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ADMINISTRATIVE ADJUDICATION OF RIPARIAN WATER RIGHTS IN CALIFORNIA AFTER *IMPERIAL IRRIGATION DISTRICT v.* *STATE WATER RESOURCES CONTROL BOARD*

I. INTRODUCTION

In 1926, the California Supreme Court held that riparian water rights¹ owners owed no duty to appropriative water rights² holders to use water reasonably.³ The ensuing public outcry⁴

1. Riparian water rights are “private real property rights to the beneficial use of water from a natural watercourse or stream contiguous to the land to which the rights attach.” H. ROGERS & A. NICHOLS, *WATER FOR CALIFORNIA*, § 157 at 217 (1967) (citing Ballentine’s Law Dictionary). The State Water Resources Control Board has only indirect power over riparian rights, *see infra* notes 51-59 and accompanying text, except in rare statutory adjudications. *See infra* notes 61-73 and accompanying text. This comment focuses on Board jurisdiction over riparian rights *outside* of statutory adjudications.

For purposes of this comment riparian water rights are contrasted with post-1914 appropriative water rights; *see infra* note 2 and accompanying text; and pre-1914 appropriative rights; *see infra* note 2 and accompanying text. Other types of water rights exist in California but are outside the scope of this comment.

2. There are two kinds of appropriative water rights: pre-1914 and post-1914. Before the Board’s creation in 1914, one could obtain common law and early statutory appropriative water rights. *See infra* notes 31-38 and accompanying text. Many of these rights are still in existence; they are referred to as pre-1914 appropriative rights.

The State Water Resources Control Board and its predecessors have been issuing licenses for appropriative water rights since 1914. 1913 Cal. Stat. Ch. 586, §§ 19-20, at 1023-26. These rights are known as post-1914 appropriative rights. Such rights are defined as “an exclusive right to take a specific amount of water from a specific source for a specific use at a specific location during a specific period of time.” CALIFORNIA WATER RESOURCES CONTROL BOARD, *A GUIDE TO CALIFORNIA WATER RIGHTS PERMITS* 5 (1984) [hereinafter *WATER RIGHTS PERMITS*]. The Board has more power over post-1914 appropriative rights than any other kind of water right. *See infra* notes 16-30 and accompanying text.

3. *Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81, 106-07, 252 P. 607, 617 (1926). A large riparian ranch used stream water for allegedly unreasonable irrigation purposes. Southern California Edison wanted to appropriate some of the water upstream from the riparian parcel. If the ranch stopped its alleged waste, more water would be available to appropriators. The court, in holding that riparian rights owners owed no duty to appropriators to use water reasonably, said such a duty would “impose a radical and . . . utterly impracticable limitation upon the doctrine of riparian rights.”

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produced an amendment to the state constitution that affected all California water rights.⁵ Today, the California Constitution, article X, section 2, propounds the First Commandment of California water law: *Thou shalt not waste water.*⁶

The State Water Resources Control Board ("Board") is California's administrative agency designated to police the constitutional mandate.⁷ *Imperial Irrigation District v. State Water Resources Control Board*⁸ increased the Board's subject matter jurisdiction⁹ to include adjudicatory authority over article X, section 2 violations¹⁰ by pre-1914 appropriative rights holders.¹¹

This comment will examine whether *Imperial* extends the Board's subject matter jurisdiction to include article X, section 2 violations¹² by riparian rights owners.¹³ Board power over post-

4. Attwater & Markle, *Overview of California Water Rights and Water Quality Law*, 19 PAC.L.J. 957, 979 (1988) ("[T]he popular reaction was swift and pointed.")

5. CAL. CONST. art. X, § 2 (1928, amended 1976) (formerly art. XIV, § 3).

6. CAL. CONST. art. X, § 2 reads:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.

7. CAL. WATER CODE § 174 (West 1971) provides that the Board "shall exercise the adjudicatory and regulatory functions of the state in the field of water resources." Section 275 provides that the Board "shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state." *Id.* at § 275. Hereafter, all statutory citations will be to the California Water Code (West 1971) unless otherwise indicated.

8. 186 Cal. App. 3d 1160, 231 Cal. Rptr. 283 (1986), *rev. denied*, 186 Cal. App. 3d at 1171, 231 Cal. Rptr. at 290.

9. The Board's subject matter jurisdiction is traditionally defined by the legislature. See Rossmann & Steel, *Forging the New Water Law: Public Regulation of "Proprietary" Groundwater Rights*, 33 HASTINGS L.J., 903, 914 (1982) (citing CAL. WATER CODE §§ 179, 186 (West 1971)).

10. *Imperial*, 186 Cal. App. 3d at 1163, 231 Cal. Rptr. at 285 (Board has power to decide if pre-1914 appropriative water rights holders are violating article X, § 2 by wasting water, and, if so, issue binding conservation orders appealable by administrative writ). See *infra* notes 122-132 and accompanying text.

11. *Id.* at 1163 n.4, 231 Cal. Rptr. at 285 n.4. The Imperial Irrigation District operates primarily under appropriative water rights which were acquired in 1901. Prior to *Imperial*, the Board's power to adjudicate article X, § 2 violations of pre-1914 appropriative rights had not been determined.

12. Riparian, pre-1914 appropriative and post-1914 appropriative water rights have

1914 appropriative rights will be examined. Next, pre-1914 appropriative rights and *Imperial* will be discussed. It is apparent that *Imperial* supports an expansion of the Board's jurisdiction to include adjudication of article X, section 2 violations of riparian rights,¹⁴ but that such jurisdiction is not affirmatively established.¹⁵

II. BOARD POWER OVER APPROPRIATIVE WATER RIGHTS

A. POST-1914 APPROPRIATIVE RIGHTS

In order to gain perspective on Board jurisdiction over riparian water rights, it is important to understand the Board's extensive power over post-1914 appropriative rights. The Board originated¹⁶ and evolved,¹⁷ *inter alia*, to administer post-1914

an important element in common: they are all controlled by article X, § 2's reasonable use standard. "The limitations and prohibitions of the constitutional amendment now apply to every water right and every method of diversion." *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 367, 40 P.2d 486, 491 (1935). The Legislature has codified, almost word for word, the provisions of article X, § 2 into Section 100 of the Water Code. See CAL. WATER CODE § 100 (West 1971).

Article X, § 2 seeks to prevent the "waste or unreasonable use or unreasonable method of use" of water. CAL. CONST. art. X, § 2. There is no exact definition of waste or unreasonable use—it is determined on a case-by-case basis. *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 140, 429 P. 2d 889, 894, 60 Cal. Rptr. 377, 382 (1967).

This comment examines whether the Board may apply that standard to riparian rights—without ascertaining the precise standard itself. CAL. CONST. art. X, § 2 also requires that all waters be put to beneficial use. This concept, separate from reasonable use, is outside the scope of this comment.

13. The Board has clear power under § 2501 to adjudicate the reasonableness of riparian use in statutory adjudications. However, that process is rare and cumbersome. See *infra* note 63 and accompanying text. Outside of the statutory adjudication process, the Board's power over riparian rights is not affirmatively established. See *infra* notes 156-63 and accompanying text.

14. See *infra* notes 135-55 and accompanying text.

15. See *infra* notes 156-63 and accompanying text.

16. In 1913, the State Water Commission was created. 1913 Cal. Stat. Ch. 586, § 1, at 1013. It was the original predecessor to today's Board. The Water Commission was designed to "regulate the use of water which is subject to such control by the State of California, and . . . the conditions under which water may be appropriated [and for] providing for the ascertainment and adjudication of water rights; [and for] regulating the appropriation of water." 1913 Cal. Stat. Ch. 586, introduction, at 1012-1013.

17. In 1921, the Water Commission became part of the Department of Public Works. 1921 Cal. Stat. Ch. 607, § 1 at 1040-41. In 1956, the Division of Water Resources of the Department of Public Works evolved into two entities: the Department of Water Resources (DWR) and the State Water Rights Board. 1956 Cal. Stat. Ch. 52, §§ 1, 6-7, at 421-22, 426. The State Water Rights Board was responsible for the administration of the

appropriative rights through the appropriative licensing system.

Board control over post-1914 appropriative rights is executed through the issuance of permits and licenses.¹⁸ Following established Board procedures is the *only* way to get appropriative rights in California today.¹⁹

The Board must condition the grant of the permit or license upon specific requirements.²⁰ Through this mechanism, the Board can regulate the amount, method, and duration of the licensed use.²¹ Furthermore, the Board can mete out fines that the user must pay if the terms and conditions are violated.²² Penalties also include revocation of licenses and permits.²³

Moreover, the Water Code allows the Board to issue administrative cease and desist orders to post-1914 appropriative rights holders.²⁴ This order may be applied to those who misuse water or otherwise violate permit or license terms.²⁵ The Board also has the power to assess statutory trespass liability and im-

statutory law relating to appropriation of water. *Id.* at Ch. 52, § 7, at 426.

In 1967, the present State Water Resources Control Board was created from the old State Water Rights Board. CAL. WATER CODE § 177 (West 1971). This Board "succeeds to and is vested with all of the powers, duties, purposes, responsibilities, and jurisdiction" of several state departments, including the Division of Water Resources of the Department of Public Works. *Id.* at § 179. The Board is also successor to the powers and duties of the Department and Director of Public Works, the State Engineer, the State Water Quality Control Board, or any officer or employee thereof, vested under the Water Code, "or any other law under which permits or licenses to appropriate water are issued, denied, or revoked or under which the functions of water pollution and quality control are exercised." *Id.*

18. WATER RIGHTS PERMITS, *supra* note 2, at 6. According to Board procedures, a temporary appropriative permit will be issued to approved new uses. *Id.* When the water use reaches its approved levels, the Board makes an inspection. *Id.* If at that time the water use is reasonable, an appropriative license will be issued. *Id.* The license vests in the user the right to continue his appropriative use under the terms set forth in the license. *Id.*

19. See CAL. WATER CODE § 1225 (West 1971 & Supp. 1989).

20. CAL. WATER CODE § 1391 (West 1971) (Board must attach these conditions to permits); *id.* at § 1626 (Board must attach these conditions to licenses); *id.* at § 1625 (allows Board to attach additional conditions to licenses which are not mandatory).

21. WATER RIGHTS PERMITS, *supra* note 2, at 5-6.

22. CAL. WATER CODE § 1052 (West 1971).

23. CAL. WATER CODE § 1410 (West Supp. 1989) (Board can revoke permits); *id.* at § 1675 (Board can revoke licenses).

24. See CAL. WATER CODE § 1831 (West Supp. 1989).

25. *Id.*

pose fines.²⁶

Compliance with the terms and conditions of the permit or license is determined by the Board.²⁷ The Board must hold a hearing before revoking a permit or license.²⁸ The Board may issue orders and impose penalties.²⁹ The user must seek a writ of mandate from superior court in order to appeal.³⁰ Thus, express control over appropriative permits and licenses gives the Board plenary power over such users, including jurisdiction to adjudicate article X, section 2 violations.

B. PRE-1914 APPROPRIATIVE RIGHTS

Prior to 1914, common law appropriative rights could be obtained through mere diversion and use.³¹ Early common law appropriative rights are distinguished from early statutory appropriative rights; the two doctrines coexisted from 1872-1914.³² Early appropriative statutes required the appropriator to post notice at the point of diversion and at the county recorder's office.³³ The appropriator then had to pursue diligent and uninterrupted construction of the diversion.³⁴ Pre-1914 appropriative rights operated on the concept of "first in time, first in right."³⁵

26. Cal. Water Code § 1052 (West 1971).

27. CAL. WATER CODE § 1831 (West Supp. 1989) (administrative cease and desist orders are issued upon Board's determination that a violation has occurred); CAL. WATER CODE § 1410 (West 1971) (regarding grounds for permit revocation); CAL. WATER CODE § 1675 (West Supp. 1989) (regarding grounds for license revocation).

28. CAL. WATER CODE § 1410 (West 1971) (revocation of permits); CAL. WATER CODE § 1675 (West Supp. 1989) (revocation of licenses).

29. CAL. WATER CODE § 1831 (West Supp. 1989) (administrative cease and desist orders); CAL. WATER CODE § 1052 (West 1971) (remedies for statutory trespass liability).

30. CAL. WATER CODE § 1412 (West 1971) (writ of mandate regarding revocation of permits); *id.* at § 1677 (writ of mandate regarding revocation of licenses); CAL. WATER CODE § 1840 (West Supp. 1989) (writ of mandate regarding administrative cease and desist orders); *id.* at § 1055.1 (writ of mandate regarding statutory trespass liability).

31. *See Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 206, 211, 110 P. 927, 930 (1910).

32. *See Wells v. Mantes*, 99 Cal. 583, 586-87, 34 P. 324, 325 (1893). The statutory appropriation system went into place in 1872. The common law appropriation system, however, was not abolished until 1914. Therefore the two systems operated simultaneously for 42 years.

33. CAL. CIVIL CODE § 1415 (West 1971).

34. *Id.* at §§ 1416, 1417.

35. *See De Necocchea v. Curtis*, 80 Cal. 397, 398, 20 P. 563, 564 (1889). This meant the appropriator who first perfected his rights was entitled to take his water before any appropriator who later perfected his rights. *Id.* This is commonly referred to as the doc-

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Board licenses have only been issued since 1914.³⁶ Appropriative rights which accrued prior to that date are not subject to licenses, and therefore, not subject to regulation by the Board under the licensing statutes. However, the Board has adopted certain administrative regulations which on their face apply to pre-1914 appropriative rights. Pursuant to these regulations, the Board may investigate³⁷ and issue orders to those outside of the appropriative licensing system (i.e., pre-1914 appropriative rights holders).³⁸ The effect of such orders was unclear; *Imperial* presented the court with the task of deciding whether the Board's order would be binding and how an appeal could be taken.

III. BOARD JURISDICTION OVER RIPARIAN RIGHTS

In contrast to the direct power the Board wields over post-1914 appropriative rights, the Board must use the courts to control riparian rights. The difference in power is due to the source of the right: post-1914 appropriative rights arise from a permit issued directly by the Board,³⁹ whereas riparian rights arise through the operation of real property law.⁴⁰

The doctrine of riparian water rights has its roots in the Roman, French Civil and English Common Law systems.⁴¹ When California adopted the English common law,⁴² the doctrine of riparian rights became part and parcel of California water law.⁴³

In California, riparian rights are not created by use⁴⁴ nor

trine of relation, or the doctrine of prior appropriation.

36. 1913 Cal. Stat. Ch. 586, §§ 19, 20 at 1023-26.

37. CAL. ADMIN. CODE tit. 23, Ch. 3, § 856; Ch. 5, § 4003 (1987).

38. *Id.* at Ch. 3, § 857; Ch. 5, § 4004.

39. See CAL. WATER CODE § 1380 (West 1971).

40. H. Rogers & A. Nichols, *supra* note 1, § 157 at 217. However, the license/non-license distinction may be moot as a result of *Imperial*. See *infra* notes 60-61, 138 and accompanying text.

41. Weatherford, *Legal Aspects of Interregional Water Diversion*, 15 UCLA L. REV. 1299, 1299-1300 (1968).

42. 1850 Cal. Stat. Ch. 95, at 219.

43. *Lux v. Haggin*, 69 Cal. 255, 384, 10 P. 674, 749 (1886). ("If it had been intended to exclude the common law as to the riparian right, the intention would have been expressed.")

44. *Id.* at 391, 10 P. at 754.

lost by nonuse;⁴⁵ they are usufructuary interests in land.⁴⁶ Because riparian rights are private real property, it may be unconstitutional for the state to take such rights⁴⁷ without paying just compensation.⁴⁸ However, riparian rights are subject to concepts of reasonable use under article X, section 2,⁴⁹ and are entitled to an expectation of some degree of water quality.⁵⁰

Prior to *Imperial*, the Board could not directly adjudicate article X, section 2 violations of riparian rights, unless it conducted a cumbersome statutory adjudication.⁵¹ In *People ex rel. State Water Resources Control Board v. Forni*,⁵² the Board attempted to stop vintners from using Napa River water to spray crops in order to help prevent frost on grape vines.⁵³ The Board sought injunctive relief in Superior Court to stop the allegedly wasteful practices.⁵⁴ The court found that *litigation, not administrative adjudication* is the proper tool for Board enforcement of article X, section 2 over riparian rights.⁵⁵

45. See Weatherford, *supra* note 42, at 1300.

46. Eddy v. Simpson, 3 Cal. 249, 252 (1853). This means the property right is in the beneficial use of the water, not in the actual corpus of the water. *Id.* See also, Lux v. Haggin, 69 Cal. at 390, 10 P. at 753, stating that the riparian right "consists not so much in the fluid itself as in its uses, including the benefits derived from its momentum or impetus." *Id.*

47. See Palmer v. Railroad Comm'n, 167 Cal. 163, 175-76, 138 P. 997, 1002 (1914); St. Helena Water Co. v. Forbes, 62 Cal. 182, 183-85 (1882). See also Lux v. Haggin, 69 Cal. at 368, 10 P. at 739. (riparian rights owners "are protected by constitutional principles.")

48. However, it has been suggested that the trend in California courts is to minimize the private property aspects of water rights, in favor of greater governmental power to regulate. See Schulz & Weber, *Changing Judicial Attitudes Towards Property Rights In California Water Resources: From Vested Rights To Utilitarian Reallocations*, 19 PAC. L.J. 1031 (1988). See *infra* notes 143-48 and accompanying text.

49. "The limitations and prohibitions of the constitutional amendment now apply to every water right and every method of diversion." Peabody v. City of Vallejo, 2 Cal.2d 351, 367, 40 P.2d 486, 491 (1935). See *supra* note 12 and accompanying text.

50. See Steinberg & Schoenleber, *Salinity Control and the Riparian Right*, 19 PAC. L.J. 1143, 1163 (1988) (the right of riparian waters to be free from excessive salinity is inherent in the riparian right).

51. See *infra* notes 61-73 and accompanying text. The statutory adjudication process is not the appropriate tool for the task of adjudicating waste of water—it is designed to resolve disputes regarding water rights.

52. 54 Cal. App. 3d 743, 126 Cal. Rptr. 851 (1976).

53. *Id.* at 747, 126 Cal. Rptr. at 853.

54. *Id.* at 747, 126 Cal. Rptr. at 854. The vinyardists' motion for summary judgment, granted by the trial court, was reversed on appeal because the complaint stated a cause of action for injunctive and declaratory relief. *Id.* at 754, 126 Cal. Rptr. at 858.

55. *Id.* at 752, 126 Cal. Rptr. at 857.

Prior to the action for injunctive relief, the Board adopted an administrative regulation⁵⁶ which declared the diversion of Napa river water during frost season unreasonable.⁵⁷ The *Forni* court found that the regulation amounted to a mere "policy statement which *leaves the ultimate adjudication of reasonableness to the judiciary.*"⁵⁸

The *Forni* court acknowledged that the Board may not issue an order directly to a riparian water right owner because the water right involved does not come directly from the Board's "administrative authorization."⁵⁹ Instead, the Board's power is indirect and it must seek injunctive relief in order to control riparian water right owners. *Imperial*, however, gave the Board power to *directly* adjudicate waste and give binding orders to pre-1914 appropriative water rights owners who operated outside of administrative authorization.⁶⁰

In one situation, however, the Board currently exercises direct and significant power over riparian rights. Upon petition,⁶¹ the Board is empowered to conduct statutory adjudications⁶² which allow the Board to hear all claims to a water system and divide the resources of the system among the claimants according to the Board's best judgment.⁶³ The statutory adjudication

56. CAL. ADMIN. CODE tit. 23, Ch. 3, § 735 (1987) (formerly CAL. ADMIN. CODE tit. 23, Ch. 3, § 659 (1960)(emphasis added)).

57. *Forni*, 54 Cal. App. 3d at 748, 752, 126 Cal. Rptr. at 854, 859.

58. *Id.* at 752, 126 Cal. Rptr. at 857 (emphasis added).

59. *Id.* at 753, 126 Cal. Rptr. at 857.

60. *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 186 Cal. App. 3d at 1162-63, 231 Cal. Rptr. at 284 (1986).

61. CAL. WATER CODE § 2525 (West 1971). The Board may not pursue a statutory adjudication on its own, but can only respond to outside petitions.

62. CAL. WATER CODE § 2501 (West 1971) states: "The board may determine, in the proceedings provided for in this chapter, all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right."

63. Statutory adjudications are cumbersome. See Ferrier, *Administration of Water Rights in California*, 44 CALIF. L. REV. 833, 845-47. They are therefore relatively rare; only an estimated 25 statutory adjudications have been conducted since their authorization in 1914. Telephone interview with Murt Lininger, Program Manager, Applications and Hearing Section, State Water Resources Control Board (Feb. 6, 1988). All claims to the entire water system must be analyzed and adjudicated by the Board. CAL. WATER CODE § 2700 (West 1971).

This process is inappropriate for the enforcement of article X, § 2 over individual users. For example, if the Imperial Irrigation District owned riparian rights along the Colorado River, the Board would have to conduct a statutory adjudication of the entire Colorado River system to achieve the result obtained in *Imperial*.

procedures empower the Board to evaluate, quantify and establish priorities for *all* of the competing claims to a particular water system, including claims based on riparian rights.⁶⁴

The California Supreme Court construed the Board's statutory adjudication powers in *In re Waters of Long Valley Creek Stream System*.⁶⁵ In *Long Valley*, the Board was called upon to determine the rights of various persons in the water flow of a stream system pursuant to the statutory adjudication procedures.⁶⁶ There were 234 claims of right to the stream system.⁶⁷

The Board conducted an extensive investigation⁶⁸ and issued an order reflecting the rights of all parties.⁶⁹ The Board's order, *inter alia*, omitted⁷⁰ a portion of the riparian rights claimed by Donald Ramelli, who appealed.⁷¹

The Supreme Court held that the legislature granted the Board broad power to "ascertain the nature of future riparian rights" when conducting a statutory adjudication.⁷² The Court concluded, however, that although the Board could "define and otherwise limit" riparian rights in statutory adjudications, in this case it could not *extinguish* such a right altogether.⁷³

64. CAL. WATER CODE § 2501 (West 1971). Statutory adjudications are designed to adjudicate all water rights, not the reasonableness of riparian water use. They are therefore not the appropriate means for adjudicating Article X, § 2 violations by riparian owners. A major limitation on Board power under statutory adjudications is that underground water (other than subterranean streams flowing through known and definite channels) are excluded from the process. *Id.* at § 2500.

65. 25 Cal. 3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979).

66. *Id.* at 345, 599 P.2d at 659, 158 Cal. Rptr. at 353.

67. *Id.* at 346, 599 P.2d at 660, 158 Cal. Rptr. at 353.

68. *Id.* In addition to the 234 claims and proofs presented, the Board heard 42 contests regarding the rights to the stream waters.

69. *Id.*

70. Because the Board's order will be a binding recordation of the rights to the system, any omission of rights is tantamount to extinction. See CAL. WATER CODE § 2774 (West 1971).

71. *Long Valley*, 25 Cal. 3d at 346, 599 P.2d at 660, 158 Cal. Rptr. at 353. If no claimant files an exception to the Board's order, the Superior Court in the county where the water system (or portion thereof) is located will enter a decree affirming the Board's order. CAL. WATER CODE § 2762 (West 1971). However, a claimant may file an exception to the Board's order. *Id.* at § 2757. In this situation, as in *Long Valley*, the court hears the matter, *id.* at § 2763, and thereafter enters its decree. *Id.* at § 2768.

72. *Id.* at 344, 599 P. 2d. at 659, 158 Cal. Rptr. at 352. Significantly, the court did not comment on the power of the Board absent statutory adjudication jurisdiction.

73. *Id.* at 345, 599 P. 2d at 662, 158 Cal. Rptr. at 356. The Court implied that the Board *has the power to extinguish* riparian rights in a certain statutory adjudications:

IV. OTHER POWERS OF THE BOARD

The Board may be called upon to serve as a "court reference" by a state court.⁷⁴ This procedure allows the Board to provide the court with its expertise as an advisor.⁷⁵ The Board is entitled to conduct extensive hearings and investigations,⁷⁶ and its powers extend to waters in artificial watercourses.⁷⁷

In addition to overseeing the reasonableness of California's water use, the Board is assigned the duty of policing water quality.⁷⁸ In this area, the Board now has exclusive jurisdiction to adjudicate wastewater reclamation.⁷⁹ Furthermore, the Board has express adjudicatory power to determine whether regional water authorities have acted properly.⁸⁰ Decisions by the Board in these cases are reviewable only by writ of mandate.⁸¹

V. SUMMARY OF THE BOARD'S POWERS BEFORE *IMPERIAL*

Immediately prior to *Imperial*, the Board had plenary power over appropriative water rights which arose under Board license. The Board could issue,⁸² supervise⁸³ and revoke⁸⁴ li-

we conclude the Legislature did not intend to authorize the complete extinction of any future riparian rights in circumstances in which the Board has failed to establish that the most reasonable and beneficial use of waters subject to the adjudication proceeding could not be promoted as effectively by placing other less severe restrictions on such rights.

Id.

74. CAL. WATER CODE §§ 2000, 2001 (West, 1971).

75. *Id.* This type of activity by the Board has been described as merely advisory in nature. *Fleming v. Bennett*, 18 Cal. 2d 518, 524, 116 P.2d 442, 445 (1941). *See also*, *Ferrier*, *supra* note 63, at 843-44.

76. CAL. WATER CODE § 183 (West 1971).

77. *Modesto Properties Co. v. State Water Rights Bd.*, 179 Cal. App. 2d 856, 861, 4 Cal. Rptr. 226, 229 (1960).

78. *See* CAL. WATER CODE § 13300 (West Supp. 1989).

79. *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.*, 20 Cal.3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904, (1977), *vacated on other grounds*, 439 U.S. 811 (1978).

80. CAL. WATER CODE §§ 13320, 13324 (West Supp. 1989).

81. *Id.* at § 13325; *see also* CAL. WATER CODE § 13330 (West 1971).

82. CAL. WATER CODE § 1610 (West 1971).

83. *Id.* at § 1831 (Board may issue administrative cease and desist orders); *id.* at § 1052 (Board may assess statutory trespass liability).

84. *Id.* at § 1675.

censes, subject to review by writ of mandate.⁸⁵ However, the Board had to seek injunctive relief in order to enforce article X, section 2 over riparian rights owners,⁸⁶ except in statutory adjudications.⁸⁷ The Board's adjudicatory jurisdiction over pre-1914 appropriative water rights had not been determined.

VI. IMPERIAL IRRIGATION DISTRICT⁸⁸

In *Imperial*, a California appellate court held the Board has the power to adjudicate the constitutionality of water conservation by an irrigation district operating primarily under pre-1914 appropriative water rights.⁸⁹ Furthermore, the Board may issue binding orders to such an irrigation district to make water-saving improvements in its irrigation system.⁹⁰ Moreover, the court held appeals are to be by way of administrative writ, and not trial de novo.⁹¹

A. FACTS OF IMPERIAL

The Imperial Irrigation District ("District"), located in the southernmost portion of California, uses nearly three million acre feet of water per year (afy) for agricultural irrigation, municipal, domestic and industrial purposes.⁹²

Approximately one third of this amount, or one million

85. *Id.* at § 1677.

86. *People ex rel. State Water Resources Control Bd. v. Forni*, 54 Cal. App. 3d 743, 752, 126 Cal. Rptr. 851, 857 (1976).

87. *In re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339, 345, 599 P.2d 656, 662, 158 Cal. Rptr. 350, 356 (1979).

88. This comment focuses on the impact of *Imperial* only as it relates to Board power to adjudicate the unconstitutional waste of water under riparian right. For a case-note, see Note, *Imperial Irrigation Dist. v. State Water Resources Control Bd.: Board as Arbiter of Reasonable and Beneficial Use of California Water*, 19 Pac.L.J. 1565 (1988) [hereafter *Board As Arbiter*].

89. *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 186 Cal. App. 3d 1160, 1163, 231 Cal. Rptr. 283, 285 (1986), *rev. denied*, 186 Cal. App. 3d 1171. The District operates primarily under appropriative water rights which were acquired in 1901. *Id.* at 1163 n.4, 231 Cal. Rptr. at 285 n.4.

90. *Id.* at 1162-63, 231 Cal. Rptr. at 285.

91. *Id.* at 1171, 231 Cal. Rptr. at 290.

92. State of California Water Resources Control Board, Water Rights Decision 1600 7 (1984) [hereafter Decision 1600].

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afy,⁹³ runs into the Salton Sea and is lost⁹⁴ to further use.⁹⁵ The Department of Water Resources ("DWR") estimated that 438,000 afy of this lost water could be saved if the District implemented DWR's recommendations.⁹⁶

In 1980, John Elmore, who owned a farm near the District, called upon the DWR to investigate the District's alleged waste of large amounts of water.⁹⁷ Elmore claimed that the District's misuse of water was causing flood damage to his farming operations.⁹⁸ The Department determined that the District was wasting water, and called upon the District to submit a water conservation plan.⁹⁹ The District rejected the Department's request to develop a conservation plan.¹⁰⁰ The Department then referred the matter to the Board.¹⁰¹

The Board conducted its own investigation and determined that the District was wasting water.¹⁰² The Board then ordered the District to improve its system.¹⁰³ The District sued the Board in the Superior Court for Imperial County, seeking a declaration that the Board did not have the jurisdiction to adjudicate the constitutionality of its water use,¹⁰⁴ and could not issue binding orders to the District.¹⁰⁵

The trial court held that the Board lacked jurisdiction to directly regulate the District by issuing binding orders,¹⁰⁶ but

93. *Id.* at 7, 31.

94. The extraordinarily high salinity of the Salton Sea renders waters which enter it unusable for further beneficial consumption. *Id.* at 29.

95. To put this amount of water in perspective, the San Francisco Bay Area's urban water usage for 1985 was 1,088,000 afy. STATE OF CALIFORNIA, DEPARTMENT OF WATER RESOURCES, CALIFORNIA WATER: LOOKING TO THE FUTURE, STATISTICAL APPENDIX 7, (Table 3).

96. Decision 1600, *supra* note 92, at 3.

97. *Id.* at 1, 2, 4.

98. *Id.* at 4.

99. *Id.* at 1, 3.

100. *Id.*

101. *Id.*

102. *Id.* at 1, 2, 66. The Board held six days of hearings in El Centro, California, and received testimony, other evidence, legal briefs and closing arguments. *Id.* at 1.

103. *Id.* at 67-70.

104. *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 186 Cal. App. 3d 1160, 1162, 231 Cal. Rptr. 283, 284 (1986).

105. *Id.* at 1164, 231 Cal. Rptr. at 285.

106. *Id.*

must seek relief in superior court.¹⁰⁷ The Board appealed the jurisdictional issue.¹⁰⁸ The Court of Appeals reversed the trial court and held that the Board has the jurisdiction to adjudicate the District's water use,¹⁰⁹ to issue binding orders to the District,¹¹⁰ and that review of the Board's orders would be through administrative writ and not trial de novo.¹¹¹

B. SUMMARY OF COURT'S REASONING IN *Imperial*

The court's opinion in *Imperial* rested primarily on California Constitution article X, sections 2 and 5, Water Code Section 174, and California case law.¹¹² Article X, section 5 declares that all appropriated water is subject to regulation and control by the state.¹¹³ Article X, section 2 asserts the state's no-waste water policy, provides that the amendment shall be self-executing and states that the legislature may also enact laws to pursue the policy.¹¹⁴

The *Imperial* court noted that the California Supreme Court has construed Section 174 as giving the Board "full authority to 'exercise the adjudicatory and regulatory functions of the state in the field of water resources.'" ¹¹⁵ Such adjudicatory powers "extend to regulation of water quality and prevention of waste."¹¹⁶

The *Imperial* court noted that Board authority in statutory adjudications is so strong it vitiates the res judicata effect of

107. *Id.* at 1162-63, 231 Cal. Rptr. at 284. The trial court's ruling here closely parallels the *Forni* court's ruling. See *supra* notes 52-61 and accompanying text.

108. *Id.* at 1162-63, 231 Cal. Rptr. at 284. Intervenor Environmental Defense Fund joined the appeal. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1171, 231 Cal. Rptr. at 290.

112. For additional analysis of the opinion, see Note, *Board As Arbiter*, *supra* note 88, at 1585-91.

113. *Imperial Irrigation District v. State Water Resources Control Bd.*, 186 Cal. App. 3d 1160, 1165, 231 Cal. Rptr. 283, 285 (1986) (citing CAL. CONST. art X, § 5).

114. *Id.* at 1164, 231 Cal. Rptr. at 285 (citing CAL. CONST. art X, § 2).

115. *Id.* at 1165, 231 Cal. Rptr. at 288 (citing *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.*, 20 Cal. 3d 327, 342, 572 P.2d 1128, 1158, 142 Cal. Rptr. 904, 919 (1977), *vacated on other grounds*, 439 U.S. 811 (1978)) (Emphasis in *Imperial*).

116. *Id.* at 1166, 231 Cal. Rptr. at 286.

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prior private litigation over the same rights.¹¹⁷ Moreover, the statutory adjudication involved in *Long Valley* was preferable to private litigation because “*in administrative proceedings comprehensive adjudication considers the interests of other concerned persons who may not be parties to the court action.*”¹¹⁸

The *Imperial* court noted a trend in recent California judicial decisions which “*emphasized the board’s power to adjudicate all competing claims, even riparian claims*”¹¹⁹. . .and prescriptive claims. . .*which do not fall within the appropriative licensing system.*”¹²⁰

Upon reaching its conclusion, the *Imperial* court expressed curiosity with the trial court: “In the light of these constitutional, statutory and Supreme Court authorities which apparently establish all-encompassing adjudicatory authority in the Board on matters of water resource management, how could the trial court have found an absence of such authority in the matter of unreasonable water use under article X, section 2?”¹²¹

VII. IMPACT OF *IMPERIAL* ON BOARD ADJUDICATION OF PRE-1914 APPROPRIATIVE RIGHTS

As a result of *Imperial*, the Board may now be an ‘adjudicator of first resort’ in actions involving the alleged unconstitutional misuse of pre-1914 appropriative water rights. State courts retain concurrent jurisdiction in such matters.¹²² Now, a party wishing to stop another’s waste of water resources can go to state court or seek binding orders from the Board. The Board may also initiate proceedings on its own.¹²³

117. *Id.* at 1167, 231 Cal. Rptr. at 287.

118. *Id.* at 1167, 231 Cal. Rptr. at 287 (citing *Environmental Defense Fund*, 26 Cal. 3d 189, 199, 605 P.2d 1, 9, 161 Cal. Rptr. 466, 474 (1980) (emphasis in *Imperial*)).

119. *Id.* at 1169, 231 Cal. Rptr. at 287 (referring to *In re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339, 559 P.2d 656, 158 Cal. Rptr. 350 (1979); *but see Long Valley*, 25 Cal. 3d at 344, 559 P.2d at 659, 158 Cal. Rptr. at 352 (Board jurisdiction limited to statutory adjudications)).

120. *Imperial*, 186 Cal. App. 3d at 1169, 231 Cal. Rptr. at 287 (citing *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 449, 658 P.2d 709, 730, 189 Cal. Rptr. 346, 366 (1983) (emphasis in *Imperial*)).

121. *Imperial*, 186 Cal. App. 3d at 1169, 231 Cal. Rptr. at 287.

122. *Id.* at 1171, 231 Cal. Rptr. at 290.

123. CAL. ADMIN. CODE tit. 23, Ch. 3, § 859 (1987).

A. EFFECT ON APPEALS

If the Board conducts the adjudication of the alleged unconstitutional waste of pre-1914 appropriative water rights, it may issue orders.¹²⁴ Appeal of the Board's order is by way of writ.¹²⁵ The standard of review on such a writ will be the "independent judgment test."¹²⁶

Making the Board an 'adjudicator of first resort' has a significant impact on the preservation of the administrative record. In an appeal by administrative writ, the administrative record is the *only* record used by the reviewing court,¹²⁷ although petitioner may attempt to augment the record with additional evidence.¹²⁸ In a trial de novo, the record is created subject to the more stringent rules of evidence in superior court.¹²⁹ Therefore, an appeal by administrative writ will be more expeditious and favor the Board.¹³⁰ The greater likelihood of a judgment in favor of the Board will have a potentially greater deterrent effect on pre-1914 appropriative water rights holders who waste water.

B. EFFECT ON TIMELINESS OF BOARD ACTION

From a practical standpoint, the Board will be able to react faster to situations where water is being wasted. The Board can issue orders immediately after its adjudication without pursuing injunctive relief. If the violator wishes to petition the court for a writ to appeal the Board's order, he may preserve the status quo by pursuing a temporary stay of the administrative decision.¹³¹

124. *Imperial*, 186 Cal. App. 3d at 1171, 231 Cal. Rptr. at 290.

125. *Id.* For the exact procedure of such an appeal, see CAL. CIVIL PROC. CODE § 1094.5 (West Supp. 1989).

126. *Id.* at 1171 n.17, 231 Cal.Rptr at 290 n.17 (citing CAL. WATER CODE § 1840(c)). Under the independent judgement test, the "trial judge should weigh the evidence and resolve any conflicting testimony in his own mind." CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE MANDAMUS § 5.74 (1966).

127. CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE MANDAMUS §§ 13.4, 13.5 (1966 & Supp. April 1988) [hereafter ADMINISTRATIVE MANDAMUS].

128. *Id.* at §§ 13.5-13.13.

129. CAL. ADMIN. CODE tit. 23, Ch. 3, § 648.4(a) (1987) states that administrative proceedings before the Board ". . .will not be conducted according to technical rules relating to evidence and witnesses."

130. See Note, *Board As Arbiter*, *supra* note 88, at 1594.

131. ADMINISTRATIVE MANDAMUS, *supra* note 128 at § 10.8; see also CAL. CIV. PROC.

However, the burden of proof is on the moving party—not the Board.¹³² *Imperial*, then, can be seen as shifting the advantages of time and inertia from pre-1914 rights owners who violate article X, section 2 to the Board.

VIII. IMPACT OF *IMPERIAL* ON BOARD ADJUDICATION OF RIPARIAN RIGHTS

Imperial gave the Board jurisdiction to issue binding orders to parties outside of the appropriative licensing system.¹³³ This rationale seemingly would allow the Board similar power over riparian rights. The *Imperial* court expressly cited language approving of adjudicatory action by the Board over all water rights.¹³⁴ Thus, the question is raised: is the Board able to conduct adjudications and issue binding orders directly to riparian rights owners who allegedly violate article X, section 2?

A. *Imperial* AS SUPPORT FOR THE BOARD'S POWER TO ADJUDICATE ARTICLE X, SECTION 2 VIOLATIONS BY RIPARIAN RIGHTS OWNERS

Article X, section 2 is a 'brooding omnipresence' over all California water law; it applies to every kind of water right in the state.¹³⁵ There appears to be no justification for allowing the Board to adjudicate in some instances, and requiring it to litigate in others.¹³⁶

The fact that riparian rights are grounded in real property law does not necessarily preclude the Board from adjudicating

CODE §§ 1094.5(g), (h)(1) (West Supp. 1989).

132. ADMINISTRATIVE MANDAMUS, *supra* note 128 at § 10.8.

133. Imperial Irrigation Dist. v. State Water Resources Control Bd., 186 Cal. App. 3d 1160, 1163, 231 Cal. Rptr. 283, 284 (1986).

134. *Id.* at 1169, 231 Cal. Rptr. at 287 (citing National Audubon Society v. Superior Court, 33 Cal. 3d 419, 449, 658 P.2d 709, 730, 189 Cal. Rptr. 346, 366 (1983)). The *Imperial* court "emphasized the board's power to adjudicate all competing claims, even riparian claims. . . and prescriptive claims. . . which do not fall within the appropriative licensing system." (Emphasis in *Imperial*.) See *supra* note 120 and accompanying text.

135. Peabody v. City of Vallejo, 2 Cal. 2d 351, 367, 40 P.2d 486, 491 (1935).

136. The Board currently may issue binding, appealable orders directly to post-1914 appropriative rights holders, see *supra* notes 16-30 and accompanying text, and pre-1914 appropriative rights holders, see *infra* notes 122-132 and accompanying text, but must seek injunctive relief to control riparian rights owners outside of statutory adjudications. See *infra* notes 51-69 and accompanying text.

the unconstitutional waste of water by a riparian. In *Imperial*, the Board was given power to adjudicate the unconstitutional waste of pre-1914 water rights. Pre-1914 water rights developed from the real property concept of prescription.¹³⁷

The fact that riparian owners are not covered by the Board's licensing requirements is not a basis for precluding Board jurisdiction over their wasteful use of water. Although pre-1914 water rights are not licensed by the Board, *Imperial* gave the Board power to adjudicate their unconstitutional waste.¹³⁸ *Imperial* thus suggests that Board's jurisdiction over those wasting water extends beyond those persons regulated by its licensing provisions.

Granting the Board jurisdiction to issue binding orders to riparian rights owners would be consistent with existing California law. The Board already has significant power over riparian rights in statutory adjudications under section 2501.¹³⁹ In fact, section 2501 gives the Board power to determine *all rights* to water in a stream system, including a "riparian right, or other basis of right."¹⁴⁰ The state may control riparian rights in navigable waterways under the theory that navigable waterways are held in trust for the public benefit.¹⁴¹ The state's control over navigable waterways is used to protect this public trust.¹⁴²

The Board does not need to pay just compensation for "taking" riparian rights in article X, section 2 adjudications.¹⁴³ Article X, section 2 specifically mandates that riparian rights attach *only* to the flow of the water which is reasonable under the cir-

137. *San Bernadino v. Riverside*, 186 Cal. 7, 13, 198 P. 784, 787 (1921). ("Appropriation under the Civil Code is but another form of prescription. . . .") See also *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 223-24, 24 P. 645, 645 (1890).

138. *Imperial*, 186 Cal. App. 3d at 1163, 231 Cal. Rptr. at 284.

139. CAL. WATER CODE § 2501 (West 1971).

140. *Id.*

141. *Colberg, Inc. v. State ex rel. Dep't of Public Works*, 67 Cal. 2d 408, 420, 432 P.2d 3, 11, 62 Cal. Rptr. 401, 409 (1967), *cert. denied*, 390 U.S. 949 (1968).

142. *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 445, 658 P.2d 70, 724, 189 Cal. Rptr. 346, 361 (1983) (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, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.")

143. See *supra* notes 48, 49 and accompanying text. The real property aspect of riparian rights raises the issue of just compensation. A riparian owner may allege that the Board is taking his private property rights by adjudicating and issuing orders.

cumstances.¹⁴⁴ Simply put, riparian owners have no right to waste riparian water in California.¹⁴⁵ Because a vested property right is not present when riparian water is being used unreasonably,¹⁴⁶ there is no need for the state to pay just compensation.¹⁴⁷ Furthermore, the trend of the California courts is to view private water rights not as compensable private property interests, but as governmentally granted interests which are subject to state regulation.¹⁴⁸

Imperial can be seen as affirmation of the administrative regulation which permits the Board to issue orders to non-license water users.¹⁴⁹ If this interpretation of *Imperial* is upheld, the Board could use the same regulation to control riparian owners because it covers *all* non-license rights, not just pre-1914 appropriative rights.¹⁵⁰

The public policies present in *Imperial* support the Board's additional jurisdiction over riparian rights. Water is perhaps the most precious natural resource of the state, and the constitution forbids its waste.¹⁵¹ California needs an agency that will police

144. CAL. CONST. art. X, § 2 states "riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section."

145. *People ex rel. State Water Resources Control Bd. v. Forni*, 54 Cal. App. 3d 743, 753, 126 Cal. Rptr. 851, 857 (1976). The riparian right owners argued that the injunction would constitute a compensable taking of their vested water rights. *Id.* The court replied, "respondents ignore the necessity of first establishing the legal existence of a compensable property interest. Such an interest consists in their right to the *reasonable* use of the flow of water" *Id.* (emphasis in original).

146. *In re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339, 348, n.3, 599 P.2d 656, 661, n.3, 158 Cal. Rptr. 350, 355, n.3 (1979) ("Thus, to the extent that a future riparian right may impair the promotion of reasonable and beneficial uses of state waters, it is inapt to view it as vested.")

147. *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 145, 429 P.2d 889, 898, 60 Cal. Rptr. 377, 385 (1967) ("[s]ince there was and is no property right in an unreasonable use, there has been no taking or damaging of property by the deprivation of such use, and, accordingly, the deprivation is not compensable.")

148. See *Schulz & Weber*, *supra* note 48, at 1065 ("Indeed, the courts are propelling California into a new era of judicially and administratively supervised reallocations of its water resources, on the premise that water use is more a governmentally granted privilege than a privately held property right."); *id.* at 1064 ("The changes can only be viewed as a broad retreat from protection of private property aspects in favor of utilitarian reallocation.")

149. CAL. ADMIN. CODE tit. 23, Ch. 3, § 857; Ch. 5, § 4004.

150. *Id.*

151. *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 186 Cal. App. 3d 1160, 1164, 231 Cal. Rptr. 283, 286 (1986) (citing CAL. CONST. art. X, § 2).

article X, section 2. The Legislature, by enacting section 174 has made the Board that agency.¹⁵²

The current alternative to Board jurisdiction of riparian rights is case-by-case litigation of riparian rights—litigation in which the courts unfortunately decide only the interests of the parties to the instant matter.¹⁵³ The California Supreme Court held that administrative adjudication is preferable to case-by-case litigation¹⁵⁴ because the agency can take into account the interests of those who are not parties to the instant matter.¹⁵⁵ Moreover, Board jurisdiction over riparian rights may have a deterrent effect on waste because of the threat of Board adjudication.

Thus, subject matter jurisdiction over article X, section 2 violations of riparian rights owners appears to be the next logical step in the development of the Board's jurisdiction. The decision in *Imperial* provides a clear rationale for expanding the Board's jurisdiction.

B. *Imperial* DOES NOT AFFIRMATIVELY ESTABLISH BOARD JURISDICTION OVER ARTICLE X, SECTION 2 VIOLATIONS BY RIPARIAN RIGHTS OWNERS

Board jurisdiction to adjudicate the misuse of riparian rights under article X, section 2 (outside of statutory adjudications) cannot be assumed, however.¹⁵⁶ *Imperial* alone does not

152. *Id.* at 1165, 231 Cal. Rptr. at 285.

153. *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 140, 429 P.2d 889, 894, 60 Cal. Rptr. 377, 382 (1967) (stating that what is reasonable water use "cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance.")

154. *Environmental Defense Fund*, 26 Cal. 3d 189, 199, 605 P.2d 1, 9, 161 Cal. Rptr. 466, 474 (emphasis in original); see note 118 and accompanying text.

155. *Imperial*, 186 Cal. App. 2d at 1167, 231 Cal. Rptr. at 287.

156. See Note, *Board as Arbiter*, *supra* note 88, at 1570, construing § 275 as "granting the Board administrative jurisdiction over all competing water rights other than pre-1914 appropriative rights," and at note 45, construing *Forni* as "authorizing the Board to regulate water use by riparian right holders." *Forni*, however, does not approve of Board power to issue binding orders directly to riparian rights owners, but rather affirms Board standing to *litigate* for injunctive relief, leaving the "adjudication of reasonableness to the judiciary." *Forni*, 54 Cal. App. 3d at 752, 126 Cal. Rptr. at 857.

The difference between Board power to issue direct, binding orders and Board standing to seek injunctive relief is significant. This was the exact controversy in *Imperial*. The District sued for a declaration that the Board must enforce article X, § 2 via injunctive relief—not administrative adjudication. *Imperial*, 186 Cal. App. 3d at 1164,

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provide a secure legal framework for Board jurisdiction over article X, section 2 violations by riparian rights holders.

There is no specific statute empowering the Board to adjudicate the waste of riparian water. Sections 174 and 275 certainly lead in that direction (and were construed to give the Board such power over pre-1914 appropriative right holders in *Imperial*), but fail to mention riparian rights.¹⁵⁷ Therefore, these two sections are subject to litigation with regard to private riparian rights.

Furthermore, the California Supreme Court has not addressed Board jurisdiction to issue binding conservation orders to pre-1914 appropriative *or* riparian rights owners. *Imperial* as an appellate level case from the Fourth District, although persuasive, is not binding precedent throughout the state.¹⁵⁸

That the Board has certain powers over riparian rights in statutory adjudications does not necessarily help the Board's case for additional jurisdiction over riparian rights in other circumstances.¹⁵⁹ Statutory adjudications are an independent statutory creation designed to settle disputes about water rights.¹⁶⁰

Imperial could be distinguished in a riparian rights case since the rights adjudicated in *Imperial* were pre-1914 appropri-

231 Cal. Rptr. at 285. The Board's victory in *Imperial* was that it may directly regulate with binding orders and be *responsive* to litigation attacking the orders.

157. See relevant text of CAL. WATER CODE §§ 174 & 275 *supra* note 6.

158. See *People v. Muir*, 244 Cal. App. 2d 598, 603, 53 Cal. Rptr. 398, 401 (1966). Furthermore, a district court opinion is not necessarily binding even in the same district. See *People v. Yeats*, 66 Cal. App. 3d 874, 879, 136 Cal. Rptr. 243, 245 (1977); *but see Allstot v. Long Beach*, 104 Cal. App. 2d 441, 446, 231 P. 2d 498, 501 (1951) (indicating that some courts give greater deference to a case like *Imperial* which was denied review by the State Supreme Court).

159. While the Board may have certain powers over riparian rights in statutory adjudications (see *supra* notes 61-73 and accompanying text), a court decree finalizes the process. CAL. WATER CODE §§ 2762, 2768 (West 1971). It is the court decree, not a Board order which is appealable. *Id.* at § 2757; see *supra* note 71 and accompanying text. Therefore, the Board, by itself, has no power to issue binding orders to riparian rights owners even within statutory adjudications.

160. CAL. WATER CODE § 2501 (West 1971) ("The board may determine, in the proceedings provided for in this chapter, all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right.") This section does not authorize prosecution of individual violations of article X, § 2. See *supra* notes 61-73 and accompanying text.

ative rights. *Imperial* rested partially on article X, section 5.¹⁶¹ Article X, section 5 states that all water now appropriated or which may be appropriated in the future is "subject to the regulation and control of the State."¹⁶² Because pre-1914 rights are "appropriative" rights and riparian rights are not, article X, section 5 would not apply to a case involving Board control of riparian rights owners under article X, section 2.¹⁶³

IX. CONCLUSION

The California constitution clearly seeks to prevent the waste of water resources. The enforcement of this critical policy is complicated because of the existence of several types of California water rights. Meanwhile, all water rights are capable of being wasted.

The *Imperial* decision revealed an example of the waste of substantial California water resources.¹⁶⁴ Smaller and more numerous examples of waste undoubtedly occur every day. *Imperial* gave a statewide administrative agency, the Board, power to act upon the waste of pre-1914 appropriative rights: adjudicate and issue binding conservation orders.

Whether the Board's subject matter jurisdiction will be increased to include power to issue binding orders to riparian water rights owners is unclear. The basic logic of *Imperial* seemingly would permit the Board to issue binding orders anywhere California water resources are being wasted. However, the complexity of California water law forbids the conclusion that the Board now has such power.

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161. *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 186 Cal. App. 3d 1160, 1165, 231 Cal. Rptr. 283, 285 (1986); see *supra* notes 129-130 and accompanying text.

162. CAL. CONST. art. X, § 5.

163. *Imperial* itself could possibly have come out differently without the constitutional support of article X, § 5.

164. But see *Imperial Irrigation District & The Metropolitan Water District of Southern California, Agreement for Implementation of a Water Conservation Program and Use of Conserved Water* at 4 (1988) (plan intended to eliminate at least 100,000 afa of the aforementioned waste).

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