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Imperial Irrigation District v. State Water Resources Control Board\(^1\): Board as Arbiter of Reasonable and Beneficial Use of California Water

Water rights may be acquired in California by two methods: owning land adjacent to or overlying a water course or body of water, or through the statutory permit appropriation system of the California Water Code.\(^2\) The Water Code designates the State Water Resources Control Board (Board)\(^3\) as the state agency responsible for issuing appropriative water rights.\(^4\) Additionally, the Water Code grants the Board authority to adjudicate issues of waste water reclamation\(^5\) and competing uses by riparian rights holders.\(^6\) More-

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3. CAL. WATER CODE §§ 174 (West 1971) (the adjudicatory and regulatory functions of the state in the water resources field are consolidated into one control board to provide for the efficient administration of water rights, water pollution control, and water quality control); 179 (Board succeeded to all powers, duties, and jurisdiction of the Department and Director of Public Works, the Division of Water Resources of the Department of Public Works, the State Engineer, and the State Water Quality Control Board relating to water appropriation, water pollution, and water quality). In this Note “the Board” refers to the entity created by the legislature in 1967 and its predecessors.
4. CAL. WATER CODE § 1250 (West 1971) (requiring the Board to consider and act upon all applications for permits to appropriate water).
6. In re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 348-50, 358-59, 599 P.2d 656, 661-63, 668-69, 158 Cal. Rptr. 350, 355-56, 362 (1979) (holding that although the legislature granted the Board broad authority to adjudicate the water rights in a stream system, the Board may not extinguish future riparian rights absent a showing that less drastic limitations on those rights are insufficient to promote the most reasonable and beneficial uses of state water).
over, the statutory authority of the Board to issue appropriative water rights and to regulate riparian rights is comprehensive enough to prohibit prescriptive claims.\(^7\) Presently, the Board has concurrent authority with the courts to adjudicate the question of whether a method of diversion is reasonable.\(^8\) Since the creation of the Board in 1967, the California legislature and courts, through statutory enactment and interpretation, have steadily expanded the jurisdiction of the Board to regulate and adjudicate water resource management issues.\(^9\)

In *Imperial Irrigation District (IID) v. State Water Resources Control Board*,\(^10\) the Fourth District Court of Appeal held that appropriative rights predating the permit system are subject to Board adjudication on the issue of unreasonable water use.\(^11\) After finding that IID was misusing water,\(^12\) the Board directed IID to implement certain conservation measures.\(^13\) IID claimed the Board could pursue a claim of water misuse against IID only by requesting that the State Attorney General file suit on behalf of the Board.\(^14\) The Imperial County Superior Court agreed and held that IID was not bound by the Board decision.\(^15\) In reversing the trial court, the appellate court discerned the intent of the legislature to fully empower the Board to adjudicate claims of unreasonable water use.\(^16\)


\(^8\) Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist. 26 Cal. 3d 183, 200, 605 P.2d 1, 10, 161 Cal. Rptr. 466, 475 (1980) [*hereinafter EDF I*] (holding that the Board has concurrent jurisdiction with the courts to determine whether a method of diversion is reasonable).

\(^9\) *See infra* notes 48-124 and accompanying text (explaining that the Board has extensive jurisdiction over riparian water rights, waste water reclamation, and may now regulate the reasonable use of water by statutory and non-statutory right holders).


\(^11\) *Imperial*, 186 Cal. App. 3d at 1171, 231 Cal. Rptr. at 290.

\(^12\) *See CAL. ADMN. CODE* tit. 23, § 855(b) (1987) (misuse of water includes any waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water).

\(^13\) *Misuse of Water by Imperial Irrigation District*, State Water Resources Control Board Decision 1600 (1984) (giving IID six months to implement conservation measures, including: tailwater monitoring; repair of defective tailwater structures; accounting of deliveries to farmers' headgates; monitoring tailwater, canal spills, canal seepage, and leachwater; requiring IID to resume construction of regulatory reservoirs; and requiring IID to submit a comprehensive water conservation plan and to report on progress of compliance with the order [*hereinafter Decision 1600*]. *See Imperial*, 186 Cal. App. 3d 1160, 1162, 231 Cal. Rptr. 283, 283 (action for declaratory relief from Board directive to conserve water).

\(^14\) *Imperial*, 186 Cal. App. 3d at 1169, 231 Cal. Rptr. at 288 (IID relied upon a narrow reading of Water Code section 275, which authorizes the Board to take all appropriate executive, legislative, or judicial actions to prevent misuse of water).

\(^15\) Id. at 1164, 231 Cal. Rptr. at 285.

\(^16\) Id. at 1167-68, 231 Cal. Rptr. at 287-88 (reviewing the legislative history cited by the supreme court in EDF II, 26 Cal. 3d 183, 198, 605 P.2d 1, 9, 161 Cal. Rptr. 466, 474 (1980)).
The Court of Appeal reasoned that the administrative branch is better equipped than the judiciary to resolve matters of unreasonable water use.\textsuperscript{17} The appellate court concluded that the Board and the courts have concurrent authority to adjudicate issues of unreasonable water use.\textsuperscript{18} The court held that appellate review of a Board decision must be by writ of mandamus on the record compiled by the Board rather than by trial de novo.\textsuperscript{19}

This Note examines the evolution of the Board from a ministerial body to a powerful administrative agency with the authority to prevent unreasonable use of state water. Part I explores the development of the statutory and constitutional authority of the Board. Part I also examines the case law preceding \textit{Imperial}.\textsuperscript{20} Part II summarizes the facts of \textit{Imperial} and reviews the opinion of the appellate court.\textsuperscript{21} The possible legal ramifications of the decision are discussed in part III.\textsuperscript{22}

I. LEGAL BACKGROUND

A. California Constitution and Statutes

The appropriative right to use water in California was first regulated by statute in 1872.\textsuperscript{23} Common law appropriation co-existed with the 1872 statutory appropriative procedure\textsuperscript{24} until 1913, when

\begin{itemize}
\item \textsuperscript{17} Id. at 1167, 231 Cal. Rptr. at 287.
\item \textsuperscript{18} Id. at 1171, 231 Cal. Rptr. at 289.
\item \textsuperscript{19} Id. at 1171, 231 Cal. Rptr. at 290.
\item \textsuperscript{20} See infra notes 23-122 and accompanying text.
\item \textsuperscript{21} See infra notes 123-222 and accompanying text.
\item \textsuperscript{22} See infra notes 223-244 and accompanying text.
\item \textsuperscript{23} \textsc{CAL.} \textsc{CIVIL} \textsc{CODE} §§ 1410-1421 (West 1982). Early statutory appropriation required taking possession of the water, posting a notice at the point of diversion, and recording a copy of the notice with the county recorder. Commentary, Craig, \textit{California Water Law in Perspective}, 68 \textsc{West's Annotated Water Code} LXV, LXXII (1971). Prior to the statutory appropriation provisions, the appropriation doctrine was recognized by judicial decision. Irwin v. Phillips, 5 Cal. 140, 147 (1855).
\item \textsuperscript{24} Fullerton v. State Water Resources Control Bd., 90 Cal. App. 3d 590, 599, 153 Cal. Rptr. 518, 524 (1979) (because appropriation requires taking physical possession of water, the Board correctly denied an application by the State Department of Fish and Game to appropriate water for "in-stream uses"). The 1872 appropriation procedure was not exclusive, since courts continued to recognize completed appropriations of water made by actual diversion and use. \textit{Id.} See \textit{e.g.} Wells v. Mantes, 99 Cal. 583, 34 P. 324 (1883) (holding that a completed appropriation of water could be made without following the statutory procedure).
\end{itemize}
the legislature enacted the Water Commission Act. The Act established the California Water Commission and an exclusive statutory scheme for acquiring appropriative water rights. The present statutory appropriation procedure, derived from the 1913 Water Commission Act, is now the exclusive means of appropriating water.

The Board, created in 1967, succeeded to the statutory powers and duties of the Water Commission. The Board may issue a permit to an applicant wishing to appropriate water. Once an appropriator constructs a diversion system and puts the water to beneficial use in accordance with the conditions of a permit, the Board may issue a license confirming the right to appropriate water. In addition, upon petition by a water right claimant, the Board has the power to adjudicate all rights to water in a stream system.


31. Any person may apply to the Board for a permit to appropriate any unappropriated water. Cal. Water Code § 1252 (West 1971). See also id. §§ 1260-1266 (West 1971) (application requirements for various types of water users).


33. The Board may set terms and conditions that will best develop, conserve, and utilize in the public interest the water sought to be appropriated. Cal. Water Code § 1253 (West 1971). The Board must consider the water quality control plans and may place terms and conditions on the permit to carry out those plans. Id. § 1258 (West 1971). See id. §§ 13000-13361 (West 1971 & Supp. 1988) (regulating water quality control).

34. Id. §§ 1600-1677 (West 1971 & Supp. 1988) (provisions for issuance of license).

35. Id. § 2525 (West 1971) (the Board may determine all water rights in any stream system to serve the public interest upon petition by one or more claimants). See id. §§ 2626-2703 (West 1971 & Supp. 1988) (procedures for conducting investigation, hearing, and entering order for a determination of water rights in a stream system).

36. Id. § 2501 (West 1971). See id. § 2500 (West 1971) (defining "stream system" to
On November 6, 1928, California voters amended the state constitution to add a state water policy requiring reasonable and beneficial use of state waters. Article 10, section 2 of the California Constitution prohibits misuse of water and requires reasonable and beneficial use by all state water users. In 1943, the Legislature adopted Water Code sections 100 and 101, which restate the provisions of article 10, section 2. Subsequently, the Legislature declared certain uses of water to be reasonable and beneficial.

Under Water Code section 275, also enacted in 1943, the Board must prevent unreasonable water uses or diversions by taking ap-

include a stream, lake, or other body of water, including tributaries and contributory sources, but not underground water supplies other than a subterranean stream flowing through a known and definite channel. But see Modesto Properties Co. v. State Water Rights Bd., 179 Cal. App. 2d 856, 859-61, 4 Cal. Rptr. 226, 228-29 (1960) (interpreting California Water Code sections 100, 102, 1050, 1202, 1252, and article 10, section 2 of the California Constitution as not restricting the power of the Board to the adjudication of water rights in natural water courses but rather as including artificial channels).

Although California Constitution article 10, section 2 declares that the state water policy is self-executing, the section also provides that the Legislature may enact laws in furtherance of the policy. Id. (enacted in 1928 as article 14, section 3; amended in 1976 to article 10, section 2).

The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for beneficial uses; CAL. WAT.

42. See 1939 Cal. Stat. ch. 838, sec. 1, at 2420 (the earliest statute containing the present form of California Water Code section 275, authorizing and directing the Division of Water

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appropriate action before executive, legislative, or judicial agencies. However, the authority of the Board to prevent unreasonable water use may be limited to specific statutory jurisdiction granted by the legislature. Prior to the decision of the California Court of Appeal in *Imperial Irrigation District v. State Water Resources Control Board*, Water Code section 275 was interpreted as granting the Board administrative jurisdiction over all competing water rights other than pre-1914 appropriative rights. Accordingly, the Board promulgated rules establishing administrative procedures to govern claims of waste or unreasonable use by all water rights holders. Under the administrative rules, if a permittee or licensee fails to comply with a Board order to discontinue misusing water, the Board may revoke the permit or license or issue a cease and desist order. Significantly, the Board may request appropriate legal action by the Attorney General if a water user, other than a permittee or licensee, does not comply with any Board order to discontinue waste or unreasonable use. Thus, the state constitution and statutes, as well as administrative rules, bestow broad authority upon the Board to regulate the reasonable use of state water.

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43. CAL. WATER CODE § 275 (West 1971 & Supp. 1988) (Code Commission Note to section 275 declares that although the provision originated in the Water Commission Act, the power of the Board under section 275 is not limited to activities governed by the Act).

44. CAL. WATER CODE §§ 100-450 (general state powers over water); §§ 200-345 (miscellaneous powers of Department of Water Resources). See CAL. CONST. art. X, § 2 (declaring the state policy to prevent waste or unreasonable use and declaring that article 10, section 2 is a self-executing provision but that the Legislature may enact laws to further the policy). Id. § 5 (declaring the sale, rental, and distribution of all water appropriated at present or in the future to be public uses subject to state regulation and control as provided by law). See generally A. Rossman and M. Steel, *Forging the New Water Law: Public Regulation of "Proprietary" Groundwater Rights*, 33 Hastings L.J. 903, 914 (1982) (stating that the Legislature created a framework for comprehensive allocation of rights in the Board and a procedure requiring consideration of the public interest, "[y]et the State Board has not acted and generally cannot act on other than post-1914 surface diversions; although the State Board may take action to prevent unreasonable use of water, its subject matter jurisdiction is limited to the authority granted to it by the legislature." (footnotes omitted)).

45. *In re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339, 359, 599 P.2d 656, 676, 158 Cal. Rptr. 350, 362-63 (1979) (Board may determine all competing water rights in a stream system, including riparian rights); People ex rel. State Water Resources Control Bd. v. Forni, 54 Cal. App. 3d 743, 751-52, 126 Cal. Rptr. 851, 856 (1976) (authorizing the Board to regulate water use by riparian right holders).


48. CAL. ADMIN. CODE tit. 23, § 859 (1987) (the Board may request appropriate legal
B. California Case Law

In *Tulare Water Co. v. State Water Commission*⁴⁹, the California Supreme Court held the duties of the Water Commission,⁵⁰ the first predecessor to the Board, to be purely ministerial; if surplus water was available for appropriation, the Commission was required to issue an appropriation permit to any applicant who followed the procedures of the Water Commission Act.⁵¹ Under the Water Code, before approving any appropriation permit, the Board must now consider public interests, including the mandate of California Constitution article 10, section 2, that all state waters be put to a reasonable and beneficial use to the fullest extent possible.⁵² California case law defines the constitutional water policy as requiring that a use of water be both reasonable and beneficial.⁵³ Additionally, the state water policy applies to riparian right holders as well as appropriators.⁵⁴

A series of cases have explored the jurisdiction of the Board to adjudicate various water rights and water resource management issues. The Board may now regulate the use of water in artificial channels.⁵⁵ Waste water reclamation issues are under the exclusive jurisdiction of the Board.⁵⁶ The Board has concurrent jurisdiction with the superior courts over unreasonable point of diversion claims.⁵⁷ Because prescriptive rights may not be acquired against the state, the Board has exclusive jurisdiction to issue appropriative water action by the Attorney General if a non-permittee fails to comply with a Board order to prevent or terminate the misuse of water).

⁴⁹. 187 Cal. 533, 202 P. 874 (1921).
⁵². CAL. WATER CODE §§ 1253, 1255 (Vest 1971).
When adjudicating the competing rights in a stream system, the Board may reconsider rights previously granted, if necessary to preserve public trust interests. The gradual increase in Board adjudicatory authority over various water issues is evident from a chronological exploration of various California cases.

1. Reasonable and Beneficial Use

Initially, the California Supreme Court interpreted article 10, section 2 of the California Constitution as mandating a single requirement—the "reasonable beneficial use" of water. Then, in Joslin v. Marin Municipal Water District, the supreme court held that article 10, section 2 requires both reasonable and beneficial use of water; although a use may be beneficial to the right holder, it may not be reasonable in light of the constitutional water policy. In Joslin, a downstream riparian right holder, who sold the rock, sand, and gravel deposited on his land by the natural flow of a stream, sued the municipality that constructed a dam upstream under an appropriative permit. The trial court granted a motion for summary judgment by the municipality. Affirming, the supreme court determined that a use must be both beneficial and reasonable to meet the constitutional mandate of article 10, section 2. Although Joslin benefited from the natural deposit of rock, sand, and gravel on his land, the supreme court concluded this was not a reasonable use sufficient to preclude the upstream use by the municipality. Additionally, the Joslin court affirmed that what constitutes a reasonable and beneficial use must be determined on

60. Peabody v. City of Vallejo, 2 Cal. 2d 351, 368-69, 375, 40 P.2d 486, 492, 495 (1935) (remanding for new trial a dispute between downstream riparians and a licensed appropriator who built a reservoir and directing the trial court to consider the constitutional mandate of article 10, section 2 that all waters of the state be put to a "reasonably beneficial" use).
61. Id. at 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).
63. Id. at 134-35, 429 P.2d at 891, 60 Cal. Rptr. at 379 (the dam prevented the stream from depositing the rock, sand, and gravel upon plaintiff's land).
64. Id. at 135, 429 P.2d at 891, 60 Cal. Rptr. at 379.
65. Id. at 140-41, 429 P.2d at 895, 60 Cal. Rptr. at 383 (under article 10, section 2, beneficial use and reasonable use are not interchangeable terms).
66. Id. at 143, 429 P.2d at 896, 60 Cal. Rptr. at 384.
the individual facts of each case. The supreme court emphasized that the factual inquiry could not be resolved without considering the paramount state interest in the increasing need to conserve water.

In People ex rel. State Water Resources Control Board v. Forni, the appellate court confirmed the need to examine the individual circumstances in determining the reasonableness of a water use. In Forni, the Board sought to enjoin riparian vineyardists from diverting water to their vineyards for frost protection when the Napa River was too low to accommodate the needs of all the riparian vineyardists. The trial court found the direct diversion of water for frost protection reasonable within the meaning of California Constitution article 10, section 2 and Water Code section 100. In reversing the trial court, the appellate court rejected the riparian defendants' claim that the Board had no authority to bring suit to adjudicate the use of water by a riparian. Thus, the court applied the reasonable and beneficial use requirements of the California Constitution and Water Code to riparian rights holders. Water Code section 275 is direct statutory authority for the Board to sue to prevent unreasonable water use. Thus, Forni vests the

67. Id. at 140, 429 P.2d at 894, 60 Cal. Rptr. at 382. See Joeger v. Pacific Gas and Elec. Co., 207 Cal. 8, 22, 276 P. 1017, 1024 (1929) (declaring that reasonable use is a question of fact for the court to determine upon the evidence presented in each case); Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 567, 45 P.2d 972, 1007 (1935) (reiterating that what is a beneficial use depends upon the facts and circumstances of each case).
68. Joslin, 67 Cal. 2d at 140, 429 P.2d at 894, 60 Cal. Rptr. at 382.
69. 54 Cal. App. 3d 743, 126 Cal. Rptr. 851 (1976).
70. Forni, 54 Cal. App. 3d at 750, 126 Cal. Rptr. at 855. The court stated:

What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

Id. (quoting Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 567, 45 P.2d 972, 1007 (1935)).
71. Id. at 747, 126 Cal. Rptr. at 853 (1976).
72. Id. at 748, 126 Cal. Rptr. at 854. The trial court also invalidated California Administrative Code title 23, section 659, which declared that direct diversion of water from the Napa River during the frost period was unreasonable. Id.
73. Id. at 750-51, 126 Cal. Rptr. at 855-56. The appellate court found that the Board had stated a cause of action because the complaint alleged that although the young vine shoots could best be protected from frost by applying a fine water mist, the high demand by all the vineyardists rendered the river flow inadequate to meet all their needs. Id.
74. Id. at 748, 752-53, 126 Cal. Rptr. at 854, 856-57. The appellate court held that a judgment on the pleadings was not an appropriate medium for resolving the question of reasonable use or method of use of water. Id. at 754, 126 Cal. Rptr. at 858.
75. Id. at 751, 126 Cal. Rptr. at 856.
76. Id. at 753, 126 Cal. Rptr. at 858. The trial court invalidated title 23, section 659, of
Board with power to bring suit to enforce the reasonable use of water by riparians.\textsuperscript{77} \textit{Forni} leaves open the question whether the Board could exercise its enforcement power through administrative or executive proceedings.


In \textit{Modesto Properties Co. v. State Water Rights Board,}\textsuperscript{78} the Third District Court of Appeal considered a claim that the Board has no jurisdiction over water in artificial channels.\textsuperscript{79} In 1918, Merced County built an irrigation drain across land subsequently acquired by petitioner Modesto Properties Company.\textsuperscript{80} The trial court agreed with the Board that the Board has jurisdiction over water in an artificial channel and may issue a permit to appropriate any unappropriated water therein.\textsuperscript{81} The appellate court found sufficient evidence to support the Board finding that the drain contained more water than petitioner could reasonably use in conformity with petitioner's overlying water rights.\textsuperscript{82} The \textit{Modesto} court decided that precluding jurisdiction over water in artificial channels would not be consistent with the state policy of conserving water.\textsuperscript{83} Thus,

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the California Administrative Code, which declares that the direct diversion of water in the frost period constitutes an unreasonable method of use within the meaning of the California Constitution and Water Code. \textit{Id.} The \textit{Forni} court reversed and construed section 659 as a policy statement leaving the ultimate adjudication of reasonableness to the judiciary upon suit by the Board pursuant to Water Code section 275. \textit{Id.} at 752, 126 Cal. Rptr. at 857.

\textsuperscript{77} \textit{Id.} at 753, 126 Cal. Rptr. at 858.

\textsuperscript{78} \textit{Id.} at 753, 126 Cal. Rptr. at 858.

\textsuperscript{79} \textit{Id.} at 753, 126 Cal. Rptr. at 858.

\textsuperscript{80} \textit{Id.} at 752, 126 Cal. Rptr. at 857.

\textsuperscript{81} \textit{Id.} at 753, 126 Cal. Rptr. at 858.

\textsuperscript{82} \textit{Id.} at 753, 126 Cal. Rptr. at 858.

\textsuperscript{83} \textit{Id.} at 753, 126 Cal. Rptr. at 858.
because the Board regulates the reasonable and beneficial use of all state water, Modesto expanded the jurisdiction of the Board to include the regulation of water in artificial watercourses.

In Environmental Defense Fund, Inc. v. East Bay Municipal Utility District (EDF I), the plaintiffs contended that the failure of the East Bay Municipal Utility District (EBMUD) to reclaim waste water violated the Water Reclamation Law, article 10, section 2, of the California Constitution, and Water Code section 100. The California Supreme Court held that because the plaintiffs failed to seek relief from the Board before filing suit, the claim was not properly before the court. The supreme court explained that the Board has broad statutory authority to control and condition water use for the public interest, to protect the environment, regulate water quality, and prevent misuse. The supreme court concluded that permitting concurrent jurisdiction in the superior courts on complex, technical water resource management issues

84. 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977), vacated and remanded 439 U.S. 911 (1978) (the United States Supreme Court remanded on a preemption issue not addressed in this Note). See infra note 95 (explaining that in EDF II the California Supreme Court affirmed the EDF I decision).

85. Plaintiffs in EDF I consist of three corporations and three individuals who are residents of an area served by defendant East Bay Municipal Utility District, a governmental agency. EDF I, 20 Cal. 3d at 331, 572 P.2d at 1129, 142 Cal. Rptr. at 905. The County of Sacramento intervened in the action to protect the County's $6 million regional park along the American River, which has been used by the public for scenic and recreational purposes for many years. Id. at 333, 572 P.2d at 1130, 142 Cal. Rptr. at 906.

86. CAL. WATER CODE § 13500-13551 (West 1971 & Supp. 1988) (providing for the reclamation of waste water to supplement existing water supplies and to help meet the future water needs of the state).

87. EDF I 20 Cal. 3d at 341, 572 P.2d at 1135, 142 Cal. Rptr. at 911 (1977). The supreme court examined the reasonableness of the EBMUD decision not to reclaim waste water over the course of a long-term procurement of water supplies for more than a million people. Id. at 344, 572 P.2d at 1137, 142 Cal. Rptr. at 913. The supreme court found the issues involved in waste water reclamation far more complex than issues where the superior court traditionally has concurrent jurisdiction, such as adjudication between two competing water users. Id.

88. Id. at 341, 572 P.2d at 1135, 142 Cal. Rptr. at 911 (plaintiffs' cause of action to compel the defendant to reclaim waste water is the only claim in EDF I relevant to this Note).

89. CAL. WATER CODE § 1257 (West 1971).

90. Id. §§ 13510-12 (West 1971), 13320 (West 1971) (the Department of Health, the Regional Water Quality Control Boards, and the Board jointly regulate reclamation and use of waste water).

91. EDF I, 20 Cal. 3d at 342, 572 P.2d at 1135-36, 142 Cal. Rptr. at 911-12 (1977). The Board enforces compliance with the statutes and develops policies and plans for waste water reclamation throughout the state. Id. at 343, 572 P.2d at 1136-37, 142 Cal. Rptr. at 912-13. The supreme court found that the Legislature intended to vest the regulation of waste water reclamation in administrative agencies. Id. See CAL. WATER CODE §§ 100 (West 1971), 275 (West 1971 & Supp. 1988) (authorizing the Board to prevent misuse of water); CAL. ADMIN. CODE tit. 23, §§ 856-60 (1987) (provisions for investigation, hearing, and order regarding prevention of water misuse).
would impair the comprehensive administrative system established by the legislature to guarantee reasonable water use and purity.  

When a statutory pattern integrates an administrative agency into a regulatory scheme, the litigation must be initiated with the agency, if the subject falls within the special competence of the agency. Thus, the *EDF I* court declared that the Board has exclusive primary jurisdiction over matters of waste water reclamation.

In *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District (EDF II)*, the California Supreme Court considered a claim that the location chosen by defendant East Bay Municipal Utility District (EBMUD) for diversion of water from the American River violates California law. The Board granted permits to EBMUD to appropriate water from the Folsom-South Canal, beginning the year the Auburn-Folsom-South Project on the American River is completed. The plaintiffs complained that EBMUD should have tried to acquire water from the federal government at a point below the confluence of the Sacramento and lower American Rivers. Although the Board retained jurisdiction to consider the diversion point, the supreme court agreed with the plaintiffs that the superior court was not thereby deprived of concurrent jurisdiction on the issue whether a diversion method is reasonable. The court emphasized that California law requires the Board to consider specific

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92. *EDF I*, 20 Cal. 3d at 343, 572 P.2d at 1136-37, 142 Cal. Rptr. at 912-13. The California Supreme Court reiterated that whether water use is reasonable depends upon all factors affecting the use, including variations when circumstances change. Id. at 344, 572 P.2d at 1137, 142 Cal. Rptr. at 913 (citing Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 140, 429 P.2d 889, 894, 60 Cal. Rptr. 377, 382 (1967)). 93. Id. 94. 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980). The United States Supreme Court vacated the *EDF I* decision and remanded to the California Supreme Court. *EDF II*, 26 Cal. 3d at 187, 605 P.2d at 2, 161 Cal. Rptr. at 467. In *EDF II*, the California Supreme Court did not reconsider its holding in *EDF I* that litigation involving waste water reclamation issues must first be addressed to the Board, because that issue did not involve federal preemption. Id. at 187, n.1, 605 P.2d at 2, n.1, 161 Cal. Rptr. at 467, n.1. 95. Id. at 193, 605 P.2d at 5, 161 Cal. Rptr. at 470, (1980). EDF contended the superior court possesses concurrent jurisdiction with the Board to determine whether the construction of the Auburn Dam and the choice of diversion point are unreasonable uses of water, relying upon California Constitution, article 10, section 2, and Water Code section 100. Id. at 193, 605 P.2d at 6, 161 Cal. Rptr. at 471. 96. Id. at 188-90, 605 P.2d at 2-4, 161 Cal. Rptr. at 467-69 (1980). 97. Id. at 191, 605 P.2d at 4, 161 Cal. Rptr. at 469. Plaintiffs contended that once defendant begins diversion from the Folsom-South Canal, the diminished flow on the lower American River will injure recreational opportunity, increase salinity, accelerate destruction of the wild river, and pollute San Francisco Bay, and completion of the Auburn Dam will eliminate whitewater rafting and stream fishing opportunities on the upper American River. Id. 98. Id. at 200, 605 P.2d at 10, 161 Cal. Rptr. at 475.
factors relating to beneficial use and the public interest before deciding whether to grant a permit.\textsuperscript{99} In conclusion, the \textit{EDF II} court held that, absent overriding considerations such as the health and safety dangers involved in the reclamation of waste water, the superior courts continue to have concurrent jurisdiction with the Board to enforce the state policy against the unreasonable use or diversion of water declared in article 10, section 2, of the California Constitution.\textsuperscript{100}

In \textit{People v. Shirokow}\textsuperscript{101} the defendant claimed to have acquired a prescriptive right to water as against all parties downstream, including the state.\textsuperscript{102} The defendant’s predecessor constructed a dam and reservoir on a creek without first acquiring a permit from the Board.\textsuperscript{103} At the request of the Board, the state filed suit to enjoin the defendant’s diversion of water.\textsuperscript{104} The supreme court concluded the diversion could be enjoined only if the water was subject to the statutory appropriation procedures.\textsuperscript{105} The court in-

\textsuperscript{99} \textit{Id.} See \textit{Cal. Water Code} §§ 1253 (West 1971) (allowing the Board to condition appropriation upon terms that will best develop, conserve, and utilize the water in the public interest); 1255 (West 1971) (requiring the Board to reject the permit application when the appropriation does not best conserve the public interest); 1257(1) (West 1971) (requiring the Board to consider the relative benefit to be derived from all beneficial uses of the water concerned, including domestic, irrigation, municipal, and industrial uses, preservation and enhancement of fish, wildlife, and recreational uses); 1257(2) (West 1971) (requiring the Board to consider the benefit to be derived from the reuse or reclamation of the water sought to be appropriated); 1258 (West 1971) (requiring the Board to consider any established water quality plans).

\textsuperscript{100} \textit{EDF II}, 26 Cal. 3d at 200, 605 P.2d at 10, 161 Cal. Rptr. at 475 (1980).

\textsuperscript{101} \textit{Shirokow}, 26 Cal. 3d at 305-06, 605 P.2d at 863, 162 Cal. Rptr. at 33. Defendant claimed that he had openly, notoriously, under claim of right, and adverse to all persons owning property downstream from his property, impounded and stored the waters of Arnold Creek behind the dam, placed the water to beneficial use, and paid all taxes assessed thereon. \textit{Id.}

\textsuperscript{102} \textit{Id.} at 305, 605 P.2d at 862-63, 162 Cal. Rptr. at 33. The defendant and the predecessor in interest paid all taxes assessed on the dam, reservoir, and impounded water, the use of which they have enjoyed exclusively since the construction. \textit{Id.} Defendant on two occasions applied to the Board for a permit to appropriate some of the impounded water. \textit{Id.} The first application was denied when defendant failed to remove brush, a condition imposed upon the right to appropriate the water, and defendant abandoned the second application upon discovering the cost ($8,500) entailed in complying with the conditions. \textit{Id.}

\textsuperscript{103} \textit{Id.} See \textit{Cal. Water Code} § 1052 (West 1971 & Supp. 1988) (trespass to divert water by a means not in compliance with the Water Code provisions for appropriation by permit granted by the Board; authorizes the Board to take appropriate action to have the trespass enjoined).

\textsuperscript{104} \textit{Shirokow}, 26 Cal. 3d at 305, 605 P.2d at 862-63, 162 Cal. Rptr. at 33. The suit was filed under Water Code section 1052, authorizing suit to enjoin improper water appropriation. \textit{Id. See Cal. Water Code} §§ 1052 (West 1971 & Supp. 1988); 1201 (West 1971) (excluding from unappropriated water any water reasonably needed for useful and beneficial purposes by a riparian right holder).
terpreted the Water Code as subjecting all state water to the statutory appropriation procedure unless it is already subject to the vested rights of a riparian, a statutory appropriator, or a pre-1914 appropriator.\textsuperscript{106} The ability of the Board to comply with the legislative mandate to issue appropriative rights consistent with the public interest is hindered by any uncertainty regarding the availability of water for appropriation.\textsuperscript{107} The supreme court concluded that prescriptive rights are inconsistent with the comprehensive system of water rights administration and thus may not be acquired against the state.\textsuperscript{108}

In \textit{National Audubon Society v. Superior Court},\textsuperscript{109} the California Supreme Court determined the relationship between the public trust doctrine\textsuperscript{110} and the appropriative water rights system.\textsuperscript{111} Defendant Department of Water and Power of the City of Los Angeles (DWP)\textsuperscript{112} obtained a permit in 1940 from the Board\textsuperscript{113} to appropriate

\begin{itemize}
  \item \textsuperscript{106} \textit{Shirokow}, 26 Cal. 3d at 309, 605 P.2d at 865, 162 Cal. Rptr. at 35-36. This conclusion is based upon the court's interpretation of the state constitution, legislative enactments, and opinions of court and water experts construing the constitution and statutes, all of which would limit the scope of water rights, rather than leave open the possibility of prescription. \textit{Id.} at 306-09, 605 P.2d at 863-65, 612 Cal. Rptr. 34-36 (1980).
  \item \textsuperscript{107} \textit{Id.} at 309-310, 605 P.2d at 865-66, 162 Cal. Rptr. at 36 (the Board does not have unfettered discretion to act on appropriation applications because the Board may not arbitrarily and capriciously reject an application; thus, the holding will not result in the destruction of all beneficial uses of water originally undertaken by prescription).
  \item \textsuperscript{108} \textit{Id.} at 309-10, 605 P.2d at 865-66, 162 Cal. Rptr. at 36. In addition, the supreme court held that even if prescription were not precluded by statute, defendant's prescription is defective because public rights cannot be lost by prescription and defendant failed to establish that his use was hostile to downstream users. \textit{Id.} at 311-12, 605 P.2d at 866-67, 162 Cal. Rptr. at 37-38. The court expressly left unresolved the issue of prescriptive rights as between private parties. \textit{Id.} at 312 n.15, 605 P.2d at 867 n.15, 162 Cal. Rptr. at 38 n.15.
  \item \textsuperscript{109} 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).
  \item \textsuperscript{110} The Supreme Court summed up the public trust doctrine as follows: \[ \textit{Id.} \]
  \begin{itemize}
    \item \textsuperscript{111} \textit{Id.} \[ \textit{Id.} \]
    \begin{itemize}
      \item \textsuperscript{112} \textit{Id.} at 419, 425, 658 P.2d at 709, 712, 189 Cal. Rptr at 346, 348 (DWP is the real party in interest in writ of mandamus proceeding before the state supreme court and the named defendant in the initial action).
      \item \textsuperscript{113} \textit{Id.} at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348 (the issuing authority was the Division of Water Resources, a Board predecessor). The Board granted the permit because the diverted water would be put to domestic uses, declared to be the most beneficial use of state water, even though the result would impair public trust values. \textit{Id.} at 427, 427-28 n.6, 658 P.2d at 713, 713-14 n.6, 189 Cal. Rptr. at 350, 350-51 n.6 (1983) (the Board assumed that approval was required because of the high priority of domestic use). However, at the time the permit was issued, the Board had the power to consider the other public trust impacts of the
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water from four of the five streams flowing into Mono Lake. Plaintiffs sued to enjoin DWP diversions, claiming that the shores, bed, and waters of Mono Lake are protected by a public trust. The supreme court held that the Board must consider public trust values before approving water diversions and must attempt to prevent or minimize any harm to public interests. Because the diversion by DWP was granted, commenced, and continued without any consideration of the public trust, the supreme court held that an objective study and reconsideration of Mono Basin water rights was long overdue.1

Affirming the trial court ruling that plaintiffs must exhaust administrative remedies, the supreme court noted in National Audubon...
that the expertise, experience, and powers of the Board support the conclusion that the Board should have exclusive primary jurisdiction.\textsuperscript{118} However, the courts have concurrent jurisdiction based on long-established precedents.\textsuperscript{119}

A minority of the \textit{National Audubon} court concluded that the Board should have exclusive original jurisdiction over all state water issues.\textsuperscript{120} However, that view did not command a majority of the court.\textsuperscript{121} Instead, the supreme court held that the Board may reconsider allocation of rights previously granted when considering a claim that a water use is harmful to interests protected by the public trust.\textsuperscript{122} \textit{National Audubon} left open the question whether a Board ruling on the issue may be reviewed de novo or only upon the record.

\section*{II. \textsc{The Case}}

\subsection*{A. \textit{The Facts}}

The dispute that led to \textit{Imperial Irrigation District (IID) v. State Water Resources Control Board}\textsuperscript{123} originated in 1980, when a farmer with acreage next to the Salton Sea\textsuperscript{124} sought action by the Board

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\item[118.] \textit{Id.} at 426, 658 P.2d at 713, 189 Cal. Rptr. at 349-50.
\item[119.] \textit{Id.} at 426, 449-51, 658 P.2d at 713, 730-31, 189 Cal. Rptr. at 349-50, 367-68. In support, the Court cited \textit{EDF I} and \textit{EDF II}. The supreme court noted that courts have statutory authority to refer water rights disputes to the Board, which may then act as referee. \textit{Id. See CAL. WATER CODE §§ 2000-2001} (West 1971) (provisions for court referral of water issues to the Board). The supreme court recommends that courts make referrals to the Board even though they have concurrent jurisdiction with the Board whenever the experience or expertise of the Board would be useful. \textit{National Audubon}, 33 Cal. 3d 419, 426, 658 P.2d 709, 713, 189 Cal. Rptr. 346, 350 (1983).
\item[120.] \textit{National Audubon}, 33 Cal. 3d at 453, 658 P.2d at 733, 189 Cal. Rptr. at 369-70 (Kaus, J., concurring) (arguing for holding that the Board has exclusive primary jurisdiction over all water issues); \textit{Id.} at 453-55, 658 P.2d at 733-35, 189 Cal. Rptr. at 370-71 (Richardson, J., concurring and dissenting) (arguing for holding that the Board has exclusive primary jurisdiction over all water issues).
\item[121.] \textit{Id.} at 451-52, 568 P.2d at 731-32, 189 Cal. Rptr. at 368-69.
\item[122.] \textit{Id.} at 449, 658 P.2d at 730, 189 Cal. Rptr. at 366-67. \textit{See CAL. WATER CODE §§ 2501} (West.1971) (authorizing the Board to determine all rights to water in a stream system); 2525 (West 1971) (authorizing the Board to grant a petition for determination of rights in a stream system when the Board finds that the public interest and necessity will be served by a determination).
\item[123.] 186 Cal. App. 3d 1160, 231 Cal. Rptr. 283 (1986).
\item[124.] The Salton Sea, created in 1905 when the Colorado River flooded, is the largest lake in California and supports a major sport fishery. \textit{See Dunning, The "Physical Solution" in}
to relieve the flooding of his fields.\textsuperscript{125} The flooding was allegedly caused by misuse of water by IID.\textsuperscript{126} After the Board ordered IID to conserve water, IID filed suit for declaratory relief from the order to conserve.\textsuperscript{127}

The Imperial Irrigation District is located in Imperial County between the Salton Sea and the border of Mexico.\textsuperscript{128} IID supplies all water to the Imperial Valley,\textsuperscript{129} and maintains the All-American Canal,\textsuperscript{130} which diverts water from the Colorado River at the Imperial Dam.\textsuperscript{131} IID acquired the right to appropriate Colorado River water in 1901,\textsuperscript{132} prior to the establishment of the statutory permit appropriation system in 1914.\textsuperscript{133} The All-American Canal carries the water over 1,760 miles of conveyance and distribution facilities.\textsuperscript{134} IID supplies water to farmers in the Imperial Valley and collects irrigation return flows through approximately 1,450 miles of drain-

\textsuperscript{125} Western Water Law, 57 U. Colo. L. Rev. 445, 479 n.181 (suggesting that the Los Angeles Metropolitan Water District (MWD) finance physical improvements to the IID system in exchange for MWD obtaining all the extra water IID can't beneficially use).
\textsuperscript{126} Imperial Irrigation Dist. v. State Water Resources Control Bd.; 186 Cal. App. 3d 1160, 1164, n.4, 231 Cal. Rptr. 283, 284, n.4 (noting that IID's rights pre-date the 1914 Act establishing the permit appropriation system).
\textsuperscript{127} Decision 1600, supra note 13, at 6 (stating that the priority dates and present perfected rights of all interested parties except Indian tribes to the beneficial use of Colorado River water, including the right of IID to 2,600,000 acre feet per annum of the amount necessary to irrigate 424,145 acres, whichever is less; Bryant v. Yellen at 364-65, (1980) (holding that the federal reclamation laws limiting irrigation water deliveries from reclamation projects to 160 acres under single ownership did not apply to lands that IID was irrigating prior to the enactment of the federal Boulder Canyon Project Act in 1929, but that whether acreage limitations were applicable to lands that IID began irrigating after 1929 was a question for the lower courts to determine).
The return flows drain into the New and Alamo rivers, which in turn drain into the Salton Sea.\textsuperscript{136} John Elmore is a farmer with acreage adjacent to the Salton Sea.\textsuperscript{137} The surface level of the Salton Sea had gradually risen more than three feet,\textsuperscript{138} flooding thousands of acres of farmland, including much of Elmore's land, and destroying the natural gravity drainage.\textsuperscript{139} Elmore installed pumps and built a three-mile long earthen dike to keep the floodwaters off his unsubmerged fields.\textsuperscript{140} In June, 1980, Elmore asked the Department of Water Resources (DWR) to investigate misuse of water by IID.\textsuperscript{141} Elmore identified five separate practices of IID that he felt were wasteful.\textsuperscript{142} First, Elmore alleged that IID kept its canals too full,
causing frequent spills at the terminal end of the canals. Second, Elmore alleged that IID should have installed reservoirs to regulate canal flows to prevent the delivery of excess water, the resultant canal spills, and the runoff into the Salton Sea. Third, by delivering too much water to farmers' headgates, IID allegedly created excess tailwater because the excess water passed unused through the farmers' fields. Fourth, Elmore claimed that the excess tailwater and runoff could have been put to productive use had IID installed tailwater recovery systems. Finally, IID required farmers to order water only in twenty-four-hour intervals, which prevented farmers from terminating the delivery once they received the desired amount of water. Elmore alleged this practice caused excess water from deliveries to drain unused into the Salton Sea.

Upon concluding an investigation into Elmore's allegations, DWR found that although IID operations were improving, IID was still wasting water that could be conserved for other beneficial uses. DWR identified a potential for conserving 438,000 acre-feet of water per year through a combination of physical improvements and operational changes. DWR notified IID of the findings and asked IID to submit a water conservation plan within six months. After initially agreeing to submit the plan, IID later advised DWR that all use of water by IID was reasonable and did not constitute unnecessary waste. DWR concluded that IID was not responding to the request to develop a water conservation plan. Therefore, DWR referred the matter to the Board.

143. Id. at 4.
144. Id.
145. Id.
146. Id.
147. Decision 1600, supra note 13, at 5.
148. Id.
149. Id. at 3.
150. Id. See id. at 38-51 (possible solutions include lining canals to prevent canal seepage, ceasing excess delivery to prevent excess tailwater, ceasing the practice of keeping canals overly full to reduce canal spills). See id. at 29-37 (estimates of water losses by DWR, Elmore, IID, and United States Bureau of Reclamation together with Board findings of losses).
151. Id. at 3. See CAL. ADMIN. Code tit. 23, § 4002 (1979) (DWR may request that a water supplier or local government agency correct any water misuse DWR finds upon preliminary investigation).
152. Decision 1600, supra note 13, at 3.
153. Id. at 3. Following the the Board hearing, IID submitted a brief citing a 12/31/82 letter to IID in which (then) DWR Director Ron Robie stated it is "not presently economic for you [IID] to salvage much of this water for your own uses." Id. at 21. The IID brief suggests that DWR may not have concluded that IID practices result in waste or unreasonable use of water and therefore a hearing before the Board was unnecessary. Id. The Board decided
the Board held a hearing to determine whether IID was misusing water.\textsuperscript{155}

On June 21, 1984, the Board issued Decision 1600, a 71-page finding that the failure of IID to implement additional water conservation measures was unreasonable and a misuse of water under the California Constitution, article 10, section 2.\textsuperscript{156} In Decision 1600, the Board ordered IID to undertake specified conservation measures and submit a water conservation plan.\textsuperscript{157} The Board reserved jurisdiction until IID is in full compliance with the provisions of article 10, section 2.\textsuperscript{158}

IID asked the Board to reconsider\textsuperscript{159} Decision 1600 and claimed that all the water IID diverted from the Colorado River was put to beneficial use and no alternate beneficial use for the water existed.\textsuperscript{160} On September 20, 1984, the Board denied the request for reconsideration.\textsuperscript{161} IID then filed suit against the Board in Imperial County Superior Court for declaratory relief.\textsuperscript{162}

that review of the DWR record left no doubt that DWR concluded IID practices result in a misuse of water. \textit{Id.}

\textsuperscript{154} \textit{Id.} at 3-4. The Board received letters supporting Elmore's request for Board action from Citizens for a Better Environment, the Environmental Defense Fund, and on behalf of seventy property owners in the vicinity of the Salton Sea. \textit{Id.}

\textsuperscript{155} \textit{Id.} at 3. During the hearing, numerous individuals and organizations made both evidentiary and non-evidentiary presentations. \textit{Id.} at 8-9. See \textit{CAL. ADMIN. CODE} tit. 23, §§ 4004 (1979) (the Board may hold a hearing to determine whether unreasonable water use has occurred or continues to occur, upon reference by DWR, upon its own motion, or upon good cause shown by an interested party); 648.4(a-c) (1980) (technical rules regarding evidence and witnesses do not apply; e.g., any relevant, non-repetitive evidence is admissible, oral or written testimony under oath or affirmation is admissible, and each person may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matters, and offer rebuttal evidence); 648.4(d) (1980) (hearsay evidence is admissible to supplement or explain other evidence, but is not alone sufficient to support findings unless admissible in a civil trial).

\textsuperscript{156} \textit{Decision 1600, supra} note 13.

\textsuperscript{157} \textit{Id.} at 67-71.

\textsuperscript{158} \textit{Id.} at 70-71. On March 30-31, 1988, the Board conducted an evidentiary hearing to determine whether IID had implemented a conservation plan and whether alternative needs existed for any water saved through conservation by IID. Telephone conversation with Dan Frink, Staff Counsel, State Water Resources Control Board (April 22, 1988) notes on file at \textit{the Pacific Law Journal}. At the hearing, Metropolitan Water District presented testimony projecting the future water needs of Los Angeles and proposing the purchase by MWD of water saved by IID conservation measures. \textit{Id.} At this writing, the Board has not rendered a decision on the March, 1988, hearing.

\textsuperscript{159} \textit{CAL. WATER CODE} § 2702 (West 1971 supp. 1988) (the Board may reopen the proceedings and grant a rehearing for good cause shown within 30 days after notice of entry of a Board determination).

\textsuperscript{160} \textit{Imperial Irrigation Dist. v. State Water Resources Control Bd.}, 186 Cal. App. 3d 1160, 1163, 231 Cal. Rptr. 283, 284.

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{Id.} at 1164, 231 Cal. Rptr. at 284.
The trial court granted declaratory relief, concluding that the Water Code does not permit the Board to adjudicate the issue of unreasonable use of water. The Board could enforce orders only by initiating an action through the State Attorney General. Because the Board could only seek enforcement through the Attorney General, Decision 1600 had no binding effect on IID in any other action or proceeding; therefore, IID would be entitled to a full trial de novo. The Board and intervenor Environmental Defense Fund appealed the trial court finding, contending the Board has adjudicatory power to make a finding of unreasonable use of water by IID.

B. The Opinion

The Fourth District Court of Appeal held that the Board may adjudicate the constitutional issue of the unreasonable use of water. Although the superior courts have concurrent jurisdiction with the Board on the unreasonable water use issue, the Imperial court affirmed the extensive authority of the Board to administer California water law. Furthermore, the appellate court concluded that a Board decision on the unreasonable water use issue is subject to superior court review on the record rather than by trial de novo.

The Imperial court reiterated the provisions of article 10, section 2 and Water Code section 100, which declare that the general welfare of the state requires that all water be put to beneficial use to the fullest extent possible and also requires the prevention of waste or unreasonable use of water. Moreover, article 10, section 5 of the California Constitution declares that all water appropriated for sale, rental, or distribution is a public use subject to state

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163. Id. at 1162-64, 231 Cal. Rptr. at 284-85.
164. Id.
165. Imperial, 186 Cal. App. 3d at 1164, 231 Cal. Rptr. at 284-84.
166. Id. at 1162, 231 Cal. Rptr. 283-84.
167. Id. at 1171, 231 Cal. Rptr. at 290. The opinion contained extensive quotations of legislative materials and judicial opinions but contained very little analysis. William Atwater affectionately characterized the opinion as plagiarizing several other California water law cases. Address by State Water Resources Control Board Chief Counsel William Atwater, McGeorge School of Law Environmental Law Forum Spring Water Law Speaker Series (March 10, 1988) (videotape available at McGeorge Law Library Reserve Desk).
168. Imperial, 186 Cal. App. 3d at 1171, 231 Cal. Rptr. at 290.
169. Id. at 1164-65, 231 Cal. Rptr. at 285.
regulation. Because IID has an appropriative right to distribute and sell water to farmers, IID has a public use subject to state regulation. The court emphasized that the legislature vested the Board with the adjudicatory and regulatory functions of the state in the field of water resources. After listing examples of adjudicatory and regulatory functions expressly delegated to the Board, the court acknowledged that the legislature has not specifically granted authority to the Board in some areas.

The Imperial court reviewed various California Supreme Court decisions regarding Board adjudicatory authority expressly delegated to the Board by statute. According to Environmental Defense Fund v. East Bay Municipal Utility District (EDF I), the Board has exclusive adjudicatory jurisdiction over claims involving waste water reclamation by water agencies. Board jurisdiction is based on the comprehensive delegation to administrative agencies of authority to regulate reasonable use and purity of water. The Imperial court highlighted language in EDF I that emphasizes the primary jurisdiction of the Board over matters involving the special competence and high level of expertise of the Board.

Additionally, the Imperial court examined the express authority of the Board to adjudicate competing uses by all holders of riparian rights in a stream system. Previously, in People v. Shirokow

170. Id. at 1165, 231 Cal. Rptr. at 285.
171. Id.
172. Id. at 1165-66, 231 Cal. Rptr at 286 (citing CAL. WATER CODE § 174 (West 1971)). See CAL. WATER CODE §§ 1051 (West 1971) (the Board may adjudicate the question whether water is appropriated); 13320 (West 1971 & Supp. 1988) (the Board may review any action of a regional water quality control board).
173. Imperial, 186 Cal. App. 3d at 1165, 231 Cal. Rptr. at 286. An example of an area of Board adjudicatory authority not specifically granted by statute is a claim that the location of a water diversion constitutes an unreasonable method of diversion under article 10, section 2 of the Constitution, the issue addressed in EDF II. Id. at 1167, 231 Cal. Rptr. at 287.
174. Id. at 1166-68, 231 Cal. Rptr. at 286-87.
175. 20 Cal. 3d 327, 572 P.2d 1128 142 Cal. Rptr. 904 (1977).
176. Id. at 341, 572 P.2d at 1135, 142 Cal. Rptr. at 911. See Imperial at 1166, 231 Cal. Rptr. at 286.
178. Imperial, 186 Cal. App. 3d at 1166, 231 Cal. Rptr. at 286 (citing EDF I, 20 Cal. 3d at 343-344, 572 P.2d at 1136-37, 142 Cal. Rptr. at 912-13).
179. Id. at 1165, 231 Cal. Rptr. at 286 (citing EDF I, 20 Cal. 3d at 344, 572 P.2d at 1137, 142 Cal. Rptr. at 913).
180. Id. at 1169, 231 Cal. Rptr. at 288.
181. 26 Cal. 3d 301, 605 P.2d 859, 162 Cal. Rptr. 30 (1980).
and *In re Waters of Long Valley Creek Stream System*, the California Supreme Court noted the expansive authority of the Board to undertake comprehensive planning and allocation of water resources. Specifically, the *Imperial* court observed that Board authority extends to determining the nature of future riparian rights in a stream system. The *Long Valley* court held that a judicial determination of an unreasonable use claim would not be *res judicata* in a subsequent administrative adjudication of the same claim with similar parties. However, the later administrative proceeding would result in a final, comprehensive determination of all user rights. The *Imperial* court acknowledged, however, that *Environmental Defense Fund v. East Bay Municipal Utility District (EDF II)* expressly recognized that nothing in *Long Valley* indicated that traditional court enforcement should be abandoned. Although the Board has concurrent, not exclusive, jurisdiction to determine competing riparian claims in a stream system, the *Imperial* court emphasized that the administrative adjudication is more efficient and comprehensive.

The *Imperial* court next explored areas where the Board lacks express statutory adjudicatory authority. *EDF II* held that both the courts and the Board may decide whether the location of a diversion constitutes an unreasonable diversion under article 10, section 2, of the California Constitution. The Board must adhere to hearing requirements and judicial review procedures to balance

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184. *Imperial*, 186 Cal. App. 3d at 1169, 231 Cal. Rptr. at 288 (citing *Shirokow*, 26 Cal. 3d at 309, 605 P.2d at 865, 162 Cal. Rptr. at 35-36; *Long Valley*, 25 Cal. 3d at 348-50 n.5, 599 P.2d at 355-36 n.5, 158 Cal. Rptr. at 661-63 n.5).
185. *Long Valley*, 25 Cal. 3d at 359-60, 599 P.2d at 669, 158 Cal. Rptr. at 363 (holding that the Board may not extinguish future riparian rights absent a showing that less drastic limitations are insufficient to promote the most reasonable and beneficial uses of state water).
186. *Id.* (private water rights litigation may be inconclusive and fragmentary and the Board may not be a party to the litigation; however, a statutory adjudication proceeding by the Board must consider the public interest in conserving water).
187. 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980).
188. *Imperial*, 186 Cal. App. 3d at 1167, 231 Cal. Rptr. at 287 (citing *EDF II*, 26 Cal. 3d at 199, 605 P.2d at 9, 161 Cal. Rptr. at 474).
189. *Id.* at 1168, 231 Cal. Rptr. at 287 (citing *EDF II*, 26 Cal. 3d at 199, 605 P.2d at 9, 161 Cal. Rptr. at 474).
190. *Id.* at 1168-69, 231 Cal. Rptr. at 287-88.
properly the rights of an appropriator with the needs of the public.\textsuperscript{192} Public needs include protecting the environment, regulating water quality, and preventing waste.\textsuperscript{193} The *Imperial* court described *EDF II* as expressly holding that Board responsibilities over appropriative rights include ensuring that appropriators meet the mandate of article 10, section 2.\textsuperscript{194}

Finally, the *Imperial* court found guidance in *National Audubon Society v. Superior Court*,\textsuperscript{195} which declares that all uses of water must now conform to the standard of reasonable use.\textsuperscript{196} Because the Board may reconsider appropriative rights previously granted,\textsuperscript{197} and because of the legislative intent to grant the Board open-ended, expansive authority to undertake comprehensive planning and allocation of water resources,\textsuperscript{198} the *Imperial* court found inconsistent the conclusion that the Board lacked jurisdiction to employ those powers.\textsuperscript{199}

The *Imperial* court concluded that these constitutional, statutory, and California Supreme Court authorities establish full adjudicatory authority in the Board on matters of water resource management. Therefore, the appellate court found perplexing the trial court conclusion that the Board lacked jurisdiction to adjudicate the matter of unreasonable water use.\textsuperscript{200} Despite the authority supporting the adjudicatory power of the Board, IID claimed that the authority of the Board is limited by California Water Code Section 275.\textsuperscript{201} The court emphasized that not only had no case interpreted section 275 as a limitation on Board adjudicatory power, but *EDF I* construed section 275 as supporting the broad regulatory power of the Board.\textsuperscript{202} The *Imperial* court concluded that section 275 is

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\item \textsuperscript{192} *Imperial*, 186 Cal. App. 3d at 1167-68, 231 Cal. Rptr. at 287 (citing *EDF II*, 26 Cal. 3d at 198, 605 P.2d at 8, 161 Cal. Rptr. at 473).
\item \textsuperscript{193} *Id.* (citing *EDF II*, 26 Cal. 3d at 198, 605 P.2d at 8, 161 Cal. Rptr. at 473).
\item \textsuperscript{194} *Id.* at 1168, 231 Cal. Rptr. at 288 (citing *EDF II*, 26 Cal. 3d at 195, 605 P.2d at 7, 161 Cal. Rptr. at 472). See CAL. WATER CODE § 1050 (West 1971 & Supp. 1988) (declaring that the Board and DWR perform a governmental function in carrying out the provisions for appropriation in accordance with article 10, section 2 of the California Constitution).
\item \textsuperscript{195} 33 Cal. 3d 419, 568 P.2d 709, 189 Cal. Rptr. 346 (1983).
\item \textsuperscript{197} *National Audubon*, 33 Cal. 3d at 449, 658 P.2d at 730, 189 Cal. Rptr. at 366-67. See *Imperial*, 186 Cal. App. 3d at 1168-69, 231 Cal. Rptr. at 288.
\item \textsuperscript{198} *National Audubon*, 33 Cal. 3d at 449, 658 P.2d at 730, 189 Cal. Rptr. at 366.
\item \textsuperscript{199} *Imperial*, 186 Cal. App. 3d at 1169, 231 Cal. Rptr. at 288 (citing *National Audubon*, 33 Cal. 3d at 449, 658 P.2d at 730, 189 Cal. Rptr. at 366).
\item \textsuperscript{200} *Imperial*, 186 Cal. App. 3d at 1169, 231 Cal. Rptr. at 288.
\item \textsuperscript{201} *Id.*
\item \textsuperscript{202} *Id.* See *EDF I*, 20 Cal. 3d at 342, 572 P.2d at 1136, 142 Cal. Rptr. at 912 (citing
one of many tools available to the Board in managing water resources. The *Imperial* court disposed of IID's primary argument in support of the trial court judgment by concluding that section 275 confers upon the Board expansive adjudicatory authority.

The *Imperial* court summarily dismissed other arguments by IID. Neither the statutory local agency status of IID nor the statutory authority to undertake water conservation programs would result in a different conclusion. IID claimed to be exempt from Board regulation because IID was required, as an urban water supplier, to prepare and adopt an urban water management plan. The court held that even if IID were within the Urban Water Management Planning Act, planning activities in compliance with the Act would not insulate IID from concurrent Board adjudicatory authority on the issue of unreasonable water use. In response to a further

California Water Code sections 100 and 275 in support of the proposition that the Board's powers extend to regulation of water quality and prevention of waste).

203. *Imperial*, 186 Cal. App. 3d at 1169, 231 Cal. Rptr. at 289. See also United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986) (holding *inter alia* that the Board has reserved and inherent authority to modify water project permits and citing California Water Code section 275 in support of the proposition that the Board has the separate and additional power to take whatever steps are necessary to prevent unreasonable uses or methods of diversion).

204. *Imperial*, 186 Cal. App. 3d at 1170, 231 Cal. Rptr. at 289. The court did not perceive any benefit to IID from the proposed conclusion that when a party fails to comply with a Board order, the exclusive remedy is for the Board to request legal action by the Attorney General. Id. See Cal. Admin. Code tit. 23, § 4006 (1980) (authorizing the Board to seek legal action through the Attorney General for failure of a water misuser to comply with a Board order); 859 (1987) (authorizing the Board to seek legal action through the Attorney General for failure of a water misuser to comply with a Board order).

205. *Imperial*, 186 Cal. App. 3d at 1170, 231 Cal. Rptr. at 289.

206. Cal. Water Code §§ 20513 (West 1984) ("district" means any irrigation district formed pursuant to any state law); 20560 (West 1984) (districts, regardless of when formed, are subject to the Irrigation District Law); 20570 (West 1984) (districts are state agencies).


208. *Imperial*, 186 Cal. App. 3d at 1170, 231 Cal. Rptr. at 289.

209. Cal. Water Code § 10617 (West 1971 & Supp. 1988) (defining an urban water supplier as a private or public supplier who distributes or sells water for municipal purposes to more than 3,000 customers or supplies more than 3,000 acre feet per annum of water).


211. Cal. Water Code §§ 10610-10656 (West supp. 1988) (the Urban Water Management Planning Act requires urban water suppliers to develop and implement water management plans to achieve conservation and efficient use of the limited water resources of the state). See *Imperial*, 186 Cal. App. 3d at 1170, 231 Cal. Rptr. at 289 (the court found an absence of proof in the record on the issue of whether IID was an urban water supplier).

212. *Imperial*, 186 Cal. App. 3d at 1170, 231 Cal. Rptr. at 289 (the court concluded the Board could even order IID to submit a plan to conserve water, as the Board did in *Imperial*). See Cal. Water Code §§ 10650 (West 1971 & Supp. 1988) (authorizing proceedings to review

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argument by IID, the court stated that discussing alleged or actual inconsistencies in the positions taken by the parties would not be helpful to IID.\textsuperscript{213} IID next claimed that \textit{Elmore v. Imperial Irrigation District}\textsuperscript{214} supports the contention that the Board lacked jurisdiction over IID.\textsuperscript{215} The \textit{Imperial} court discounted the claim, because \textit{Elmore} held that IID has a clear, mandatory duty to avoid wasting water, prevent flooding, and provide drainage, and directed the trial court to consider Decision 1600, the same Board decision at issue in \textit{Imperial}.\textsuperscript{216} The court then distinguished \textit{People ex. rel. State Water Resources Control Board v. Forni}\textsuperscript{217} by emphasizing that the regulation of riparian rights involved in \textit{Forni} has no bearing on the issue of reasonable use of water in the irrigation system involved in \textit{Imperial}.\textsuperscript{218}

In conclusion, \textit{Imperial} held that the Board possesses the authority to adjudicate the constitutional issue of unreasonable use of water by an appropriative right holder.\textsuperscript{219} Moreover, the court held that

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\textsuperscript{213} \textit{Imperial}, 186 Cal. App. 3d at 1170, 231 Cal. Rptr. at 289.

\textsuperscript{214} 159 Cal. App. 3d 185, 205 Cal. Rptr. 433 (1984).


\textsuperscript{216} \textit{Imperial}, 186 Cal. App. 3d at 1171, 231 Cal. Rptr. at 289-90 (citing \textit{Elmore}, 159 Cal. App. 3d at 192-93, 205 Cal. Rptr. at 438-39). Because IID's claim that the law does not support implied powers of the Board was fully addressed in the proceeding part of the opinion, the court declined to address the issue separately. \textit{Id.} at 1170, 231 Cal. Rptr. at 290.

\textsuperscript{217} 54 Cal. App. 3d 743, 752, 126 Cal. Rptr. 851, 856-57 (1976) (declaring that a Board-promulgated administrative regulation, which prohibited diversion from a river for frost protection, was no more than a policy statement subject to judicial adjudication on the question of reasonableness).

\textsuperscript{218} \textit{Imperial}, 186 Cal. App. 3d at 1170, 231 Cal. Rptr. at 289 (the court deemed the adjudicatory function performed by the Board in \textit{Imperial} "far different in nature and effect from the adoption of a regulation declaring unreasonable the diversion of water from a particular river during a specified season").

\textsuperscript{219} \textit{Id.} at 1171, 231 Cal. Rptr. at 290. The appellate court remanded the matter to the Imperial County Superior Court for review of \textit{Decision 1600} by way of writ of mandate and applying the independent judgment test. \textit{Imperial Irrigation Dist. v. State Water Resources Control Board, Statement of Decision}, No. 58706 (Imperial County Superior Court, April 13, 1988). After reviewing the lengthy record of the hearing before the Board, Judge Malkus applied his independent judgment and concluded that the evidence amply supported the Board's finding that the failure of IID to implement additional water conservation measures is unreasonable and constitutes a misuse of water. \textit{Id.} at 4. Judge Malkus then remanded the matter to the Board to determine new dates for compliance by IID. \textit{Id.} at 5. When this decision was rendered, the Board had recently concluded a hearing to determine whether IID

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judicial review of Board decisions is not by trial de novo, but rather by writ of mandamus. The court concluded that superior courts should apply the independent judgment test when reviewing Board decisions.

was implementing conservation measures. See supra note 158 (discussing the March, 1988, hearing).

220. Imperial, 186 Cal. App. 3d at 1171, 231 Cal. Rptr. at 290 (typical of the opinion, the court did not explain the rationale for the holding that review is on the record rather than de novo). See CAL. WATER CODE § 1840 (West 1971 & Supp. 1988) (provision for aggrieved party to file petition for writ of mandate for review of any preliminary cease and desist order issued by the Board). See also infra note 222 (discussing the standard of review applicable to an administrative decision).

221. When applying the independent judgment test, a reviewing court may not substitute its independent policy judgment for that of the agency on the basis of an independent trial de novo. United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 111-13, 227 Cal. Rptr. 161, 175-76 (1986). See infra note 218 (detailing the independent judgment test).

222. Imperial, 186 Cal. App. 3d at 1171, n. 17, 231 Cal. Rptr. at 290, n. 17 (this conclusion was delivered in the final footnote to the opinion). See United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 111-13, 227 Cal. Rptr. 161, 175-76 (1986) (setting forth a two part test for determining the standard by which actions of administrative agencies are reviewed). When the agency acts in its legislative capacity, the court must ask three questions: (1) Did the agency act within the scope of its delegated authority; (2) did the agency employ fair procedures; and (3) was the agency action reasonable. Id. Under the third inquiry, a reviewing court may not substitute its independent policy judgment for that of the agency on the basis of an independent trial de novo. Id. When the agency performs an adjudicatory function, the test used in Bank of America National Trust & Savings Association v. State Water Resources Control Board applies. Id. See Bank of America Nat. T. & S. Ass'n v. State Water Resources Control Bd., 42 Cal. App. 3d 291, 204-07, 116 Cal. Rptr. 770, 773-75 (1974). Under the Bank of America test, if the agency decision will substantially affect a vested, fundamental right, the reviewing court examines the administrative record for errors of law and exercises independent judgment upon evidence disclosed in a limited trial de novo. Id. An example of a fundamental right is the right to practice one's trade or profession free of unward intrusions by the massive apparatus of government. Id. If no vested, fundamental right is affected, the court scrutinizes the record for errors of law and determines whether the findings are supported by substantial evidence. An example of a non-fundamental right is a purely economic privilege or an expectation that a permit to appropriate water will be granted. Id. If the agency's authority stems from a constitutional grant, a substantial evidence test is applied; but if the authority is statutory, the court exercises its independent judgment. Id. Bank of America determined that the Board and its functions arise from both the constitution and statutes but the right involved, an application to appropriate water, was neither vested nor fundamental. Id. The court applied the substantial evidence test. Id. The two-part test would apply to Imperial as follows. Imperial holds that the Board has adjudicatory authority over the article 10, section 2, unreasonable water use issue. Thus, the superior court would review Decision 1600 according to the Bank of America test. Imperial involves the vested, fundamental rights of John Elmore to prevent the flooding of his land and of IID to pursue its trade without overwhelming governmental interference as well as the compelling interest of the public in the prevention of unreasonable use of state water. Thus, the independent judgment test should be applied in a limited trial de novo. Furthermore, because the Board's authority stems from both constitutional and statutory provisions, the less deferential independent judgment test should apply. Although the independent judgment test is less deferential than the substantial evidence test, the standard is significantly more deferential than the full trial de novo sought by IID.

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III. LEGAL RAMIFICATIONS

To ensure that superior courts accord Board decisions appropriate deference in the future, in *Imperial Irrigation District v. State Water Resources Control Board,* the appellate court concluded that review of a Board decision must be conducted, not by trial de novo, but instead on the record previously compiled by the Board. Although a citizen initiated the administrative action in *Imperial,* the Board may initiate administrative proceedings upon perceiving misuse of water. The enabling statutes and administrative regulations do not limit the type of right holder the Board may investigate. After conducting an investigation and a hearing and upon finding misuse of water, the Board may order the right holder to prevent or terminate the misuse. Should the right holder fail to comply with an order to correct water misuse, the next action available to the Board depends upon the type of water right held by the party misusing the water. The Board may revoke the permit or license of a statutory appropriative right holder. However, if the water user holds any other type of water right, including riparian, overlying, or pre-1914 appropriative rights, the Board may refer the matter to the State Attorney General for appropriate legal action in accordance with Water Code section 275 and Administrative Code section 4006.

*Imperial* does not resolve the question of whether the enforcement power of the Board is limited to prosecution through the Attorney General when a non-statutory water misuser fails to comply with a Board order to conserve water. In *Imperial,* the Board had no opportunity to refer the matter to the Attorney General to prosecute

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224. *Imperial,* 186 Cal. App. 3d at 1171, 231 Cal. Rptr. at 290.
225. *Id.* at 1163, 231 Cal. Rptr. at 284. See CAL. ADMIN. CODE tit. 23, § 856 (1987).
227. CAL. WATER CODE § 1051 (West 1971) (Board may investigate all bodies of water, take testimony regarding water rights to all bodies of water, and ascertain whether water is unappropriated); *id.* § 1058 (West 1971) (Board may make rules and regulations as it deems advisable in carrying out its powers and duties under the Water Code); CAL. ADMIN. CODE tit. 23, § 856 (1987) (Board must investigate an allegation of water misuse when an interested person shows good cause or when the Board believes a misuse may exist).
228. CAL. ADMIN. CODE tit. 23 § 856 (1987).
230. *Id.* § 858.
IID for violating the Board order to correct the misuse. IID filed suit for relief from the Board order before sufficient time had passed for the Board to determine that IID had failed to comply with the order.\(^{232}\) While Water Code section 275 requires the Board to take some action to prevent water misuse, the Board may choose to pursue either executive, legislative, or judicial proceedings.\(^{233}\) Administrative Code section 4006 uses permissive language: the Board may refer the matter to the Attorney General.\(^{234}\) Because the Board promulgated Administrative Code section 4006, perhaps the Board intends enforcement of orders to correct misuse by non-statutory right holders only by referral to the Attorney General for prosecution. However, the permissive "may" in the regulation leaves open the possibility that the Board interprets its enforcement power more broadly.\(^{235}\)

Practically, the Board lacks independent enforcement power over non-statutory water right holders. No statute, or administrative regulation issued pursuant to statute, authorizes the Board to levy fines or issue injunctions to enforce orders to terminate or discontinue misusing water. Yet, the Board may effectively enforce an order to conserve because once that order is entered, the water user is on notice that failure to comply may result in a Water Code section 275 proceeding by the Attorney General. After Imperial, if the water user challenges the Board finding, the superior court will review, by a deferential standard, only the record of the hearing before the board.\(^{236}\)

Thus, the water user has a great incentive to cooperate with the investigation and participate fully in the hearing. Full cooperation


\(^{233}\) CAL. WATER CODE § 275 (West 1971, supp 1988). "The 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." (emphasis added). Id.

\(^{234}\) CAL. ADMIN. CODE tit. 23, § 4006 (1980) (providing that if a water user, who is not subject to a permit or license issued by the Board, fails or refuses to comply with any Board order to terminate or prevent misuse of water, "the board may refer the matter to the Attorney General for appropriate legal action").

\(^{235}\) Cf. People ex rel. State Water Resources Control Board v. Forni, 54 Cal. App. 3d 743, 126 Cal. Rptr. 851 (1976). The Board has invoked section 275 on only one occasion, the referral to the Attorney General for prosecution of Forni. Id. The courts have invoked section 275 to support the conclusion that the Board possesses broad, comprehensive adjudicatory and regulatory authority. Id.; EDF I, 20 Cal. 3d 327, 342, 572 P.2d 1128, 1136, 142 Cal. Rptr. 904, 912 (1977); EDF II, 26 Cal. 3d 183, 198, 605 P.2d 1, 8, 161 Cal. Rptr. 466, 473 (1980).

will result in a more efficient administrative proceeding because the water user will want to prevent the expenses involved in litigation that will prove futile absent clear error by the Board. 237 Clear error is unlikely in a proceeding conducted by a board comprised of experts in the field of water resource management 238 to which a superior court judge is obliged to give great deference. 239 The usually adversarial nature of a proceeding on a water misuse allegation may be mollified if the water user is cooperative from the outset, realizing that the enforcement power of the Board is fully supported by the executive, legislative, and judicial branches of state government.

Presently, the Board may issue orders on numerous aspects of water resource development. 240 In addition, the courts are empowered to refer claims involving complex water issues to the Board, which has the required expertise and experience to resolve conflicts involving competing interests of public trust, need, and efficient use. 241 Perhaps the best course is to grant the Board exclusive original jurisdiction over all aspects of water resource management. 242

The expertise and experience of the Board is demonstrated in a policy and planning statement, issued by the Board in conjunction with DWR, detailing the criteria the Board will consider in water resource planning and management over the next twenty years. 243 The joint report of the Board and DWR sets forth nine policy statements and details how these policies may be applied. 244

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237. See supra note 222 (discussing independent judgment test).
238. Cal. Water Code § 175 (West 1971 & Supp. 1988) (the Board consists of five members appointed by the Governor: an attorney qualified in the fields of water supply and water rights, a registered civil engineer qualified in the fields of water supply and water rights, a registered professional engineer experienced in sanitary engineering and qualified in the field of water quality, and another individual qualified in the field of water quality relating to irrigated agriculture; one of the five must also be qualified in the field of water supply and water quality relating to irrigated agriculture).
239. See Imperial, 186 Cal. Rptr. at 1166, 231 Cal Rptr. at 286.
240. See, e.g., Cal. Admin. Code tit. 23 § 857 (1987) (order to prevent or terminate misuse of water); Cal. Water Code §§ 1340 (West 1971) (order on protested application for permit to appropriate water); 2700 (West 1971) (order determining the rights in a stream system).
244. Id. First, before new water sources are developed, existing water resource developments
well-reasoned policies and planning goals of the Board, which take into account all competing water interests, merit the confidence the courts show in according the Board great deference. In addition, the expertise and experience of the Board merit a supreme court or legislative finding that the Board has exclusive original jurisdiction over all water resource management issues.

IV. CONCLUSION

This Note examined the evolution of the State Water Resources Control Board from a ministerial agency to a significant “fourth branch” of government. Legislative enactments and statutory interpretations by the judiciary have steadily increased the adjudicative and regulatory functions of the Board. In *Imperial Irrigation District v. State Water Resources Control Board*, the Fourth District Court of Appeal held that the Board has authority to adjudicate the issue of unreasonable use of water by a public water user with a pre-1914 right to appropriate water. A Board adjudication of an unreasonable use claim is reviewable by writ of mandamus on the record of the Board hearing rather than by trial de novo.

This deferential standard of review places a major impetus on water users to comply with the state policy against waste and unreasonable use of state waters and encourages water users to cooperate with Board investigations and proceedings. The *Imperial* decision is one more incremental step in the development of the

must be maximized. *Id.* at 2. Second, the Board, DWR, and the Regional Boards will adopt water quality objectives, beneficial uses, and water quality control plans and policies as an integral part of water resource management. *Id.* Third, surface and ground water supplies and storage capacity will be used conjunctively to obtain the greatest practical yield and still protect water quality. *Id.* at 3. Although groundwater pumping is allowed, groundwater overdraft is not consistent with sound water resource management practices. *Id.* Fourth, water development plans will achieve maximum practicable conservation and efficient use of state water. *Id.* Fifth, water will be reclaimed and reused to the maximum extent feasible. *Id.* at 4. Sixth, point sources and nonpoint sources of pollution will be controlled to protect beneficial water uses. *Id.* Seventh, instream beneficial uses will be maintained and, when practical, restored and enhanced. *Id.* at 5. Eighth, methods of preventing flood damage to people and property must consider flood plain zoning, flood proofing, flood warning systems, and similar nonstructural measures, as well as construction of dams, reservoirs, and levees. *Id.* at 6. Ninth, energy considerations are an integral part of the water resource planning process. *Id.* at 6-7.

245. *See supra* notes 23-122.
247. *See supra* notes 167-222.
248. *See supra*, note 220.
Board as an administrative agency with significant responsibility and authority in the field of water resource management. Because the Board has evolved into an important "fourth branch" of government with a high degree of expertise in a complicated field, the California Legislature or Supreme Court should grant the Board exclusive original adjudicatory jurisdiction over all matters involving water resource management.

Samantha Sue Spangler