sup> In the touchstone case, *National Audubon Society v. Superior Court*, the Supreme Court of California held that state water right allocation must ensure protection of trust uses where feasible.<sup>70</sup> The Court also held that as a matter of logic, this obligation extends to non-navigable streams where water use and diversion affect navigable watercourses.<sup>71</sup> Under this reasoning, the Board's authority to protect the public trust might extend to percolating groundwater, at least where pumping impacts navigable or tidally influenced water subject to the trust.<sup>72</sup>

The recent case of *Environmental Law Foundation v. State Water Resources Control Board* addressed that precise issue.<sup>73</sup> There, the petitioner alleged that groundwater pumping had diminished the flow of the Scott River, damaging fish populations and decreasing opportunities for recreational activities like boating and swimming.<sup>74</sup> In July 2014, addressing a motion for judgment on the pleadings, the superior court issued an opinion holding that where pumping causes harm to navigable waters, the public trust doctrine allows the Board to restrict pumping in order to protect those waters held in the public trust.<sup>75</sup> It is important to keep in mind that this was a superior court holding, and thus, it has limited value as of yet.<sup>76</sup> However, the decision does represent a willingness to move closer to regulating groundwater not previously within the government's reach. Judicial receptiveness to the application of the public trust doctrine to

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68. See, e.g., STATE WATER RES. CONTROL BD., RESOLUTION NO. 88-114, RESOLUTION CALLING FOR JOINT ACTION BY FEDERAL, STATE, AND LOCAL AGENCIES TO REMEDY CONTAMINATION IN THE MAIN SAN GABRIEL GROUND WATER BASIN (1988).

69. Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393, 396–97 (2009).

70. 33 Cal. 3d 419, 426 (1983).

71. *Id.* at 437.

72. See, e.g., Press Release, Env'tl. Law Found., Court Rules Groundwater Protected as Public Trust (July 16, 2014) (on file with *The University of the Pacific Law Review*) (advocating the use of the public trust doctrine to proscribe use of groundwater resources where pumping causes harm to waters protected by the public trust).

73. Order after Hearing on Cross Motions for Judgment on the Pleadings at 2, Env'tl. Law Found. v. State Water Res. Control Bd., No. 34–2010–80000583 (Cal. Super. Ct. 2014), 2014 WL 8843074.

74. *Id.* at 3–4.

75. *Id.* at 13.

76. *Id.* at 1.

groundwater resources is part of a trend toward broader Board authority to regulate groundwater use.<sup>77</sup>

4. *Article X, Section 2 of the California Constitution*

Enacted by voters in 1928,<sup>78</sup> Article X, Section 2 of the California Constitution mandates a standard of “reasonable” use, stating that “the right to water or to the use . . . of water . . . 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.”<sup>79</sup> Article X, Section 2 also requires that “the water resources of the state be put to beneficial use to the fullest extent of which they are capable.”<sup>80</sup> Although Article X, Section 2 is self-executing, the Water Code authorizes the Board to take measures necessary to “prevent . . . unreasonable use.”<sup>81</sup> The exact scope of the authority that Article X, Section 2 grants is unclear.<sup>82</sup> Given this ambiguity, water interests clash over the question of whether the constitutional provision provides sufficient regulatory power to the Board to give the Board jurisdiction over certain water rights—such as rights to percolating groundwater—which the Board otherwise clearly does not have jurisdiction.<sup>83</sup>

Despite this ambiguity, the Board has in fact invoked Article X, Section 2 to assert regulatory jurisdiction over rights that would not otherwise be within its jurisdiction.<sup>84</sup> California’s judiciary has thus far upheld such Board action,<sup>85</sup> although it could be argued that the few cases that exist are limited to their facts. One of the first cases to convey this type of reasoning is *SWRCB v. Forni*.<sup>86</sup> There, without reference to the constitutional provision, the court found that the constitutional and statutory requirements of reasonable and beneficial use applied to a riparian right holder.<sup>87</sup> In reaching the decision to uphold the Board’s action, the court relied heavily on Water Code Section 275, and ultimately held that the

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77. *See id.* at 13. (paving the way and bolstering the argument for such an expansion).

78. Bryan E. Gray, *In Search of Bigfoot: The Common Law Origins of Article X, Section 2 of the California Constitution*, 17 HASTINGS CONST. L.Q. 225 (1989).

79. CAL. CONST. art. X, § 2.

80. *Id.*

81. CAL. WATER CODE § 275; *see, e.g.*, *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 186 Cal. App. 3d 1160, 1163 (1986) (stating that “the Board has adjudicatory power in the matter of unreasonable use of water”).

82. Sax, *supra* note 21, at 313.

83. *Id.* at 308.

84. *People ex rel. State Water Res. Control Bd. v. Forni*, 54 Cal. App. 3d 743 (1976); *Imperial Irrigation*, 186 Cal. App. 3d at 1163 (1986); *Light v. State Water Res. Control Bd.*, 226 Cal.App.4th 1463, 1487 (2014).

85. *See, e.g.*, *Imperial Irrigation*, 186 Cal. App. 3d at 1163 (stating that “the Board has adjudicatory power in the matter of unreasonable use of water.”); *Light*, 226 Cal. App. 4th at 1473 (following the same logic).

86. 54 Cal. App. 3d 743 (1976).

87. *Id.* at 752–53.

code section confers an affirmative power to the Board that allows it to “bring an action in which the reasonableness of . . . water use could be adjudicated.”<sup>88</sup> Water Code Section 275 states that the “board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.”<sup>89</sup> However, the court substantially rested its decision on the fact that the Board was exercising only the power to bring the action to court, and not to direct regulation.<sup>90</sup>

Courts became more overtly supportive to the idea of broader Board jurisdiction over unreasonable uses over time: a decade after *Forni*, the court in *Imperial Irrigation District v. SWRCB* addressed whether the Board’s determination that a water district’s failure to implement conservation measures constituted unreasonable use was binding on the District, despite the fact that the district held pre-1914 rights.<sup>91</sup> Ultimately, the court held that the Board has adjudicatory power as to unreasonable water use.<sup>92</sup> Rather than relying on Section 275, the court based this notion on Article X, Section 2.<sup>93</sup> The *Imperial Irrigation* decision appears to be the earliest direct authority for Board exercise of broad regulatory jurisdiction over the question of reasonable use under Article X, Section 2. The *Imperial Irrigation* court, however, never grounded its decision in any specific legal authority other than the desirability of the Board wielding comprehensive power over the question of reasonable use.<sup>94</sup>

Despite this slim foundation, the idea of broad Board authority under Article X, Section 2 appears to be trending toward acceptance. Nearly forty years after *Forni*, the court in *Light* again questioned whether the Board had the authority to enact regulations concerning unreasonable use.<sup>95</sup> Unlike *Forni*, *Light* considered whether the Board imposed the regulation directly on the water user rather than relying on a court process (although the regulation itself was fairly restrained, requiring the water users to develop their own management plans rather than the Board imposing plans on them).<sup>96</sup> The *Light* petitioners argued that in adopting this regulation, the Board had exceeded its authority under Water Code Section 275 to bring actions before the judiciary, legislature, and other administrative agencies. Thus, the *Light* court was squarely focused on the scope of the Board’s

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88. *Id.* at 753.

89. CAL. WATER CODE § 275.

90. *Forni*, 54 Cal. App. 3d at 754.

91. *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 186 Cal. App. 3d 1160, 1162–63 (1986).

92. *Id.*

93. *Id.*

94. *Id.*

95. 226 Cal. App. 4th at 1472–73.

96. Compare *id.* at 1472 (dealing with a Board regulation on unreasonable use) with *SWRCB v. Forni*, 54 Cal. App. 3d 743 (1976) (addressing whether the Board could bring an action concerning unreasonable use, and concluding that such action comes within the express language of Water Code section 275).

jurisdiction under Article X, Section 2.<sup>97</sup> The court held that the constitutional provision confers broad jurisdiction, and by specifying that the Board could take actions to court, Section 275 simply outlined one approach that the Board could take and did not limit other approaches.<sup>98</sup> Invoking *Imperial Irrigation*'s broad principles, the *Light* court held that the Board has the "authority to prevent . . . unreasonable use of water, regardless of the basis under which the right is held."<sup>99</sup> The *Light* opinion stated that Article X, Section 2 confers upon the Board a "separate and additional power" from that given in Section 275 "to take whatever steps are necessary to prevent unreasonable use."<sup>100</sup> The court also relied upon Water Code Section 174, which grants the Board the power to "exercise the adjudicatory and regulatory functions of the state in the field of water resources,"<sup>101</sup> and Section 186, which affords the Board "any powers . . . that may be necessary or convenient for the exercise of its duties authorized by law."<sup>102</sup>

Although these holdings are potentially very powerful, it is notable that their reasoning is rather thin. For instance, the court in the *Imperial Irrigation* case grounded the Board's regulatory power over pre-1914 rights—rights over which the Board otherwise does not have jurisdiction—in Article X, Section 2 and in so doing, referenced several provisions of the Water Code.<sup>103</sup> However, neither Article X, Section 2 nor those Water Code provisions specifically grant the Board jurisdiction over pre-1914 rights, and arguably, the very general language of these provisions fails to support the argument that they were intended to alter jurisdiction. Moreover, neither the *Light* court nor the *Imperial Irrigation* court presents a convincing legal argument for such a change, as sound as their policy rationales might be.<sup>104</sup> Of course, these decisions are binding and courts are unlikely to reverse them.

Despite their thin legal underpinning, the ultimate conclusion of these cases—that consistent and comprehensive regulation of water resources is most desirable regardless of a lack of legislative clarity on the issue—seems eminently sensible. Perhaps for this reason, if not for any other, Article X, Section 2 is increasingly invoked as a source of Board power, even over water rights to which

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97. See 226 Cal. App. 4th at 1481–82 (lacking other grounds to uphold the regulation, the court relied heavily on the expansive language of the constitutional provision and the fact that Board jurisdiction "has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters").

98. *Id.* at 1495.

99. *Id.* at 1487.

100. *Id.* at 1486.

101. CAL. WATER CODE § 174.

102. *Id.* § 186.

103. See *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 186 Cal. App. 3d 1160, 1169–70 (1986) (citing to California Water Code Sections 275 and 1050 for the proposition that "the Board has the 'separate and additional power to take whatever steps are necessary to prevent unreasonable use'" (quoting *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 142 (1986) (emphasis in original))).

104. See, e.g., WATER § 100 (cited by the *Imperial Irrigation* court, and mandating a statewide water policy but not mentioning the constitutional provision).

it otherwise does not have jurisdiction.<sup>105</sup> In this regard, twenty-five years ago, one commentator characterized Article X, Section 2 as “something of a sleeping giant, which may be awakened in future years as water grows shorter in supply and the interest in water conservation increases.”<sup>106</sup> After a century-long nap, the giant may finally be awake. In 2014, the legislature invoked Article X, Section 2 to confer substantial new powers on the Board in the groundbreaking Sustainable Groundwater Management Act.<sup>107</sup>

### III. NEW GROUNDWATER LEGISLATION: INTRODUCING SUSTAINABLE STANDARDS

During their 2013–2014 legislative session, California lawmakers recognized several problems connected to the state’s reliance on groundwater resources during dry years, including the ability of most groundwater users to pump at an unregulated rate.<sup>108</sup> In response to these problems, the legislature passed three bills related to sustainable local groundwater management that Governor Jerry Brown later signed into law; collectively, these three bills make up the Sustainable Groundwater Management Act.<sup>109</sup> SGMA is a groundbreaking effort to mandate sustainable groundwater use,<sup>110</sup> so as to avoid “over-drafting”<sup>111</sup> the state’s already-depleted water supplies.<sup>112</sup>

The Act primarily focuses on the roles of local groundwater management entities and finds that “groundwater resources are most effectively managed at the local or regional level” and that “groundwater management will not be

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105. *See, e.g., Light*, 226 Cal. App. 4th at 1473 (citing to the constitutional provision to support regulation of unreasonable uses).

106. Gray, *supra* note 78, at 226.

107. SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014).

108. *See* SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014) (finding that “[e]xcessive groundwater pumping can cause overdraft, failed wells, deteriorated water quality, environmental damage, and irreversible land subsidence . . .”).

109. AB 1739, 2014 Leg., 2013–14 Sess. (Cal. 2014); SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014); SB 1319, 2014 Leg., 2013–14 Sess. (Cal. 2014) (collectively referred to as the Sustainable Groundwater Management Act).

110. *See generally* EDMUND G. BROWN, GOVERNOR, STATE OF CALIFORNIA, CALIFORNIA WATER ACTION PLAN (2014) [hereinafter CALIFORNIA WATER ACTION PLAN] (advocating for sustainable water use and “serious groundwater management”); *see also* Lisa Lien-Mager, *Senate Committee Advances Groundwater Bill*, ASS’N OF CAL. WATER AGENCIES, April 22, 2014, <http://www.acwa.com/news/groundwater/senate-committee-advances-groundwater-bill> (on file with *The University of the Pacific Law Review*) (quoting Senator Fran Pavley, author of SB 1168 and SB 1319: “Everyone—literally everyone—seems to be working on groundwater this year”).

111. *See* SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014) (stating that over-draft occurs when a given basin is pumped at a faster pace than the rate at which it recharges its groundwater supply).

112. *See, e.g.,* Sara Jerome, *Water Bills Advance in California Senate*, WATER ONLINE, May 14, 2014, <http://www.wateronline.com/doc/water-bills-advance-in-california-senate-0001> (on file with *The University of the Pacific Law Review*) (stating that “California is pushing up against the limits of our finite water supply,” and calling the current state of affairs a “water crisis”); *see also* Galloway, *supra* note 4 (noting that the groundwater aquifers in California have been over-pumped for years).

effective unless local actions to sustainably manage groundwater basins and subbasins are taken.”<sup>113</sup> Consequently, groundwater management entities and rights holders must now create management plans that specify a “sustainable yield”<sup>114</sup> for the underground basins within their purview, and the basin must be managed to achieve that sustainable level by a deadline.<sup>115</sup> In order to enforce this mandate, the legislature amended the Water Code to grant new powers to the state through the Board.<sup>116</sup> It added two main functions to the state’s responsibilities: prioritization<sup>117</sup> and enforcement.<sup>118</sup>

Pursuant to the new sustainable groundwater management provisions, the state now has the authority to prioritize groundwater basins by their depletion levels and risk of overdraft.<sup>119</sup> Management entities in charge of the highest priority basins will have to create plans more quickly than those that manage lower priority basins.<sup>120</sup> These plans must be designed in a way that achieves a satisfactory result within twenty years.<sup>121</sup>

In order to ensure that management entities actually develop these plans, the new legislation makes its most impactful change by allowing for Board enforcement. Upon noncompliance with the new planning requirements and a determination that a basin is probationary,<sup>122</sup> the Board may arrange for a qualified third party to develop a groundwater management plan for the basin.<sup>123</sup> The Board may adopt such a plan one year after designating a basin as probationary as long as the specific problems noted during designation have not been addressed and remedied.<sup>124</sup> Ultimately, the Board only has the authority to rescind its interim plans if it determines that the sustainability plan and the activities moving forward are “adequate.”<sup>125</sup> This could mean indefinite control

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113. SB 1168 § 1(a)(6)–(7), 2014 Leg., 2013–14 Sess. (Cal. 2014).

114. See CAL. WATER CODE § 10721(v) (enacted by Chapter 346) (defining “sustainable yield” as the “maximum quantity of water . . . that can be withdrawn annually . . . without causing an undesirable result”).

115. *Id.* § 10727(a) (enacted by Chapter 346); CAL. WATER CODE § 10726.2(b) (enacted by Chapter 346).

116. See generally AB 1739, 2014 Leg., 2013–14 Sess. (Cal. 2014); SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014); SB 1319, 2014 Leg., 2013–14 Sess. (Cal. 2014) (known collectively as SGMA).

117. WATER § 10933(b) (enacted by Chapter 346).

118. *Id.* § 10735.4(c) (enacted by Chapter 347).

119. *Id.* § 10933(b) (enacted by Chapter 346).

120. Compare *id.* § 10720.7(a)(1) (enacted by Chapter 346) with *id.* § 10720.7(a)(2) (enacted by Chapter 346) (allowing low-priority basins two more years to adopt sustainability plans than basins of high- and medium-priority).

121. CAL. WATER CODE § 10727.2(b) (enacted by Chapter 346).

122. See *id.* § 10735.2 (enacted by Chapter 347) (stating that “the board may . . . designate a basin as a probationary basin if” any of the listed criteria are met, such as failure to form a management entity by 2017 or to create a management plan by 2020).

123. *Id.* § 10735.4(c) (enacted by Chapter 347).

124. *Id.* §§ 10735.6–8 (enacted by Chapter 347).

125. *Id.* § 10735.8(b)(2) (enacted by Chapter 347).

over the basins that continually fail to meet the Board's standards, regardless of the rights held by the entities that operate those basins.<sup>126</sup>

#### IV. ROUGH WATERS: DOES THE BOARD'S NEW ABILITY TO LIMIT PUMPING IMPLICATE A TAKINGS CLAIM?

Regulators disagree with users and appropriators about the practical implications of statewide monitoring, prioritization, and the possibility of intervention.<sup>127</sup> However, the focus of this Comment is not the pros and cons of the new legislation, but the way in which it expands Board jurisdiction, and whether such expansion creates a takings issue.<sup>128</sup> Therefore, the next section determines whether the legislature has expanded the Board's jurisdiction.<sup>129</sup> Upon concluding that the legislature has indeed increased the Board's jurisdictional scope, the sections thereafter discuss the nature of groundwater rights<sup>130</sup> and the viability of a takings claim.<sup>131</sup>

##### A. *Does SGMA Expand Board Jurisdiction?*

The question of whether SGMA expands the Board's authority in a manner relevant to a takings analysis depends on whether the Board had the authority to limit pumping of percolating groundwater rights prior to the enactment of SGMA. If the Board had that authority, then SGMA did not, as a practical matter, alter the Board's ability to regulate percolating groundwater rights—it merely changed the regulatory framework. From this perspective, Article X, Section 2 of the California Constitution provides the best support for the argument that SGMA does not expand the Board's jurisdiction.<sup>132</sup> The constitutional provision mandates reasonable and beneficial use of all of California's water resources, including groundwater.<sup>133</sup> Further, as explored above, at least one court has recognized the Board's regulatory authority concerning reasonable uses to be as broad and expansive as possible.<sup>134</sup> These authorities suggest that SGMA has not

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126. *Id.*

127. For a review of those issues, see Micah Green, Article, *Chapters 346 and 347: Keeping California's Thirst for Groundwater in Check*, 46 MCGEORGE L. REV. 425 (2015) (discussing the practical consequences of the new groundwater legislation and outlining the arguments on both sides).

128. *See infra* Part IV.

129. *See infra* Part IV.A.

130. *See infra* Part IV.B.

131. *See infra* Parts IV.C.1–3.

132. CAL. CONST. art. X, § 2.

133. *Id.*

134. *See supra* Part II.B.4 (explaining the evolution of the notion that the Board has a regulatory authority comparable to the legislature when dealing with unreasonable uses).

expanded Board jurisdiction, because Article X, Section 2 already grants the Board the power to limit unreasonable pumping.<sup>135</sup>

An argument to the contrary might note that prior to SGMA, no court had addressed the scope of the Board's jurisdiction. The *Light* case explored this issue in more detail than any prior authority, and *Light* itself did not address percolating groundwater. Arguably, because no court has ever clearly held that the pre-SGMA Board had the authority to directly limit percolating groundwater pumping under Article X, Section 2, percolating groundwater rights holders would not have reasonably anticipated that Board authority was a limitation on their property rights. In other words, Board regulation would not have historically been part of the bundle of sticks that made up their groundwater rights.

The legislature's adoption of requirements for sustainable groundwater management and allocation has granted new powers to the Board to regulate percolating groundwater pumping that did not exist before.<sup>136</sup> Legislators working on the bills made a concerted effort to make the state stronger in its role as water manager.<sup>137</sup> Under SGMA, the Board may now limit pumping even though the authority to do so largely did not exist before the enactment of the new laws.<sup>138</sup>

Take, for example, the hypothetical case of an overlying landowner who extracts percolating groundwater from a basin underneath the property and uses it for farming. Assume further that this landowner is subject to the new sustainability requirements, but a groundwater sustainability plan has not been adopted for the basin. Under the law as it existed before SGMA, the Board would not be authorized to interfere with this landowner's use of percolating groundwater.<sup>139</sup> However, under the new legislation, the Board would be able to step in and deem the basin as probationary because no plan was created.<sup>140</sup> The Board would then be able to adopt its own plans and limit that landowner's pumping.<sup>141</sup>

Therefore, at least in this one scenario, it is likely that the legislature has indeed expanded the Board's jurisdiction. This remains true even if one accepts

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135. CAL. WATER CODE § 1201.

136. See *supra* Part III (detailing the shift in authority).

137. See SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014) (stating in the legislative findings section that “[g]roundwater management will not be effective unless local actions to sustainably manage groundwater . . . are taken,” and that in order to do so, “robust conjunctive management” and state “authority to develop and implement an interim plan” will be necessary).

138. Compare WATER § 1200 (stating that “whenever the [term] . . . water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such [term] refers only to surface water, and to subterranean streams flowing through known and definite channels.”), with WATER §§ 10735.2–10735.8 (allowing for adoption of interim plans for “probationary” basins without any reference to whether percolating groundwater is exempt from coverage).

139. See CAL. WATER CODE § 1200 (impliedly exempting percolating groundwater from coverage under the Water Code).

140. *Id.* § 10735.2(a)(2) (enacted by Chapter 347).

141. *Id.* § 10735.4(c) (enacted by Chapter 347).



the argument that such action on the part of the landowner is unreasonable,<sup>142</sup> because as far as the State Board is concerned, landowners in California have historically been left alone to do what they wish with the percolating groundwater sitting underneath their properties.<sup>143</sup>

### B. Water Rights are Property Rights in California

According to the California Supreme Court, “courts typically classify water rights in an underground basin as overlying, appropriative, or prescriptive.”<sup>144</sup> Overlying rights are landowner rights to use groundwater on their own properties.<sup>145</sup> Appropriative rights depend on a surplus of water and these rights holders may only take that groundwater that is “not needed for the reasonable beneficial use of those having prior rights.”<sup>146</sup> Prescriptive rights arise where wrongful appropriative pumping of non-surplus groundwater takes place openly and notoriously for a continuous period of time, much like adverse possession of real property.<sup>147</sup>

All of these groundwater rights are property rights.<sup>148</sup> Like all water rights in California, groundwater rights are usufructuary, which means that owners have a “legal right to use the water,” but hold “no right of private ownership” in the corpus of the water itself.<sup>149</sup> However, the fact that a property right is a

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142. See *Imperial Irrigation*, 186 Cal. App. 3d at 1163 (stating that “the Board has adjudicatory power in the matter of unreasonable use of water.”); see also *Allen v. Cal. Water & Tel. Co.*, 29 Cal. 2d 466, 484 (noting that “[t]he amount of water required to irrigate . . . lands should . . . be determined by reference to the system used”); see also *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1488 (2014) (holding that “[w]hat constitutes an unreasonable use of water changes with circumstances, including the passage of time.”) These authorities, when put together, permit an argument that the overlying landowner in the above hypothetical is using an unreasonable amount of water under the circumstances.

143. CAL. WATER CODE § 1200; *Cross v. Kitts*, 69 Cal. 217, 222 (1886); *Light*, 226 Cal. App. 4th 1463.

144. *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1240 (2000).

145. *Id.*

146. *Id.* at 1241.

147. *Id.*

148. See *Lux v. Haggin*, 69 Cal. 255, 392 (1886) (stating that overlying water rights are property rights); *San Bernardino Valley Mun. Water Dist. v. Meeks & Daley Water Co.*, 226 Cal. App. 2d 216, 221 (1964) (noting that appropriative and prescriptive rights are property interests that begin to exist when certain conditions are met); *Eddy v. Simpson*, 3 Cal. 249, 252 (1853) (stating that “the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use”) (emphasis deleted); *N. Kern Water Storage Dist. v. Kern Delta Water Dist.*, 147 Cal. App. 4th 555, 559 (Ct. App. 2007) (citing to *Smith v. Hawkins*, 110 Cal. 122, 126 (1895)) (recognizing that “water rights are a form of property and, as such, are subject to establishment and loss”); *Fullerton v. State Water Res. Control Bd.*, 90 Cal. App. 3d 590, 598 (Ct. App. 1979) (standing for the proposition that, “[a]lthough there is no private property right in the corpus of the water while flowing in the stream, the right to its use is classified as real property”); *Locke v. Yorba Irrigation Co.*, 35 Cal. 2d 205, 211 (1950) (stating that “[w]ater rights are a species of real property”); *Adamson v. Black Rock Power & Irrigation Co.*, 12 F. 2d 437, 438 (9th Cir. 1926) (noting that the proposition “[t]hat a water right is real property is well settled”).

149. See 62 CAL. JUR. 3D. *Water* § 373 (2015) (noting that “water rights holders have the right to take and use water, but they do not own the water and cannot waste it”).

usufructuary right does not mean that it is outside the protection of the Fifth Amendment’s “takings” clause.<sup>150</sup>

C. *Applying the Doctrine of Regulatory Takings to Groundwater*

This section details the law of regulatory takings and applies those principles to the groundwater context.<sup>151</sup> The United States Supreme Court has never ruled on a takings case concerning California groundwater, but its takings cases have established legal principles that guide application to groundwater.<sup>152</sup> This section examines cases that have addressed takings claims concerning California water rights.<sup>153</sup> Finally, this Comment concludes that SGMA itself does not result in a taking of property, nor will many (or even most) forms of regulation under SGMA, because a mere shift in regulatory jurisdiction from court-only to the Board cannot itself result in a taking.<sup>154</sup> Instead, a takings claim will only be cognizable when a water right holder suffers a specific harm, such as limited pumping, and that claim must specify a harm other than the Board’s new assertion of jurisdiction, and the mere fact of some pumping limits would probably not support a claim.<sup>155</sup> There may be specific circumstances in which a pumping limit disproportionately forces a property owner to bear a burden that should be shared by the public, and in those circumstances, a takings claim could be successful.<sup>156</sup>

1. *The Takings Jurisprudence of the United States Supreme Court*

The United States Supreme Court has a longstanding takings doctrine under the Fifth and Fourteenth Amendments, in which the Court divides takings into categories of “physical” and “regulatory” takings.<sup>157</sup> Within these categories, the Court has developed a standard for two kinds of “categorical” or “per se” takings: one that applies “to physical invasions and direct appropriations of property and complete wipeouts in value, even if those wipeouts were caused solely by regulatory constraints,”<sup>158</sup> and another that applies when governmental action deprives an owner of “all economically beneficial or productive use.”<sup>159</sup> If

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150. See *Schimmel v. Martin*, 190 Cal. 429, 432 (characterizing the usufructuary right to use water as “a right in real property,” as opposed to personal property).

151. See *infra* Parts IV.C.1–3.

152. See *infra* Part IV.C.1.

153. See *infra* Part IV.C.2.

154. See *infra* Part IV.C.3.

155. See *infra* Part IV.C.4.

156. See *id.* (explaining the scenarios where a takings claim could be successful).

157. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

158. Dave Owen, *Taking Groundwater*, 91 WASH. U. L. REV. 253, 271–72 (2013).

159. *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

a regulation comes within either narrow category, a court should automatically hold it to be a taking and award just compensation to the plaintiff.<sup>160</sup>

In contrast, the analysis for whether a taking occurred as a result of less extensive, albeit still significant, regulatory action is more complicated. In the landmark case *Penn Central Transportation Company v. City of New York*,<sup>161</sup> the Court outlined a case-by-case analysis that should apply to regulatory actions interfering with private property interests.<sup>162</sup> The Court's test has three factors, none of which is dispositive on its own.<sup>163</sup> Courts must decide a takings question based on: (1) the "economic impact of the regulation on the claimant," (2) the "extent to which the regulation has interfered with distinct investment-backed expectations" of the claimant, and (3) "the character of the governmental action."<sup>164</sup>

Competing purposes help characterize the Court's evolving doctrine.<sup>165</sup> On one hand, recognition of takings claims "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>166</sup> On the other hand, the government must retain some ability to regulate, because "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."<sup>167</sup>

In the context of groundwater law, these competing interests will heavily influence the discourse going forward because of the ongoing power struggle between regulators and users.<sup>168</sup> The state undoubtedly has an interest in regulating groundwater pumping due to the negative impacts of unregulated use.<sup>169</sup> At the same time, however, rights holders have an equally weighted interest in their historically-preserved rights,<sup>170</sup> and the agricultural industry will work to maximize profits by providing irrigation for as many crops as legally possible.<sup>171</sup>

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160. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

161. *Id.*

162. *Id.* at 124.

163. *Id.*

164. *Id.*

165. Owen, *supra* note 158, at 272.

166. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

167. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

168. See *infra* Part I (describing the conflict between those who pump and those who protect).

169. See SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014) (finding that "[e]xcessive groundwater pumping can cause overdraft, failed wells, deteriorated water quality, environmental damage, and irreversible land subsidence . . .").

170. See *Cross v. Kitts*, 69 Cal. 217, 222 (1886) (holding that "[w]ater percolating in the soil belongs to the owner of the freehold").

171. See CAL. DEP'T OF FOOD & AGRIC., CALIFORNIA AGRICULTURAL STATISTICS REVIEW, 2013–2014, at 5 (2014) (noting that California leads the nation in the production of over 70 crops, despite the current conditions of extreme drought and groundwater overdraft).

## 2. Water Rights Takings Cases from California

This section reviews California and federal takings law in the context of groundwater.<sup>172</sup> Two U.S. Federal Claims Court cases applying California water law help illustrate how a California state court could recognize compensation for interference with certain rights.<sup>173</sup> In the first case, *Tulare Lake Basin Water Storage District v. United States*, a group of plaintiffs claimed their right to use water had been taken from them when the federal government imposed water use restrictions under the Endangered Species Act.<sup>174</sup> The plaintiffs reasoned that the government had placed the costs of protecting local endangered species solely on their shoulders.<sup>175</sup> The Court of Federal Claims found in favor of the plaintiffs, recognizing that “a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs’ sole entitlement is to the use of the water.”<sup>176</sup>

In the second case, *Casitas Municipal Water District v. United States*, a different regulatory agency attempted to curtail rights holders’ water use under the Endangered Species Act.<sup>177</sup> The rights holders brought suit alleging that their water rights had been taken in violation of the Fifth Amendment.<sup>178</sup> The government conceded that, under California water law, the plaintiff had a “valid property right in the water in question.”<sup>179</sup> The court went on to state that an application of the doctrine of physical takings was appropriate and remanded to the lower court to determine whether a taking had actually occurred.<sup>180</sup> Thus, under California’s current water rights’ framework, courts would act well within the limits of the law by granting compensable takings awards in certain circumstances.

Contrary to this rationale, at least one California court has held that governmental regulation of groundwater in the permitting context does not come within either category of per se takings, nor does it constitute a taking under *Penn Central*.<sup>181</sup> In *Allegretti & Company v. County of Imperial*, a landowner alleged that the Board’s requirement to obtain a permit for certain groundwater

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172. See *infra* Part IV.C.2.

173. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001); *Casitas Mun. Water Dist. v. U.S.*, 543 F.3d 1276 (Fed. Cir. 2008).

174. *Tulare Lake Basin*, 49 Fed. Cl. at 314.

175. *Id.* at 316.

176. *Id.* at 319; see also *Int’l Paper Co. v. United States*, 282 U.S. 399, 407 (1931) (stating that “the petitioner’s right was the use of water; and when all the water that it used was withdrawn from the petitioner’s mill and turned elsewhere by [the] government . . . it is hard to see what more the [g]overnment could do to take that use”).

177. *Casitas Mun. Water Dist.*, 543 F.3d at 1282.

178. *Id.*

179. *Id.* at 1295.

180. *Id.* at 1296–97.

181. *Allegretti & Co. v. Cnty. of Imperial*, 138 Cal. App. 4th 1261, 1267 (2006).

drilling activities and comply with reporting standards amounted to a taking.<sup>182</sup> Despite recognizing that California's Constitution allows a taking when "land is taken . . . for public use" and that "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property,"<sup>183</sup> the court held that "imposition of a . . . condition limiting the total quantity of groundwater available for . . . use" could not be a physical taking.<sup>184</sup> The court also held that state intervention with groundwater resources does not constitute a total "deprivation of economically beneficial or productive use" because owners may still use the overlying land for farming and other financially gainful purposes.<sup>185</sup>

Further, the *Allegretti* court did not see interference with groundwater rights as a taking under the ad hoc *Penn Central* test, because the economic impact was reasonable, and the landowner had no "distinct, as opposed to abstract, [investment-backed] expectations."<sup>186</sup> The court did not view the landowner's interest in the anticipated profits when buying the farm as compensable because it believed that a landowner's missed economic opportunity should not take away from the state's power to regulate under both the police power and of the court's understanding of Article X, Section 2.<sup>187</sup> The *Allegretti* case is the only California case to examine whether regulation of an overlying landowner is a taking.<sup>188</sup>

An older case suggests that the *Allegretti* court's reasoning was not entirely novel.<sup>189</sup> In *Joslin v. Marin Municipal Water District*, the California Supreme Court held that a compensable interest in water is rooted in reasonable use, and thus, regulation of unreasonable uses cannot constitute a taking.<sup>190</sup> Although not dealing directly with groundwater, the Court concluded that no takings claim arises when the state regulates an unreasonable use, because property owners are not entitled to use their water unreasonably.<sup>191</sup> Thus, although the *Allegretti* court did not need to cite to *Joslin* to reach its conclusion, the case law in California demonstrates a trend of opposition to recognizing takings claims for regulation of water resources.<sup>192</sup>

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182. *Id.*

183. *Id.* at 1269–70.

184. *Id.* at 1273.

185. *Id.* at 1276.

186. *Id.* at 1277.

187. *Id.* at 1279.

188. *Id.* at 1267.

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

190. *Id.* at 144–46.

191. *Id.*

192. See *Allegretti & Co.*, 138 Cal. App. 4th 1261 (holding that property owners do not have a property right in groundwater resources and making no reference to *Joslin*); see also *Joslin*, 67 Cal. 2d (opposing a takings claim where regulation is to prohibit unreasonable uses).

3. *Creation of New Jurisdiction Alone is Likely Insufficient to Support a Takings Claim*

Generally, when a state decides to allocate private resources for public purposes, such action necessitates a discussion of takings and just compensation.<sup>193</sup> That principle begs the question of whether a shift in jurisdiction is equal to a state action for condemnation of private interests sufficient to create a facial takings claim.

Case law answers this question in the negative. For example, in *United States v. Riverside Bayview Homes*, the U.S. Supreme Court affirmed the principle that “the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking.”<sup>194</sup> The plaintiffs alleged that the United States Army Corps of Engineers had effectuated a taking by extending its regulatory authority to previously unregulated property.<sup>195</sup> The Supreme Court confirmed that mere extension of regulatory authority does not, by itself, result in a compensable taking.<sup>196</sup>

In California, the road is even rockier for a facial claim because courts generally reason that the ability to regulate groundwater use for public benefit comes “within the sphere of the [state’s] police power.”<sup>197</sup> This notion could arguably take regulation of groundwater out of the takings conversation altogether.<sup>198</sup> In *People v. Murrison*, the Third District Court of Appeal applied this police power rationale to restrictions imposed on an alleged pre-1914 right holder who was diverting stream water for irrigation purposes.<sup>199</sup> In doing so, it noted that “[l]egislation with respect to water affects the public welfare and the right to legislate in regard to its use and conservation is referable to the police power of the state” and that “[w]ater rights have been the subject of pervasive regulation in California.”<sup>200</sup> Ultimately, the *Murrison* court held that:

where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly

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193. 4 TIFFANY REAL PROPERTY § 1252 (3d ed. 1947).

194. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

195. *Id.* at 123.

196. *Id.* at 126.

197. *State Water Res. Control Bd. v. Forni*, 54 Cal. App. 3d 743 (1976).

198. *See id.* (stating that “it is established beyond dispute” that regulations based on the California Constitution are valid exercises of the police power, and citing to *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132 (1967) in support of the police power rationale).

199. *People v. Murrison*, 101 Cal. App. 4th 349, 354–55 (2002).

200. *Id.* at 360.

singled out the property owner to bear a burden that should be borne by the public as a whole.<sup>201</sup>

One final consideration for regulatory takings is the question of whether “background principles” of state law limit a takings claim for pumping limits under SGMA.<sup>202</sup> In *Lucas v. South Carolina Coastal Council*, the U.S. Supreme Court noted that the state does not owe compensation if the regulation simply reiterates the restrictions that the “background principles” of the state’s property law already place upon ownership.<sup>203</sup> Because of this statement, the question becomes whether California’s background principles of groundwater law already dictate that unsustainable use is unreasonable. On the one hand, the California courts have long recognized the Board’s regulatory power to prescribe unreasonable uses,<sup>204</sup> and unsustainable pumping could fit within the meaning of “unreasonable.” That would be a background principle likely to prevent compensation. Another, and perhaps more definitive question, is whether any entity had the authority to impose pumping cuts on percolating groundwater users prior to SGMA; if the users were subject to limits from another source prior to SGMA, then perhaps it doesn’t matter that the Board has not historically had the power to issue those limits. In this regard, the courts have always had the power to limit pumping to prevent overdraft and to ensure that pumping is within the “safe yield” of a basin.<sup>205</sup> Because SGMA’s definition of sustainable use essentially mirrors the common law “safe yield” definition,<sup>206</sup> the best conclusion seems to be that pumping limits to achieve a safe yield have always been part of a landowner’s so-called bundle of sticks. In other words, the potential for such limits has always been inherent in the water right.

#### 4. “As Applied” Takings

Although reduction of pumping under SGMA is unlikely to support a viable takings claim in many instances, there may be a few specific scenarios in which regulation raises the specter of takings. First, there should be a cognizable takings claim if SGMA results in limits on individual riparian or overlying rights holders who pump from isolated aquifers that do not contribute to the problems of unsustainable groundwater pumping and overdraft.

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201. *Id.* at 363.

202. *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

203. *Id.*

204. *See supra* Part II.B.4 (outlining the cases demonstrating the regulatory authority of the Board when it comes to addressing unreasonable use).

205. *Safe Yield*, WATER EDUC. FOUND., <http://www.watereducation.org/aquapedia/safe-yield> (last visited September 7, 2015) (on file with *The University of the Pacific Law Review*).

206. *See* CAL. WATER CODE § 10721(v) (enacted by Chapter 346) (defining “sustainable yield” as the “maximum quantity of water . . . that can be withdrawn annually . . . without causing an undesirable result”).

Second, a takings claim might succeed where SGMA limits deprive a water user of all economically beneficial use of their water rights. The *Lucas* court held that, “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”<sup>207</sup> Of course, this argument depends in part on what is required of the water user and how the right is defined—if the user is limited in critically dry years, but not every year, such regulation would likely withstand a takings claim.

## V. CONCLUSION

Throughout California’s storied history as a leading agricultural producer, each branch of the government has worked to keep the state’s groundwater law current with evolving demands.<sup>208</sup> Now, as the legislature pushes for sustainability and confers new authority on the Board, it is important to keep the longstanding framework in mind. The Board now has a scope of authority that is larger than before.<sup>209</sup> Although such pumping limits are likely desirable from an environmental and policy perspective, this substantial legal change raises important questions about whether the government is overreaching in the scope of its impact on private property in the name of public benefit, at least without compensation. As described herein, this mere shift in jurisdiction is unlikely to support a viable takings claim; however, there may be some limited, specific circumstances in which state interference “goes too far” and results in a compensable taking.<sup>210</sup>

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207. *Lucas*, 505 U.S. at 1019 (emphasis in original).

208. See CALIFORNIA WATER ACTION PLAN, *supra* note 110 (showing the executive’s role in groundwater management); SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014) (showing the legislature’s role); *Cross v. Kitts*, 69 Cal. 217, 222 (1886) (showing the judiciary’s role).

209. See *supra* Part III.

210. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).