

**EXPLORING AN UNENUMERATED CALIFORNIA
CONSTITUTIONAL RIGHT TO SAFE AND CLEAN WATER
THROUGH A HYPOTHETICAL DECISION**

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INTRODUCTION

California recognizes by statute that every human being has a right to safe and clean water.¹ Yet, throughout the state, one million Californians lack such access.² Many of these Californians are Hispanic farmworkers residing in disadvantaged unincorporated communities (DUCs) throughout the

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1. CAL. WATER CODE § 106.3(a) (2013).
2. CAL. DEP’T OF WATER RES. ET AL., 2020 WATER RESILIENCE PORTFOLIO: IN RESPONSE TO THE EXECUTIVE ORDER N-10-19, 17 (2020).

Central and Salinas Valleys. These communities must rely on contaminated aquifers.³ The unincorporated community of Tooleville of Tulare County, located in the San Joaquin Valley, represents many of these Californians' struggle for the right to safe and clean water.⁴

Tooleville consists of 80 homes and about 391 residents—68% of whom are Hispanic.⁵ Records show Tooleville's water has been contaminated by pesticides since the 1970s and continues to be so because the state does not regulate Tooleville's source of water.⁶ Since 2001, Tooleville has unsuccessfully tried to persuade the neighboring City of Exeter (Exeter)—about a mile away—to extend Tooleville's water from Exeter's municipal water system.⁷ Tooleville could not rely on California to order such consolidation, despite the California State Water Resources Control Board's (Water Board) authority to order a mandatory consolidation of public water systems.⁸ Tooleville was ineligible for mandatory consolidation because Tooleville's water did not consistently fail to meet state and federal standards.⁹ Furthermore, the residents of Tooleville cannot rely on § 106.3(a) of the California Water Code to require the State to provide them with access to safe and clean water because the statute does not create a legal duty.¹⁰ Therefore, the residents of Tooleville did not have legal recourse to achieve access to clean and safe water. The overarching question for the Tooleville residents is: can they achieve access to safe and clean water by filing suit against the State of California, the Water Board, the County of Tulare (Tulare), and the City of Exeter by claiming Tooleville residents have an unenumerated constitutional right to safe and clean water? Will the Supreme Court of California recognize such an unenumerated right?

3. Jose A. Del Real, *They Grow the Nation's Food, but They Can't Drink the Water*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/us/california-central-valley-tainted-water.html>; CAL. GOV. CODE § 56033.5 (2012).

4. Casey Beck, *Inside the Uphill Fight for Clean Water in California's Central Valley*, YALE ENV'T 360 (July 28, 2020), <https://e360.yale.edu/features/inside-the-uphill-fight-for-clean-water-in-californias-central-valley>.

5. Austin R. Ramsey, *The Great Divide: California Communities Battle for Rights to Water*, THE FRESNO BEE (June 5, 2020), <https://www.fresnobee.com/news/local/water-and-drought/article243237701.html>.

6. *Id.*; See also, Virginia Madrid-Salazar, Comment, *Feeding the World has Left Our Water Contaminated: Will California's Human Right to Water Act Fix the Problem?*, 24 S.J. AGRIC. L. REV. 213, 213-214 (2015) (noting that "California does not require regulation of every domestic water source.").

7. Ramsey, *supra* note 5.

8. *Id.*

9. *Id.*; CAL. HEALTH & SAFETY CODE § 116682(a) (2022).

10. See CAL. WATER CODE § 106.3(b)-(e) (2013) (noting that § 106.3(b) sets forth a policy for state agencies to consider in making decisions and does not expand any obligation of the state to provide water or infringe on the rights or responsibilities of public water systems); Madrid-Salazar, *supra* note 6, at 229-230.

This Note will explore an unenumerated California Constitutional right to safe and clean water through a hypothetical lawsuit by the residents of Tooleville against the State of California, the Water Board, Tulare, and Exeter. Part I will introduce the plaintiff, Tooleville, and the defendants, the State of California, the Water Board, Tulare, and Exeter, by providing the facts and circumstances leading up to the “cause of action.” Part II will discuss California Constitutional claims, present anticipated arguments, and analyze the strength of the legal claims before providing a discussion as to how a court is likely to rule. Part III will discuss the scope, application, and precedent of the court’s hypothetical ruling, as well as the practical concerns of potentially recognizing an unenumerated California Constitutional right to safe and clean water. This part will also consider whether the ruling will apply to other unincorporated communities.

I. TOOLEVILLE’S WATER: FACTUAL BACKGROUND

The residents of Tooleville rely on two contaminated wells—one of which ran completely dry for a day in 2021—for water that exceeded the acceptable level of nitrate at least seven times since 1997.¹¹ Most of the residents drink the water from the contaminated well and use it for cooking.¹² In addition, residents have to pay twice as much for water because they have to pay their water utility bill and for bottled water.¹³ Residents only receive five five-gallon jugs of bottled water from Tulare County every two weeks.¹⁴ Meanwhile, the Friant-Kern Canal—primarily used for irrigation—runs behind their houses and through Exeter’s municipal water system.¹⁵ The canal does not contain harmful contaminants and is less than a mile west of Tooleville.¹⁶ Tooleville residents do not have legal access to water from the Friant-Kern Canal that supports the San Joaquin Valley’s major crops: alfalfa, corn, grapes, vegetables, and fruits.¹⁷ Furthermore, Tooleville’s

11. Carolina Laurie Balazs, *Just Water? Social Disparities and Drinking Water Quality in California’s San Joaquin Valley* 1, 61 (2011) (Ph.D. dissertation, University of California, Berkeley); CTR. FOR WATERSHED SCIS., U.C. DAVIS, *ADDRESSING NITRATE IN CALIFORNIA’S DRINKING WATER WITH A FOCUS ON TULARE LAKE BASIN AND SALINAS VALLEY GROUNDWATER* 9 (2012) (noting nitrate is a by-product of nitrogen use which is widely applied to crops throughout the region); Diana Marcum, *A California Town Refused to Help Neighbors with Water. So the State Stepped In*, L.A. TIMES (Oct. 30, 2021), <https://www.latimes.com/environment/story/2021-10-30/california-water-crisis-state-intervenes-to-help-town>.

12. Marcum, *supra* note 11.

13. *Id.*

14. See Cagle, *Rural California May Run Dry*, THE GUARDIAN (Feb. 28, 2020), <https://www.theguardian.com/environment/2020/feb/28/california-water-wells-dry-sigma>.

15. Balazs, *supra* note 11, at 29.

16. Balazs, *supra* note 11, at 29; Ramsey, *supra* note 5.

17. Balazs, *supra* note 11, at 29; Ramsey, *supra* note 5; *Friant-Kern Canal*, WATER EDUC. FOUND., <https://www.watereducation.org/aquapedia/friant-kern-canal> (last visited Mar. 13, 2022).

efforts to persuade Exeter to consolidate water systems have been unsuccessful.¹⁸

Tooleville's present conditions can be attributed to several factors. One systematic and intentional factor dates back to the 1970s, when Tulare County first listed Tooleville as one of fifteen communities for which public resources—including water infrastructure—should be withheld.¹⁹ The County Plan reads:

Public commitments to communities with little or no authentic future should be carefully examined before final action is initiated. These non-viable communities would, as a consequence of withholding major public facilities such as sewer and water systems, enter a process of long term, natural decline, as residents depart for improved opportunities in nearby communities.²⁰

Tooleville is one of thirteen of the *non-viable* communities that remain and must rely on small, privately-owned wells that are contaminated—in part because Tulare County withheld public funds that could have provided Tooleville with proper water infrastructure.²¹

A second factor causing the present conditions in Tooleville is California's regulatory framework. Small public service providers and private wells are not protected by California's Safe Drinking Water Act regulations, nor the Water Board's funding mechanism.²² The smallest regulated water service providers are public water systems with at least five, but not more than 14, service connections.²³ As a result, nitrates from agricultural use has permeated into the groundwater since the early 1990s.²⁴

As an unincorporated community, Tooleville did not have a viable legal mechanism to force the State of California or Exeter to provide Tooleville residents with access to safe and clean water. Two possible legal avenues—1) a human right to water policy, and; 2) consolidation—were of no use to Tooleville either. First, California's right to safe and clean water statute does not create a legal duty or remedy that private citizens can invoke to obligate the state to provide Californians with clean and safe water.²⁵ The statute is a policy consideration agencies should take into account when planning or

18. Ramsey, *supra* note 5.

19. Laura Bliss, *Meet the Drought-Stricken Communities of California's San Joaquin Valley*, GRIST (Oct. 2, 2015), <https://grist.org/climate-energy/meet-the-drought-stricken-communities-of-californias-san-joaquin-valley/>; Balazs, *supra* note 11, at 61.

20. Bliss, *supra* note 19.

21. *Id.*

22. Madrid-Salazar, *supra* note 6, at 214.

23. CAL. HEALTH & SAFETY CODE § 116275(n) (2019).

24. CTR. FOR WATERSHED SCIS., *supra* note 11, at 9.

25. CAL. WATER CODE § 106(b)-(e) (2013); Madrid-Salazar, *supra* note 6, at 229–230.

making decisions²⁶ Second, the Water Board can order a consolidation of public water systems only if a water system is consistently failing to provide an adequate supply of safe drinking water.²⁷ Tooleville’s water did not consistently fail to provide an adequate supply of safe drinking water despite the nitrate contamination of Tooleville’s wells.²⁸ The City of Exeter has repeatedly declined to voluntarily consolidate.²⁹

In 2019, the Exeter City Council voted unanimously to reject plans for extending service to the Tooleville community after approving the Water Master Plan which examined Exeter’s water infrastructure and capacity to serve another community.³⁰ The Water Master Plan recognized that Tooleville’s water is contaminated with nitrates, hexavalent chromium, and bacteria.³¹ After the Council’s vote, the Mayor and Council stated that Exeter did not have the water capacity and ability to service Tooleville, nor were they interested in adding to Exeter’s debt or stretching its workforce to help Tooleville.³² But, helping Tooleville only requires constructing 0.7 miles of pipe.³³ In the exact words of Exeter Mayor Mary Waterman-Philpot, “[w]e [Exeter,] have to take care of Exeter first” because “[w]e don’t have the water capacity and the ability to service another community.”³⁴ Exeter officials fear extending service to Tooleville will burden the city’s water system, which they argue already requires repairs that may cost millions of dollars. Further, helping Tooleville will also require raising water and sewer rates for Exeter residents.³⁵ But as of August 2021, the State Water Resources Control Board warned Exeter that if the city does not voluntarily consolidate within six months, the State will step in according to their new authority under the Proactive Water Solution Bill Senate Bill 403.³⁶

The Proactive Water Solution Senate Bill 403 (SB 403 Consolidation of At-Risk Water Districts) was signed into law on September 23, 2021, and

26. See Kristin Dobbin et al., *SGMA and the Human Right to Water: To What extent do Submitted Groundwater Sustainability Plans Address Drinking Water Uses and Users?*, U.C. DAVIS (July 2020) (noting that of the forty-one ground basin recovery plans submitted to the Department of Water Resources for review, only five mentioned the human right to water and only one affirmed the right as a consideration in developing the plan).

27. CAL. HEALTH & SAFETY CODE § 116682(a) (2022).

28. Ramsey, *supra* note 5.

29. *Id.*

30. Cresencio Rodriguez-Delgado, *Dirty Water Fights Brewing as Central Valley City Refuses to Help Neighboring Town*, FRESNO BEE (Sept. 11, 2019), <https://www.fresnobee.com/article234986737.html>.

31. CITY OF EXETER, WATER SYSTEM MASTER PLAN 5-1 (2019).

32. Rodriguez-Delgado, *supra* note 30.

33. Marcum, *supra* note 11.

34. Rodriguez-Delgado, *supra* note 30.

35. *Id.*

36. Marcum, *supra* note 11; Ben Irwin, *Newsom Signs Proactive Water Solutions Bill SB 403*, SUN GAZETTE (Oct. 6, 2021), <https://thesungazette.com/article/news/2021/10/06/newsom-signs-proactive-water-solutions-bill-sb-403/>.

amended the California Safe Drinking Water Act.³⁷ SB 403 adds to the *consistent failure* threshold that water systems serving DUCs were required to meet for the Water Board to order consolidation.³⁸ Under SB 403 the Water Board can now authorize and fund consolidations to assist DUCs served by water systems that are “at-risk of failing” even though the water systems may consist of private domestic wells.³⁹ SB 403 also requires the Water Board to seek and consider community input before ordering a consolidation, and it requires the Water Board to consider petitions for mandatory consolidation from DUCs served by at-risk water systems.⁴⁰

Since the passage of SB 403, Tooleville and the one million Californians without access to safe and clean water appear to now have a legal mechanism to achieve access to safe and clean water.⁴¹ However, SB 403 reflects what has caused Tooleville, and arguably one million Californians, to not have access to safe and clean water: communities being left out of the decision-making process. In Tooleville’s case: Tulare County deciding to withhold public resources to DUCs in the 1970s, California’s decision to not regulate small public water systems and private wells until September 2021, and Exeter’s refusal to assist Tooleville for 20 years.⁴² The application of SB 403 has yet to unfold, but SB 403 does not create an enforceable right to safe and clean water that Californians can invoke. Rather, SB 403 grants the Water Board administrative oversight to consider providing DUCs, served by at-risk water systems, with access to safe and clean water.⁴³ Under SB 403, communities without access to water are still left out of the decision-making process, leaving the Water Board to decide whether a community may gain access to clean and safe water through consolidation. Therefore, even though SB 403 provides Tooleville and possibly the one million Californians without access to safe and clean water with a legal avenue to achieve such access, there is still value in recognizing an unenumerated constitutional right to safe and clean water Californians can invoke, which this note explores through a hypothetical lawsuit.

37. S.B. 403, 2021 Sess. (Cal. 2021).

38. *Id.*; Irwin, *supra* note 36.

39. CAL. HEALTH & SAFETY Code § 116682 (2022).

40. CAL. HEALTH & SAFETY Code § 116682 (2022).

41. CAL. HEALTH & SAFETY Code § 116682 (2022); Irwin, *supra* note 36.

42. Madrid-Salazar, *supra* note 6, at 214; Irwin, *supra* note 36.

43. Irwin, *supra* note 36.

II. IN THE COURTROOM

A. Tooleville's Residents California Constitutional Claim(s)

This section will explore a constitutional avenue for Tooleville to access clean and safe water. The Tooleville residents will file a petition to the California Supreme Court to issue a mandamus compelling the State of California, the Water Resources Control Board, County of Tulare, and City of Exeter to provide Tooleville residents with clean and safe water. They will argue for an unenumerated constitutional right to safe and clean water. What follows is the hypothetical Court decision from the mandamus action.

1. Hypothetical California Supreme Court Decision:

*RESIDENTS OF TOOLEVILLE v. STATE OF CALIFORNIA et al.*⁴⁴

Tooleville Residents (Tooleville) filed a petition in the Supreme Court for a writ of mandamus against the State of California, California Water Resources Control Board, County of Tulare, and City of Exeter (collectively, defendants), seeking to compel the parties to provide them with access to safe and clean water. Tooleville contends they have an unenumerated, fundamental, and basic California constitutional right to safe and clean water. We review this case pursuant to Article VI, § 10 of the California Constitution, whereby this Court has “original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.”⁴⁵

The defendants plead an affirmative defense under Water Code § 2000 that this Court lacks jurisdiction because Tooleville’s suit involves the determination of water rights.⁴⁶ We disagree. This Court invokes “original jurisdiction where the matters to be decided are of sufficiently great importance and require immediate resolution.”⁴⁷ Those circumstances are present here because 391 residents are, and have been, without access to safe

44. This footnote serves as a disclaimer that the following is a hypothetical opinion based on the actual factual circumstances of the Tooleville community. Please note that the Tooleville community did not comment on or endorse this Note. All information in this note is publicly available information. Any errors in this note are my own. Solely for the purposes of this note assume the California Supreme Court issued an opinion addressing Tooleville Residents’ claims for an unenumerated Constitutional right to safe and clean water in response to this hypothetical petition for a writ of mandamus.

45. CAL. CONST. art. VI, § 10; *See* Cal. Redevelopment Ass’n v. Matosantos, 53 Cal. 4th 231, 253 (2011) (noting the California Supreme Court has original jurisdiction where matters to be decided are of great importance and require immediate resolution).

46. *See* CAL. WATER CODE § 2000 (1957) (providing that in any suit brought in the state of California for the determination of water rights, the court may order a reference to the Water Resources Control Board).

47. *Matosantos*, supra note 45, at 253.

and clean water or a viable legal mechanism to achieve such access.⁴⁸ Water Code § 2000 provides that, “[in] any suit brought in any court of competent jurisdiction in this State for determination of rights to water, the court may order a reference to the [Water] board, as referee, of any or all issues in the suit.”⁴⁹ The statute merely implies the courts of this state have concurrent original jurisdiction in suits to determine water rights.⁵⁰ As such, this Court will exercise original jurisdiction over Tooleville’s petition for mandamus.

Defendants argue that Tooleville is not entitled to a writ of mandamus because they fail to show that: 1) “the respondent has failed to perform an act despite a clear, present and ministerial duty to do so,” 2) “the petitioner has a clear, present and beneficial right to that performance, and 3) “there is no other plain, speedy and adequate remedy.”⁵¹ Defendants emphasize that a mandamus compelling them to perform a future duty to supply clean and safe water is inappropriate because there is no present duty to provide Tooleville with clean and safe water.⁵² Furthermore, defendants argue that issuing a writ on the grounds that Tooleville does have an unenumerated constitutional right to safe and clean water is unconstitutional under the separation of powers doctrine, as provided in Article III, § 3 of the California Constitution.⁵³ Defendants also contend that recognizing such a right is akin to enacting legislation, which is within the power of the Legislature, not the Judiciary.⁵⁴ We disagree.

First, Tooleville satisfies mandamus requirements two and three. A party seeking a writ of mandamus has a clear, present, and beneficial right to the performance they seek when they have “some special interest to be served or some particular right to be preserved or protected over and above the interests held in common with the public at large.”⁵⁵ A mandamus writ is appropriate if the party has no “plain, speedy, or adequate remedy.”⁵⁶ Tooleville has a special interest in the outcome of this proceeding because they seek to compel defendants to provide them with access to clean and safe water—a right the legislature of this state has recognized.⁵⁷ Furthermore, as Tooleville

48. Ramsey, *supra* note 5.

49. CAL. WATER CODE § 2000 (1957).

50. Nat’l Audubon Soc’y v. Superior Ct., 33 Cal. 3d 419, 451 (1983).

51. See *Riverside Sheriff’s Ass’n v. Cnty. of Riverside*, 106 Cal. App. 4th 1285, 1289 (Cal. Ct. App. 2003) (listing the standard for a writ of mandamus).

52. See *Fitch v. Justice Court*, 24 Cal. App. 3d 492, 495 (Cal. Ct. App. 1972) (relying on *Treber v. Superior Ct.*, 68 Cal. 2d 128, 134 (Cal. 1968)) (noting that a writ of mandamus cannot compel performance of “a future duty if no present duty to perform exists.”).

53. See CAL. CONST. art. III, § 3 (providing that a branch of government may not exercise a power not authorized by the California Constitution).

54. See *Robinson v. Payne*, 20 Cal. App. 2d 103, 105 (Cal. Ct. App. 1937) (recognizing that all legislative power of the state, except the right of initiative and referendum, is vested in the legislature).

55. *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1011 (2011).

56. CAL. CIV. PROC. CODE § 1086 (1907).

57. CAL. WATER CODE § 106.3 (2013).

provides, they do not have a viable legal mechanism to access safe and clean water, so they turned to this Court to seek relief. California’s right under the clean water statute does not create a legal duty and remedy private citizens can invoke to obligate the state to provide Californians clean and safe water.⁵⁸ Nor was the Water Board able to order a consolidation of Tooleville and Exeter’s water systems because Tooleville’s water does not consistently fail to provide an adequate supply of safe drinking water.⁵⁹ Therefore, Tooleville has no “plain, speedy, or adequate remedy.”⁶⁰

Second, defendants’ argument based on the separation of powers doctrine has no merit. The separation of powers doctrine “establishes a system of checks and balances to protect any one branch against the overreaching of any other branch.”⁶¹ The judicial power may “test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority.”⁶² The judiciary can exert more influence in safeguarding or recognizing fundamental constitutional rights.⁶³

We now address whether defendants have a duty to provide Tooleville with access to clean and safe water by turning to the merits. In its petition, Tooleville advances three arguments invoking an alleged unenumerated—fundamental and basic—constitutional right to safe and clean water. We address each argument in turn. First, Tooleville provides that the laws of the State have failed to protect Tooleville’s water quality and prevent them from accessing clean and safe water despite California’s role as a public trustee of the people’s water. Tooleville cites this Court’s decisions in *National Audubon Society v. Superior Court* and *South Pasadena v. Pasadena Land & Water Company*. Tooleville argues that because California is in control of the state’s water resources through a public trust, Tooleville has a right to a clean and safe water supply and a right to enforce it through a mandamus against the person in control of the supply.⁶⁴

In *National Audubon*, this Court recognized that the State of California holds the people’s natural resources in trust.⁶⁵ This Court further recognized that the public trust is “an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands,

58. CAL. WATER CODE § 106.3 (2013).

59. CAL. HEALTH & SAFETY CODE § 116682(a) (2022); Ramsey, *supra* note 5.

60. CAL. CIV. PROC. Code § 1086 (1907).

61. CAL. CONST., art. III, § 3; Bixby v. Pierno, 481 P.2d 242, 249 (1971).

62. Pierno, 481 P.2d at 249.

63. See *id.* (relying on CARDOZO, *The Nature of the Judicial Process*, in COLLECTED LEGAL PAPERS 92, 94 (1921); LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY 118–126 (1959)).

64. *Nat’l Audubon Soc’y*, 33 Cal. 3d at 440; *S. Pasadena v. Pasadena Land & Water Co.*, 93 P. 490, 494 (1908).

65. *Nat’l Audubon Soc’y*, 33 Cal. 3d at 440.

surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”⁶⁶ In *South Pasadena*, this Court recognized the remedy in the form of a mandamus to compel an established water system—controlled by a quasi-public corporation—to continue a supply of water to all the persons who depend on the right.⁶⁷

Here, Tooleville is correct in arguing that the state holds the people’s natural resources in trust via the Public Trust Doctrine. However, Tooleville supplies its water from two private wells that have become contaminated mostly from agricultural runoff—not from a quasi-public corporation controlling an established water system. Nor has Tooleville’s supply of water ceased to exist but rather the quality of the water has degraded. Therefore, *South Pasadena* is not directly applicable here.

Tooleville’s second argument is that in reading the California Constitution liberally and as a whole, there is an unenumerated—fundamental and basic—right to safe and clean water. Therefore, by invoking this right, Tooleville can compel the state to provide them with safe and clean water for the purpose of residential drinking water. Tooleville primarily relies on Article I, §§ 1, 7, and 24 and Article X, § 5 of the California Constitution. Tooleville argues that defendants’ collective decisions spanning over decades (withholding funding by the county, refusing to voluntarily consolidate, and California’s regulatory framework that does not protect their water from pollution) have substantially affected their fundamental vested rights. Although this Court has not recognized an unenumerated right to safe and clean water, Tooleville’s argument has some merit.

The concept of unenumerated rights is not a new phenomenon.⁶⁸ Unenumerated rights are not expressly mentioned in the text of a constitution. Rather, the right is inferred from the language, history, and structure of a constitution, or cases interpreting a constitution.⁶⁹ Both the United States Supreme Court and state supreme courts have recognized unenumerated rights based on principles from their respective constitutions.⁷⁰ The United States Supreme Court recognizes the right to travel, the right to privacy, the

66. *Id.* at 441.

67. *S. Pasadena*, 93 P. 490, at 495.

68. See Stevens G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 118 (2008) (finding state constitutional law in 1868 openly contemplated the existence of unenumerated, fundamental, natural, and inalienable rights).

69. *Unenumerated Rights*, JRANK, <https://law.jrank.org/pages/10977/Unenumerated-Rights.html> (last visited Mar. 13, 2022).

70. *Id.*; See *Griswold v. Conn.*, 381 U.S. 479, 483 (1965) (recognizing that the First Amendment has a penumbra where the right to privacy is protected from governmental intrusion); see *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1100 (1995) (holding the right to intrastate travel is a basic human right protected by the United States and California Constitutions as a whole).

right to autonomy, the right to dignity, and the right to an abortion as unenumerated rights based on express constitutional provisions.⁷¹ In discussing the right to keep and bear arms for the purpose of self-defense, the Supreme Court provided that when determining whether an unenumerated right is fundamental, a court must decide whether the claimed right is either fundamental to liberty or whether it is deeply rooted in the history and tradition of the United States.⁷²

This Court has engaged in the unenumerated rights analysis when determining whether the right to travel is an unenumerated, basic human right.⁷³ It affirmed that “the right to intrastate travel (and intermunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole.”⁷⁴ This Court reasoned that “such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law.”⁷⁵ Courts of this state have found violations of the unenumerated right to travel when there is a direct restriction to travel.⁷⁶ In contrast, the lower courts of the State have refused to recognize a “constitutionally protected right to indulge in the use of euphoric drugs.”⁷⁷ In that case, the appeals court noted that the defendant did not invoke an analogous principle to protect their claimed right to use euphoric drugs.⁷⁸ Furthermore, this Court’s judicial review jurisprudence regarding the review of administrative decisions offers some applicable guidance. In *Bixby v. Pierno*, this Court provided that, “courts must determine on a case-by-case basis whether an administrative decision or class of decisions substantially affects fundamental vested rights and thus requires independent judgment review.”⁷⁹ This Court must make three determinations in this case: 1) whether the asserted right is a fundamental and basic one; 2) what the economic aspects of the right are, and; 3) what “the effect of it in human terms [is] and the importance of it to the individual in the life situation.”⁸⁰

Article I, § 1 of the California Constitution provides that, “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying life and liberty, acquiring, possessing, and protecting property,

71. See generally *Tobe*, 9 Cal. 4th at 1100 (establishing interstate travel as a basic human right protected by the California Constitution); *Griswold*, 381 U.S. at 70 (describing unenumerated rights such as the right to travel and right to privacy, among other rights).

72. *McDonald v. City of Chi.*, 561 U.S. 742, 764, 768 (2010).

73. *Tobe*, 9 Cal. 4th at 1100.

74. *Id.*

75. *Id.*

76. *Id.* at 1101 (relying on *Adams v. Superior Ct.*, 12 Cal. 3d 55, 61–62 (1974)).

77. *People v. Aguiar*, 257 Cal. App. 2d 597, 603 (Cal. Ct. App. 1968).

78. *Id.* at 605.

79. *Pierno*, 481 P. 2d at 252.

80. *Id.*

and pursuing and obtaining safety, happiness, and privacy.”⁸¹ Article I, § 7 provides that, “a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws”⁸² Article I, § 24 provides two critical provisions. First, “rights guaranteed by this [California] Constitution are not dependent on those guaranteed by the United States Constitution.”⁸³ Second, “this declaration of rights may not be construed to impair or deny others retained by the people.”⁸⁴ Article X, § 5 provides that, “[t]he use of all water now appropriated, or that may *hereafter* be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law.”⁸⁵ Article X, § 2 provides that, “because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable”⁸⁶ This Court has recognized that the purpose of Article X, § 2 is to ensure that the State’s water resources are “available for the constantly increasing needs of *all* of its people.”⁸⁷ Furthermore, California law has long recognized that residential drinking water is the highest *beneficial use*.⁸⁸

In applying the factual circumstances before this Court and the above Constitutional provisions, cases, and legal principles Tooleville has a persuasive argument. As provided in their petition, Tooleville relies on one contaminated well for water that has exceeded the acceptable level of nitrate at least seven times since 1997, which many residents have consumed and still use for cooking.⁸⁹ The regulatory framework of this state has failed to protect their supply of water from agricultural contamination.⁹⁰ The County of Tulare intentionally withheld funding from Tooleville for water infrastructure.⁹¹ The existing legal avenues to achieve access to safe and clean water are of no use to the residents of Tooleville either. California’s Right to Clean Water Statute does not create a legal duty or remedy that private citizens can invoke to obligate the state to provide Californians clean and safe water.⁹² Further, Tooleville does not qualify for a consolidation of

81. CAL. CONST. art. I, § 1.

82. CAL. CONST., art. I, § 7.

83. CAL. CONST., art. I, § 24.

84. *Id.*

85. CAL. CONST., art. X, § 5.

86. CAL. CONST., art. X, § 2.

87. *Meridian, Ltd. v. San Francisco*, 13 Cal. 2d 424, 449 (1939).

88. CAL. CONST., art. X, § 2; CAL. WATER CODE § 106 (2013).

89. Balazs, *supra* note 11, at 61.

90. CTR. FOR WATERSHED SCIS., *supra* note 11, at 9.

91. Bliss, *supra* note 19.

92. CAL. WATER CODE § 106(b)-(e) (2013); Madrid-Salazar, *supra* note 6, at 229-230; Ramsey, *supra* note 5.

their water system because their water does not consistently fail to provide an adequate supply of safe drinking water.⁹³ In addition, the neighboring city of Exeter refuses to voluntarily consolidate or extend service to Tooleville, even though Exeter recognizes Tooleville's water is contaminated with nitrates, hexavalent chromium, and bacteria.⁹⁴ Given these facts, we are convinced these are direct restrictions preventing Tooleville from accessing something as fundamental and basic as water for residential drinking.

We see no reason why, in reading the California Constitution as a whole, the provisions of Article I, §§ 1, 7, and 24 and Article X, § 5 of the Constitution should not be construed to support a fundamental and basic unenumerated right to safe and clean water. Using this Court reasoning when it recognized an unenumerated right to travel, access to safe and clean water is “such a right [that] is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law.” Through that reasoning, how can you—without water—enjoy the inalienable rights to life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy secured by the Constitution and upheld by this Court?⁹⁵ The State recognizes that water for residential water use is the highest *beneficial use* in the state, which is reinforced by the statute recognizing water as a human right.⁹⁶ Implicit in this recognition is that there is no life and liberty without safe and clean water for residential drinking because it is well recognized that humans need water to survive.⁹⁷ The human body consists of 60% water and needs water to flow through our cells and organs.⁹⁸ Nor is there enjoyment in acquiring, possessing, and protecting property without access to safe and clean water. Again, this is implicit in the state's recognition of domestic—residential—water use as the highest *beneficial use* in the state. A right to safe and clean water for residential drinking is closely related and implicit in all the explicitly recognized and protected rights in the Constitution and all the unenumerated constitutional rights this Court has recognized. Therefore, as implicit as the right to travel is in the Article I, §§ 1 and 24 of the California Constitution, this Court recognizes access to safe and clean water for residential drinking as a basic human right protected by Article I, §§ 1, 7, and 24, and Article X, § 5.

93. CAL. WATER CODE § 106(b)-(e) (2013); Madrid-Salazar, *supra* note 6, at 229-230; Ramsey, *supra* note 5.

94. CITY OF EXETER, WATER SYSTEM MASTER PLAN 5-1 (2019).

95. *Tobe*, 9 Cal. 4th at 1100; CAL. CONST., art. I, § 1.

96. CAL. WATER CODE § 106.3 (2013).

97. Karen Fifield, *Clean Drinking Water is Essential to Life*, MICH. STATE UNIV. (Nov. 16, 2017), https://www.canr.msu.edu/news/clean_drinking_water_is_essential_to_life#:~:text=Clean%20drinking%20water%20is%20essential%20to%20life,.and%20human%20and%20animal%20feces.

98. *Id.*

Furthermore, in support of Tooleville's argument, Tooleville cites to the New York, Montana, and Pennsylvania Constitutions, and to the Pennsylvania Supreme Court Opinion *Robinson Township v. Commonwealth* as persuasive authority.

Article I, § 19 of the New York Constitution provides that "[e]ach person shall have a right to clean air and water, and a healthful environment."⁹⁹ Article IX, § 1 of the Montana Constitution provides:

The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations . . . the legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.¹⁰⁰

Article I, § 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.¹⁰¹

In *Robinson*, the Pennsylvania Supreme Court held that the Pennsylvania Oil and Gas Act was unconstitutional because the Act was incompatible with Pennsylvania's duty as trustee of Pennsylvania's natural resources.¹⁰² The Court recognized that § 27 of the Pennsylvania Constitution accomplishes two goals.¹⁰³ First, § 27 identifies protected environmental rights—like the right to clean air and pure water—to prohibit the state from acting in a detrimental manner.¹⁰⁴ Second, § 27 establishes a framework for the Commonwealth to affirmatively participate in the development and enforcement of these environmental rights.¹⁰⁵

Although we find the authorities persuasive, there is a critical difference between the case before us and that of the Pennsylvania Supreme Court's decision in *Robinson*. There, the plaintiffs cited to an *enumerated* right that

99. N.Y. CONST., art. I, § 19.

100. MONT. CONST., art. IX, § 1.

101. PA. CONST., art. I, § 27.

102. *Robinson Twp. v. Commonwealth*, 632 Pa. 564, 585 (2013).

103. *Id.* at 645.

104. *Id.*

105. *Id.*

is explicitly stated in their state constitution.¹⁰⁶ While here, Tooleville is citing to various articles and sections to convince this Court to infer the California Constitution supports an *unenumerated* right to safe and clean water. An explicit and enumerated California Constitutional right to safe and clean water would require the citizenry to exercise their initiative power to propose and adopt an amendment to the Constitution, just like voters recently did in the State of New York and that other states are proposing.¹⁰⁷

Tooleville's third argument is that the current California water jurisprudence fails to address the water needs of rural disadvantaged unincorporated communities (DUCs) because the jurisprudence is based on the evaluation of water-use in a city context from California's state courts.¹⁰⁸ The evaluation assumes municipal water systems are available to all domestic water users in the state.¹⁰⁹ Cases addressing water in a rural context are overwhelmingly focused on irrigation for agriculture rather than drinking water for rural, non-city residents.¹¹⁰ Of the total water supply used in the state, about 80% is used for agricultural use while the remaining 20% is used to support residential and business use.¹¹¹ Many communities have a reliable water supply, even during droughts, except for many rural communities throughout the state.¹¹² In addition to contamination, rural communities are severely vulnerable to water shortages because of their isolation and lack of capacity to develop water supplies.¹¹³ For many of these rural communities like Tooleville, access to water is a matter of survival.¹¹⁴

Tooleville cites to two cases as examples. First, in *Southern California Water Co.*, the appeals court addressed a groundwater basin issue, where the parties were disputing their water rights and allocation of unused storage space.¹¹⁵ Throughout the opinion, there is an underlying discussion of the

106. *Id.*

107. CAL. CONST., art. II, § 8; Stacey Halliday et al., *New York Becomes the Third State to Adopt a Constitutional Green Amendment*, BEVERIDGE & DIAMOND (Dec. 10, 2021), <https://www.bdlaw.com/publications/new-york-becomes-the-third-state-to-adopt-a-constitutional-green-amendment/> (noting New York adopted a constitutional green amendment and other states have similar proposed amendments in their legislatures); see generally, Mark Baldassare et al., *The Initiative Process in California*, PPIC (Oct. 2013), https://www.ppic.org/wp-content/uploads/content/pubs/jtf/JTF_InitiativeProcessJTF.pdf (discussing California's voter initiative process).

108. Camille Pannu, *Drinking Water and Exclusion: A Case Study from California's Central Valley*, 100 CAL. L. REV. 223, 240 (2012).

109. *Id.*

110. *Id.* at 241.

111. CAL. DEP'T. WATER RES. ET AL., *supra* note 2, at 11–12.

112. *Id.*

113. *Id.*

114. See Cagle, *supra* note 14 (noting “[r]ural residents across the Central Valley are plagued with a host of water-born toxins.”).

115. *Cent. & W. Basin Water Replenishment Dist. v. S. Cal. Water Co.*, 109 Cal. App. 4th 891, 896–98 (Cal. Ct. App. 2003).

water basins at issue, a capacity to extract water from the basins and store the water, and even a recognition that the water resources in the state must be used in the public interest.¹¹⁶ However, throughout the opinion there is an underlying assumption that municipal water is available to all domestic water users in the state. The opinion provides that the California Constitution requires the state's water resources be put to reasonable and beneficial use in the interest of the people and for the public welfare as if all Californians had access to the state's water resources.¹¹⁷

Second, in *Abatti v. Imperial Irrigation District*, the appeals court addressed farmers' water interests within an irrigation district in California's Imperial Valley.¹¹⁸ The court of appeals' opinion provides a discussion of how California law empowers irrigation districts to hold their water rights in trust for the benefit of their users, including: municipal users, industrial users, agricultural users, or farmers.¹¹⁹ The opinion discusses § 106 of the California Water Code and how it expressly provides that water for domestic use is preferred, followed by irrigation.¹²⁰ However, the opinion provides that districts may exercise discretion to distribute water, and therefore, water for irrigation or agricultural purposes may be preferred over domestic uses—in practice.¹²¹ We find Tooleville's argument partially convincing.

B. Courts' Rulings

While the above hypothetical decision provides one approach, the manner in which the California Supreme Court would actually rule if they were presented with the same facts and circumstances discussed in this note would likely differ. The courts would likely have a more extensive record of the facts and circumstances, including but not limited to testimony from individual Tooleville residents of how their life is affected, documentation of any health conditions they have suffered because of consuming contaminated water, and any other relevant documentation. However, as discussed, a petition for a writ of mandamus to the California Supreme Court would likely face two arguments. First, the State, Water Board, County of Tulare, and Exeter would likely contest the Court's jurisdiction on the grounds that issuing a writ of mandamus—compelling them to fulfill a duty that *officially* does not exist—is inappropriate on grounds of separation of powers. However, the Supreme Court of California *does* have original jurisdiction to hear cases that require extraordinary relief, like a writ of mandamus, and

116. *Id.* at 900-06.

117. *Id.* at 905-06.

118. *Abatti v. Imperial Dist.*, 52 Cal. App. 5th 236, 246 (Cal. Ct. App. 2020).

119. *Id.*

120. *Id.*

121. *Id.*

courts are able to recognize unenumerated constitutional rights. Second, the California Supreme Court, like the United States Supreme Court, has recognized fundamental and basic rights that are not explicitly enumerated in the text of their respective constitutions.¹²² The purpose of this note is to explore that avenue as a means of recognizing an unenumerated California Constitutional right to safe and clean water.

Climate change advocates have been advocating for constitutional environmental rights by proposing constitutional amendments, known as Green Amendments, and by filing suits in federal court.¹²³ For example, in the famous *Juliana v. United States* case, a youth environmental activist group called Our Children's Trust sued the United States in federal court in the District of Oregon.¹²⁴ The plaintiffs asserted a fundamental unenumerated right to a sustainable climate under the Due Process Clause of the Fifth Amendment, and that by failing to enact effective legislation to combat climate change, the government infringed on their constitutional rights.¹²⁵ The district court agreed with the plaintiffs.¹²⁶ Judge Ann Aiken stated, "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."¹²⁷ Judge Aiken relied on *Obergefell v. Hodges* to compare the foundational value of the asserted right to the right of same-sex marriage—providing that all other rights would be infringed without the recognition of the right to a stable climate.¹²⁸ The *Juliana* case, coupled with the cases recognizing other unenumerated rights, like the right to travel and privacy, support the notion that a constitutional amendment is a legitimate legal avenue for achieving the recognition of an unenumerated California Constitutional right to safe and clean water.

122. See *Griswold*, 381 U.S. at 483 (recognizing that the First Amendment has a penumbra where the right to privacy is protected from governmental intrusion); *Tobe*, 9 Cal. 4th at 1100 (holding the right to intrastate travel is a basic human right protected by the United States and California Constitutions as a whole).

123. See *Resources*, GREEN AMENDMENTS FOR THE GENERATIONS, <https://forthegenerations.org/resources/> (last visited Dec. 4, 2020) (providing list of resources related to Green Amendments, including a proposal to Amend New Jersey's Constitution).

124. *Juliana v. United States*, 217 F.Supp.3d 1224, 1233 (D. Or. 2016).

125. *Id.* at 1248–50.

126. See *id.* at 1234 (denying defendants' motions to dismiss).

127. *Id.* at 1250.

128. *Id.* at 1248–50.

IV. IMPACT OF THE COURT'S RULING: SCOPE, APPLICATION, AND PRECEDENT

A. Scope of Unenumerated Constitutional Right

Regardless of how a court would actually rule, the recognition of an unenumerated right in this context must be narrowly tailored to the facts like those set forth above, where a significant number of residents of an established community do not have access to safe and clean water because the laws failed to protect their existing water supply from contamination. Courts should find a violation of this right only when these circumstances exist and when there is a direct restriction to prevent residents—who are in need of safe and clean water as a matter of *survival*—from accessing safe and clean water for residential drinking. As the hypothetical opinion suggests, such restrictions can be a regulatory framework that does not protect a supply of water that residents depend on, a county that intentionally withholds funding for essential infrastructure, or even a community that refuses to consolidate or extend service to another community (though this may require finding that the refusal is in bad faith).

A broad, unenumerated constitutional right to safe and clean water would raise a number of concerns, like the concern of exacerbating droughts by increasing competing water interests throughout the state.¹²⁹ Droughts are recurring in California and are severe; in 2014, Governor Brown declared a statewide drought emergency, and in 2021, following three years of severe drought, Governor Newsom expanded the statewide drought emergency's scope to encompass previously excluded counties.¹³⁰ The state recognizes that California faces daunting water challenges given depleted water basins, aging water infrastructure in need of repairs, climate change, and population growth.¹³¹ These are serious concerns considering climate change is projected to reduce mountain snowpack, intensify droughts and wildfire, raise sea levels, shorten wet seasons, and worsen floods—all of which will dramatically change the water resources of the state.¹³² The impacts are projected to occur in correlation with California's expected population

129. See Dan Walters, *Key Conflicts Roil California's Ever-Evolving Waterscape*, CALMATTERS, <https://calmatters.org/environment/2019/05/future-of-california-water-supply/> (noting the competing water interests throughout the state) (last updated June 23, 2020).

130. Ellen Hanak et al., *California's Latest Drought*, PPIC WATER POL'Y CTR. (July 2016), https://www.ppic.org/wp-content/uploads/JTF_DroughtJTF.pdf; *Governor Newsom Expands Drought Emergency Statewide, Urges Californians to Redouble Water Conservation Efforts*, OFF. OF GOVERNOR GAVIN NEWSOM (Oct. 19, 2021), <https://www.gov.ca.gov/2021/10/19/governor-newsom-expands-drought-emergency-statewide-urges-californians-to-redouble-water-conservation-efforts/>.

131. CAL. DEP'T. WATER RES., *supra* note 2, at 6.

132. *Id.*

increase to 45 million by 2050, which will only place greater pressure on the state's rivers and aging water infrastructure.¹³³

Given these projections, a genuine concern of recognizing an unenumerated constitutional right to safe and clean water is that developers may feel encouraged to develop in remote areas without immediate access to water and invoke the right. This is a realistic concern as many lawmakers in the state see the construction of more housing as the solution to the state's housing crisis—development in areas without existing access to water is likely.¹³⁴ However, the lesson of Owens Valley coupled with the California Supreme Court decision in *National Audubon*, existing statutes, and riparian case law already address this concern.

First, the story of Owens Valley coupled with the California Supreme Court decision in *National Audubon Society v. Superior Court* can be understood as a precautionary tale against the extensive and unlimited diversion of water to support urban expansion and development. In 1913, the City of Los Angeles began to divert water from the Owens River through the 233-mile-long Los Angeles Aqueduct to support the rapid growth of the city.¹³⁵ The Owens Lake was completely dry by 1926.¹³⁶ The dry Owens Lake bed is the biggest single source of dust pollution in the United States, which is detrimental to the health of residents and the environment.¹³⁷ In 1970, the Department of Water and Power of the City of Los Angeles completed its second diversion tunnel and began to divert “virtually the entire flow” from the streams near Mono Lake, the second largest lake in California.¹³⁸ The diversions lowered the levels of the lake; exposed the islands on the lake, which exposed the gull to coyotes; and ultimately impaired the scenic beauty and ecological values of the lake.¹³⁹ The Supreme Court of California recognized that private water rights are subject to the Public Trust Doctrine, which protects the scenic and ecological values of the

133. *Id.*

134. See Hannah Wiley, *Make Housing Cheaper? Here's How California Lawmakers are Getting Started in 2020*, THE SACRAMENTO BEE (Jan. 5, 2020), <https://www.sacbee.com/news/politics-government/capitol-alert/article238910033.html> (noting advocates and lawmakers see Gov. Newsom's law spurring construction of new homes as the solution to California's housing crisis).

135. *First Owens River-Los Angeles Aqueduct*, ASCE, <https://www.asce.org/project/first-owens-river-los-angelesaqueduct/#:~:text=The%20aqueduct%20proper%20includes%20a,97%20miles%20of%20covered%20conduit> (last visited Feb. 21, 2022).

136. Marith C. Reheis, *Owens (Dry Lake), California: A Human-Induced Dust Problem*, U.S. GEOLOGICAL SURV. (Dec. 9, 2016), [https://geochange.er.usgs.gov/sw/impacts/geology/owens/#:~:text=Inyo%20Range%20\(fig.-,1\),.2\)](https://geochange.er.usgs.gov/sw/impacts/geology/owens/#:~:text=Inyo%20Range%20(fig.-,1),.2)).

137. Caitlin Shamberg, *Part 2: What Happened to the Owens Valley*, KCRW (Nov. 5, 2013), <https://www.kcrw.com/news/articles/part-2-what-happened-to-the-owens-valley>.

138. *Nat'l Audubon Soc'y*, 33 Cal. 3d at 424.

139. *Id.* at 424–25.

people's navigable waterways.¹⁴⁰ The Supreme Court's decision in *National Audubon* saved Mono Lake from meeting the same fate as Owens Lake.

Second, the same statute that provides the established policy of California, "that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes" also recognizes that such a right "shall not apply to water supplies for *new development*."¹⁴¹ The statute, albeit implicitly, distinguishes between a human being's right to water for essential purposes and a commercial-purpose right, such as a new development. This distinction is also present in other sections of the California Water Code. For example, § 106 explicitly provides that water for domestic purposes is the highest use of water in the state.¹⁴² Domestic purposes—human consumption, household conveniences, and for the care of livestock—are given preference.¹⁴³

Third, although a developer may argue that because human beings are, or will be, occupants of their property—and therefore, their water-use qualifies as domestic use—the Supreme Court of California has already addressed this potential argument albeit implicitly. In *Prather v. Hoberg*, the Court noted that human beings occupying "hotels, apartment houses, boarding houses, auto camps, or resorts" does not exclude them from the preferential domestic use class, but such a commercial character may prejudice a domestic user of water, especially if the nondomestic uses are present.¹⁴⁴ The Court provided that nondomestic uses include swimming pools, ornamental pools, and boating.¹⁴⁵ Therefore, the lessons of Owens Lake, *National Audubon*, the California Water Code, and riparian case law provides courts a legal basis to deny developers seeking to broaden this unenumerated constitutional right to safe and clean water for the purpose of supporting their commercial development in remote areas.

B. Practical Concerns of Application of Right: Cost and Maintenance

In addition to the concerns regarding the scope of the unenumerated constitutional right, there are practical concerns of applying this right, namely the cost and maintenance of the infrastructure required to provide residents with access to safe and clean water. The estimated cost of infrastructure for small water systems to meet public health requirements is between \$250–500,000 per system.¹⁴⁶ There are about 450 small water

140. *Id.* at 435.

141. CAL. WATER CODE § 106.3 (2013) (emphasis added).

142. CAL. WATER CODE § 106 (2013).

143. *Deetz v. Carter*, 232 Cal. App. 2d 851, 854 (Cal. Ct. App. 1965).

144. *Prather v. Hoberg*, 24 Cal. 2d 549, 562 (1944).

145. *Id.*

146. Pannu, *supra* note 108, at 267.

systems, including Tooleville's, in disadvantaged unincorporated communities (DUCs) that require improvements.¹⁴⁷ The cost of infrastructure for improving DUCs' water systems is high, but the recently established Safe and Affordable Drinking Water Fund was established to help fund the cost of these improvements, providing \$130 million annually.¹⁴⁸

In contrast, doing nothing about contaminated water is also costly considering the water users' personal health, monetary costs, and cost of providing bottled drinking water.¹⁴⁹ For example, in 2010, the U.S. Centers for Disease Control and Prevention provided that hospitalizations related to waterborne diseases cost the healthcare system as much as \$539 million annually.¹⁵⁰ The monetary costs to access water is also very high for unincorporated, low-income Hispanic farmworkers because they pay for both contaminated water and bottled drinking water—as high as a 12% of their total household income.¹⁵¹ The temporary measure of the State providing bottled water is also expensive, costing four million annually to serve 51 communities with bottled drinking water.¹⁵²

Some rural residents have installed new pumps to drop their wells, or have dug a whole new well, to access water that is less contaminated.¹⁵³ However, the cost is upwards of \$20,000, which many landlords pass on to renters.¹⁵⁴ But even then, this has proven to be a temporary and unsuccessful measure amid intensive droughts throughout California.¹⁵⁵ About 12,000 rural residents ran out of water during the 2011–2017 drought.¹⁵⁶ One family in the Tombstone Territory (a small community like Tooleville) began to pump sand and air instead of water in 2016 after the territory had installed new wells and deepened existing ones despite being two miles from the Kings River.¹⁵⁷ The residents who cannot afford a new well rely on the water bottle deliveries discussed above or from local aid groups.¹⁵⁸ Needless to say, the cost of doing nothing to provide rural residents with access to safe and

147. *Id.*

148. *Safe and Affordable Funding for Equity and Resilience*, CAL. WATER BDS., https://www.waterboards.ca.gov/water_issues/programs/grants_loans/sustainable_water_solutions/safer.html (last updated Feb. 18, 2022).

149. See Pannu, *supra* note 108, at 226 (discussing the costs stemming from contaminated drinking water on water users).

150. *Waterborne Diseases Could Cost Over \$500 Million Annually in U.S.*, CDC, <https://www.cdc.gov/media/pressrel/2010/r100714.htm> (last reviewed July 14, 2010).

151. Pannu, *supra* note 108, at 242–43.

152. Ramsey, *supra* note 5.

153. Cagle, *supra* note 14.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

clean water is also expensive, and that expense burdens residents who are already disadvantaged.

C. Precedent

The recognition of an unenumerated California Constitutional right to safe and clean water will provide about 350,000 residents from about 450 DUCs throughout the San Joaquin Valley a legal mechanism for obtaining access to safe and clean water.¹⁵⁹ DUCs have been systematically deprived of access to democratic governance and essential services because DUCs do not have city governments directly representing their interests.¹⁶⁰ The story and experience of the Tooleville residents is representative of how a lack of governmental representation, an inadequate regulatory framework that does not protect your water, and the absence of a legal mechanism to achieve access to safe and clean water deprives you of a basic human right—access to safe and clean water. As this note provides, the judicial system is an avenue to remedy such a critical human concern.

CONCLUSION

In closing, millions of Californians do not have access to clean and safe water despite the state recognizing—by statute—that all human beings have such a right. As California transforms and improves its water management system to cope with the challenges presented by climate change, population growth, and economic growth, the state can no longer neglect the Californians (mostly low-income farmworkers in the Central and Salinas Valley) clean and safe water. As Tooleville highlights, many DUCs throughout the San Joaquin Valley did not have a legal mechanism to obligate the state to provide them access to safe and clean water. California's regulatory framework failed to protect many DUCs' sources of water from contamination. California's current right to water statute is symbolic. Moreover, the Water Board's authority to order a consolidation of public water systems may not apply, nor are cities willing to voluntarily consolidate. Therefore, a lawsuit brought by the residents of Tooleville against the State of California, the Water Board, the County of Tulare, and City of Exeter claiming an unenumerated constitutional right to clean and safe water, will hold the state accountable. A successful suit by Tooleville will become a powerful tool in the hands of hundreds of DUCs throughout the Central and Salinas Valleys to use in their fight for safe and clean water.

159. JONATHAN LONDON ET AL., *THE STRUGGLE FOR WATER JUSTICE IN CALIFORNIA'S SAN JOAQUIN VALLEY* 8 (U.C. Ctr. for Reg'l Change 2018).

160. *Id.*