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Exhausted of Concurrent Jurisdiction: A Reexamination of *National Audubon v. Superior Court of Alpine County*

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EXHAUSTED OF CONCURRENT JURISDICTION: A REEXAMINATION OF *NATIONAL AUDUBON V. SUPERIOR COURT OF ALPINE COUNTY*

*Zoe A. Wong**

ABSTRACT: California maintains a complex system of water rights, with the State Water Resources Control Board as the premiere administrative agency overseeing it. The State Water Resources Control Board has the ability, for example, to investigate water usage and implement regulations. However, when it comes to adjudicating water rights disputes, the agency’s power is not absolute. Under the California Supreme Court’s holding in *National Audubon v. Superior Court of Alpine County*, the trial court shares concurrent jurisdiction with the State Water Resources Control Board over water rights disputes. As California faces extreme drought conditions and climate change, legal battles over precious water resources have intensified and have brought *National Audubon* to the forefront.

This comment begins by reviewing the existing framework for water rights in California and analyzing the court’s decision in *National Audubon*. It then proceeds to explain how changed circumstances—namely, drought and climate change—render the current system unworkable. Finally, this comment advocates for abolishing the doctrine of concurrent jurisdiction for water rights disputes in favor of administrative exhaustion through legislative amendment. Doing so would eliminate confusion in litigation, give deference to the State Water Resources Control Board’s technical expertise, and better prepare California for an increasingly dry future.

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I. INTRODUCTION

California is no stranger to drought.¹ And yet, while the Golden State has previously endured periods of low precipitation,² 2012 marked the beginning of California's five-year drought emergency³—a drought that scientists described as unusually severe for the region.⁴ In response, the state took

* Juris Doctor 2017, University of Washington School of Law. I would like to thank my advisor, Professor Sanne Knudsen, and the Washington Journal of Environmental Law and Policy editorial staff.

1. The United States Geological Survey defines drought as “a period of drier-than-normal conditions that results in water-related problems.” *California Drought*, U.S. GEOLOGICAL SURVEY: CAL. WATER SCI. CENTER, <http://ca.water.usgs.gov/data/drought/> (last visited Nov. 26, 2016).

2. Various scientific studies illustrate the cyclical nature of California's climate. See, e.g., Daniel Griffin & Kevin J. Anchukaitis, *How Unusual is the 2012–2014 California Drought?*, 41 GEO. PHYS. RES. LETT. 9017 (2014).

3. Heavy storms and accumulated snowpack in the Sierra Nevada Mountains in early 2017 signaled an end to the drought for the near future. See Mike McPhate et al., *We Have Some Good News on the California Drought. Take a Look.*, N.Y. TIMES (Mar. 22, 2017), <https://www.nytimes.com/interactive/2017/03/22/us/california-measuring-snowpack.html>; Email Newsletter from Jonah Engel Bromwich, Reporter, *N.Y. Times*, to *California Today* Newsletter Subscribers (Mar. 27, 2017, 6:31 AM) (on file with author). On April 7, 2017, California Governor Jerry Brown officially declared an end to the drought emergency. Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown Lifts Drought Emergency, Retains Prohibition on Wasteful Practices (Apr. 7, 2017), <https://www.gov.ca.gov/news.php?id=19748> [hereinafter Apr. 2017 Press Release]. See also Bettina Boxall, *Gov. Brown Declares California Drought Emergency is Over*, L.A. TIMES (Apr. 7, 2017, 3:50 PM), <http://www.latimes.com/local/lanow/la-me-brown-drought-20170407-story.html>.

4. Griffin & Anchukaitis, *supra* note 2. (Note that the water year for 2012 began in October 2011.) See also CAL. DEP'T OF WATER RES., CALIFORNIA'S MOST SIGNIFICANT DROUGHTS: COMPARING HISTORICAL AND RECENT CONDITIONS i (2015), http://www.water.ca.gov/waterconditions/docs/California_Significant_Droughts_2015_small.pdf; B. Lynn Ingram & Frances Malamud-Roam, *A Drier California Than Ever? Pretty Much.*, L.A. TIMES (Feb. 3, 2014), <http://www.latimes.com/nation/la-oe-ingram-california-drought-20140203-story.html>; Tom Randall, *California's 'Hot Drought' Ranks Worst in at Least 1,200 Years*, BLOOMBERG (Dec. 2, 2014, 1:31 PM),

proactive steps to mitigate the drought's effects and control the state's water supply in the face of an uncertain future. Governor Jerry Brown declared a state of emergency and expanded the powers of state agencies.⁵ Under this new authority, the State Water Resources Control Board (SWRCB or the Water Board) changed water permits and expedited applications for water transfers.⁶ Furthermore, concerned with drought conditions and a dwindling water supply, the SWRCB issued curtailment notices to water diverters: first to those with post-1914 appropriative rights,⁷ and later to those with pre-1914 appropriative rights.⁸

<https://www.bloomberg.com/news/articles/2014-12-05/california-s-drought-ranks-worst-in-at-least-1-200-years>.

5. Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown Declares Drought State of Emergency (Jan. 17, 2014), <https://www.gov.ca.gov/news.php?id=18368> [hereinafter Jan. 2014 Press Release]. Governor Brown lifted the state of emergency in 2017, but retained some of SWRCB's responsibilities from the drought period, such as urban water use reporting requirements. See Apr. 2017 Press Release, *supra* note 3.

6. Water transfers are a physical conveyance of water from the original source to a location outside of the watershed, such as a farm. Water transfers represent a key part of overall water management strategies. DEP'T OF WATER RES. & STATE WATER RES. CONTROL BD., BACKGROUND AND RECENT HISTORY OF WATER TRANSFERS IN CALIFORNIA (2015), http://www.water.ca.gov/watertransfers/docs/Background_and_Recent_History_of_Water_Transfers.pdf.

7. Letter from Thomas Howard, Executive Director of the State Water Resources Control Board (May 1, 2015), http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/sac2015_post14curtail.pdf. See also *State Water Board Drought Year Water Actions*, STATE WATER RES. CONTROL BD., http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/faq.shtml (last visited Feb. 7, 2017). Curtailment letters are notices to stop diverting water. *Id.*

8. The language and exact meaning of these letters are at the heart of current ongoing litigation. See Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Damages, Byron-Bethany Irrigation Dist. v. California State Water Res. Control Bd., No. N15-0976 (Cal. Super. Ct. June 26, 2015). Note that all of the cases, including this one, have since been consolidated into the California Water Curtailment Cases, No. 1-15-CV-285182 (Cal. Super. Ct.). The letter in question reads, in relevant part:

Based upon the most recent reservoir storage and inflow projections, along with forecasts for future precipitation events, the existing water supply in the Sacramento-San Joaquin watersheds and Delta watersheds is insufficient to meet the needs of some pre-1914 claims of right. With this notice, the State Water Board is notifying pre-1914 appropriative claims of right . . . to immediately stop diverting water with the exceptions discussed below.

Exhibit A to Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Damages, Byron-Bethany Irrigation Dist. v. California State

Given its role in reallocating water rights in times of drought, and given the controversies of water rights, the SWRCB—unsurprisingly—has become involved in several litigation matters due to the recent drought. California state law offers two main forums for litigants to air their grievances: the appropriate agency or the trial court. To prevent a flood of cases from burdening the court system and to promote an efficient use of judicial resources, California has a robust system of administrative agencies. Courts rely on the doctrine of exhaustion of administrative remedies: aggrieved parties must seek relief through an agency's tribunal before appealing their cases to the courts.⁹ This doctrine plays a vital role, especially in water law cases, because the courts depend on the agency's technical expertise to balance competing—and oftentimes conflicting—interests in water rights.¹⁰

Recent plaintiffs, however, have bypassed administrative exhaustion. Instead of first seeking redress from the agency, plaintiffs have initiated their complaints against the SWRCB directly in superior court.¹¹ Plaintiffs circumvented the SWRCB by citing *National Audubon Society v. Superior Court of Alpine County (National Audubon)*¹² and its assertion of concurrent jurisdiction between the state agency and the state trial court for water rights disputes.¹³

National Audubon is a seminal case often cited for its treatment of the public trust doctrine.¹⁴ Yet often overlooked is the secondary holding that judicial courts share concurrent jurisdiction with the SWRCB in matters pertaining to water diversions between private parties.¹⁵ This procedural ruling rose to the forefront as California faced one of the worst droughts in state history, and various stakeholders vied for

Water Res. Control Bd., No. N15-0976 (Cal. Super. Ct. June 26, 2015).

9. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 733 (Cal. 1983) (Richardson, J., concurring and dissenting).

10. *Id.* at 733–35.

11. In California's state court system, the superior court is the state trial court.

12. 658 P.2d 709 (Cal. 1983).

13. *Id.*

14. Richard M. Frank, *The Public Trust Doctrine: Assessing its Recent Past and Charting its Future*, 45 U.C. DAVIS L. REV. 665, 669–70 (2012) (“In 1983 the California Supreme Court . . . issu[ed] what was perhaps the nation's most important public trust decision in nearly a century—the iconic “Mono Lake” case.”).

15. *Nat'l Audubon*, 658 P.2d at 732.

control of what precious water resources were left. Plaintiffs began to cite *National Audubon* to avoid the administrative process and sue the SWRCB directly in judicial courts,¹⁶ leading to confusion about the meaning and scope of *National Audubon*'s grant of concurrent jurisdiction.

One instance of confusion appeared in the *California Water Curtailment Cases*: in response to the SWRCB's issuance of curtailment notices,¹⁷ plaintiff water districts brought suit against the agency in state superior court.¹⁸ In the meantime, two of the districts allegedly continued to divert water, which caused the SWRCB to initiate an enforcement action against them: Byron-Bethany Irrigation District¹⁹ and the West-Side Irrigation District.²⁰ Those two districts moved to stay the

16. See generally Petition for Writ of Admin. Mandate, Writ of Mandate, Complaint for Declaratory and Injunctive Relief at 7, *West Side Irrigation Dist. v. State Water Res. Control Bd.*, No. 34-2015-80002121 (Cal. Super. Ct. June 29, 2015) (asserting that petitioners do not need to exhaust administrative remedies before bringing their action to trial court). Note that this case is also part of the consolidated *California Water Curtailment Cases*. See also Order After Hearing on Sept. 22, 2015 at 3, *California Water Curtailment Cases*, No. 1-15-CV-285182 (Cal. Super. Ct. Sept. 24, 2015) (citing defendant SWRCB's arguments distinguishing the instant case from *National Audubon*).

17. Curtailment notices are letters issued to certain groups of water rights holders, notifying them of dwindling water supplies and the need to curb usage. See *State Water Board Drought Year Water Actions*, *supra* note 7. This system protects water availability for priority users. *Id.* See discussion, *supra* note 8, for more information about curtailment notices.

18. See, e.g., Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Damages, *Byron-Bethany Irrigation Dist. v. California State Water Res. Control Bd.*, No. N15-0976 (Cal. Super. Ct. June 26, 2015). Byron-Bethany Irrigation District, Banta-Carbona Irrigation District, Patterson Irrigation District, the San Joaquin Tributaries Authority, and West Side Irrigation District all filed suit against the SWRCB in June 2015. The five separate actions, among others, have now been consolidated in the Superior Court of Santa Clara County, and are now known as the *California Water Curtailment Cases*. See *5 California Water District Lawsuits About Curtailment Notices Are Centralized*, LEXIS LEGAL NEWS (Sept. 09, 2015 at 11:52 AM) (on file with author).

19. Matt Stevens and Monte Morin, *State Proposes \$1.5-Million Fine of Water District for Improper Diversions*, L.A. TIMES (July 20, 2015, 8:20 PM), <http://www.latimes.com/local/lanow/la-me-ln-drought-enforcement-20150720-story.html>; Administrative Civil Liability Complaint from State Water Res. Control Bd. Against Byron-Bethany Irrigation District (July 20, 2015), http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/acl072015.pdf.

20. Draft Cease and Desist Order from State Water Res. Control Bd. to West Side Irrigation Dist. (July 16, 2015), http://www.waterboards.ca.gov/waterrights/water_issues/programs/enforcement/compliance/cease_desist_actions/2015/west_side_dcdo_2015.pdf; Press Release, State Water

administrative enforcement proceedings by citing *National Audubon* and claiming that the superior court has concurrent jurisdiction with the SWRCB over water disputes.²¹ Because a suit already existed at the trial court level, the districts argued that the agency's enforcement action must be stayed.²² In essence, the water districts were not required to go through the agency's enforcement proceedings and exhaust their administrative remedies before proceeding with their case in superior court. The defendant agency argued against this interpretation of *National Audubon* and sought to distinguish it.²³ The superior court judge denied the districts' motion to stay the administrative enforcement action, noting "there are sound policy reasons for allowing the administrative process to proceed," such as "administrative autonomy, administrative expertise, and judicial efficiency (i.e. overworked courts should decline to intervene in an administrative dispute unless absolutely necessary)."²⁴

National Audubon was invoked in a similar fashion in another recent case: Santa Barbara Channelkeeper, a local environmental organization,²⁵ also argued for concurrent jurisdiction. The nonprofit filed a petition for writ of mandate against the SWRCB to compel the agency to take action

Res. Control Bd., West Side Irrigation District Issued Draft Cease and Desist Order for Unauthorized Diversion (July 16, 2015), http://www.swrcb.ca.gov/press_room/press_releases/2015/pr071615_west_side_enforcement.pdf.

21. Order After Hearing on Sept. 22, 2015, *supra* note 16, at 2.

22. *Id.*

23. Counsel for SWRCB argued that the rule in *National Audubon* should not be applied in the Curtailment Cases because *National Audubon* involved a dispute between private parties, whereas the Curtailment Cases represent judicial action brought directly against the state agency. Furthermore, in coming to its conclusion for concurrent jurisdiction in *National Audubon*, the Court relied heavily on the referee provision in the Water Code. More specifically, the problem of lack of agency expertise in trial court proceedings is mitigated through the court's ability to refer complex cases to the agency. This policy cannot be accomplished when the SWRCB is an actual party to a dispute, such as in the *California Water Curtailment Cases*. Order After Hearing on Sept. 22, 2015 at 3, California Water Curtailment Cases, No. 1-15-CV-285182 (Cal. Super. Ct. Sept. 24, 2015). *See also infra* Section IV.A and accompanying notes for discussion of the California Water Code's referral provisions.

24. Order After Hearing on Sept. 22, 2015, *supra* note 16, at 5.

25. Verified Petition for Writ of Mandate at 1–2, Santa Barbara Channelkeeper v. State Water Res. Control Bd., No. CPF-14-513875 (Cal. Super. Ct. Sept. 19, 2014); *About Us*, SANTA BARBARA CHANNELKEEPER, <http://www.sbck.org/about-us/> (last visited Feb. 8, 2017).

against a county's pumping and diversion of water.²⁶ In its petition, Santa Barbara Channelkeeper argued that because of the *National Audubon* grant of concurrent jurisdiction over matters involving the public trust, exhaustion of administrative remedies was not required.²⁷ The parties have agreed to stay the trial court proceedings while another aspect of the case is on appeal.²⁸ Both the *California Water Curtailment Cases* and *Santa Barbara Channelkeeper* highlight misunderstandings concerning *National Audubon* and the risks posed to the administrative exhaustion doctrine, especially in the context of water rights disputes.

This comment will analyze which forum is proper for initiating water rights claims in California drought cases. Part II begins by providing a brief primer on California state water law and related administrative law doctrines. Part III proceeds by examining the seminal case of *National Audubon Society*, with particular attention paid to the secondary holding of concurrent jurisdiction. Finally, Part IV advocates for the abolition of concurrent jurisdiction as applied to water rights cases, and analyzes the various means by which this feat will be possible. The California State Legislature should amend the state Water Code to require private plaintiffs to exhaust administrative remedies before bringing water diversion claims to the judicial courts. Doing so would increase judicial efficiency, grant greater deference to the Water Board's technical expertise, and better balance various competing water rights.

II. COMPETING DOCTRINES IN CALIFORNIA LAW CONFUSE ADJUDICATION OF WATER RIGHTS DISPUTES

The holding of *National Audubon* implicates various complex areas of law, including water law and administrative law. This Part provides a brief explanation of California's dual system of water rights and water governance. It then

26. Verified Petition for Writ of Mandate at 1, *Santa Barbara Channelkeeper v. State Water Res. Control Bd.*, No. CPF-14-513875 (Cal. Super. Ct. Sept. 19, 2014).

27. *Id.*

28. Order on Stipulation Re: Stay of Proceedings Pending Appeal, *Santa Barbara Channelkeeper v. State Water Res. Control Bd.*, No. CPF-14-513875 (Cal. Super. Ct. Dec. 23, 2015).

illustrates how the doctrines of concurrent jurisdiction and exhaustion of administrative remedies conflict when applied to water rights disputes, leading to confusion in litigation proceedings.

A. *California's Overarching System of Water Rights and Water Governance*

California has a “dual system” of water rights: riparian and appropriative.²⁹ “The riparian doctrine confers upon the owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his land.”³⁰ The California Constitution acknowledges a riparian landowner’s historic common law right to water, but also limits that right to “reasonable and beneficial use.”³¹ On the other hand, the appropriation doctrine “contemplates the diversion of water and applies to ‘any taking of water for other than riparian or overlying uses.’”³² Under the appropriative rights system, California follows the rule of thumb “first in time, first in right.”³³ In other words, the older one’s right, the stronger one’s claim is to water. In general, water rights are divided into pre-1913 rights and post-1913 rights; the significance of 1913 is the enactment of the Water Commission Act and the beginning of official recordings.³⁴

The original purpose of the Water Commission Act was to provide an orderly and systematic way to appropriate water.³⁵ Under the original 1913 Act, the SWRCB had limited ability to investigate and make determinations to a subset of water rights.³⁶ As California’s relationship with water changed, so did the obligations of the agency. Although the Act contained various shortcomings, it laid the foundation for the modern day SWRCB and the agency’s ability to regulate water rights

29. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 724 (Cal. 1983).

30. *Id.*

31. CAL. CONST. art. X, § 2; MILLER & STARR, 5 CALIFORNIA REAL ESTATE DIGEST WATERS § 5 (3d ed. 2016).

32. *Nat'l Audubon*, 658 P.2d at 724.

33. *Id.*

34. *Id.* See also CAL. WATER CODE § 1003 (West 2009).

35. *Temescal Water Co. v. Dep't of Pub. Works*, 280 P.2d 1, 4 (1955).

36. See *Nat'l Audubon*, 658 P.2d at 725.

and usage in California.³⁷

The agency's responsibilities grew through both legislative amendments and judicial decisions.³⁸ In 1967, the state legislature created the five-member agency known as the SWRCB.³⁹ The Court subsequently recognized the SWRCB's enormous duty of balancing competing interests for water against the protection of the public trust: "[T]he function of the Water Board has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters."⁴⁰

Section 13100 of the California Water Code establishes the framework under which SWRCB operates.⁴¹ The Legislature intended the SWRCB to "provide for the orderly and efficient administration of the water resources of the state" through "adjudicatory and regulatory functions . . . in the field of water resources."⁴² The Legislature also codified its intention "to combine the water rights, water quality, and drinking water functions of the state government to provide for coordinated consideration of water rights, water quality, and safe and reliable drinking water."⁴³ As such, the SWRCB represents the main agency authority on water matters in California. The SWRCB not only manages the state's water supply and keeps record of various water rights, but also issues guidelines and conducts enforcement proceedings.⁴⁴ The agency also

37. ELLEN HANAK ET AL., PUB. POL'Y INST. OF CAL., MANAGING CALIFORNIA'S WATER: FROM CONFLICT TO RECONCILIATION 37–38 (2011), http://ppic.org/content/pubs/report/R_211EHR.pdf.

38. *Nat'l Audubon*, 658 P.2d at 725–26.

39. *History of the Water Boards*, STATE WATER RES. CONTROL BD., http://www.swrcb.ca.gov/about_us/water_boards_structure/history.shtml (last visited Feb. 8, 2017).

40. *Nat'l Audubon*, 658 P.2d at 725–26.

41. CAL. WATER CODE § 13100 (West 2009).

42. *Id.* § 174(a) (West Supp. 2017).

43. *Id.* § 174(b) (West Supp. 2017) (underscoring the merger of two previous boards that existed in California at the time—the State Water Quality Control Board and the State Water Rights Board). *History of the Water Boards*, *supra* note 39.

44. *See, e.g.*, CAL. WATER CODE § 179 (West 2009) (granting the SWRCB jurisdiction over permits or licenses to appropriate water); CAL. WATER CODE § 1058 (West 2009) ("The board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under this code."); CAL. WATER CODE § 2501 (West 2009) ("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.").

maintains its own tribunal system to adjudicate disputes.⁴⁵

The role of SWRCB in the State of California continues to grow. The agency plays an active and pivotal part in California, especially in light of more severe drought conditions. Governor Jerry Brown's 2014 emergency drought declaration and 2016 executive order have expanded the duties and responsibilities of the SWRCB, including requiring the agency to prohibit practices that waste water and to develop a long-term plan for California's water supply.⁴⁶

B. Water Rights Under the Doctrine of Exhaustion of Administrative Remedies

California law maintains the doctrine of exhaustion of administrative remedies. Under that doctrine, "if an administrative remedy is provided by statute, relief must be sought from the administrative body and such remedy exhausted before judicial relief respecting that remedy is available."⁴⁷

The doctrine of exhaustion of administrative remedies serves as a jurisdictional requirement.⁴⁸ For example, if a state statute delineates the creation of an administrative agency with enforcement powers, and that agency has its own tribunal and process, then a plaintiff is required to complete that process before appealing to a judicial court. Failure to do so will result in the judge dismissing the case for lack of jurisdiction. As one treatise succinctly describes:

The requirement of exhaustion of administrative remedies is based on the theory that the administrative tribunal is created by law to adjudicate the issue a litigant seeks to present to the court, and the issue is within its special jurisdiction. If a court allows the suit to proceed before a final administrative determination, the court will be interfering with the subject matter of

45. CAL. WATER CODE §§ 2501–2868 (West 2009).

46. Jan. 2014 Press Release, *supra* note 5; *Making Water Conservation a California Way of Life*, Cal. Exec. Order B-37-16 (May 9, 2016), https://www.gov.ca.gov/docs/5.9.16_Executive_Order.pdf.

47. ANN TAYLOR SCHWING, 1 CAL. AFFIRMATIVE DEF. § 16:1 (2d ed. 2016) (internal quotations omitted).

48. B.E. WITKIN, 3 CAL. PROC. ACTIONS § 325 (5th ed. 2008). *See also* Andrew Dhadwal, *Administrative Remedies Must be Exhausted Before Filing Suit*, L.A. LAW, Sept. 2010, at 10.

another tribunal.⁴⁹

In the context of California water law, a robust doctrine of exhaustion of administrative remedies would require a litigant to resolve her dispute by first proceeding through the SWRCB's administrative adjudication process, as laid out in the Water Code.⁵⁰ If the litigant is dissatisfied with the result of that administrative hearing, she may then appeal her case in the superior court. However, *National Audubon* and its grant of concurrent jurisdiction has blurred this area of the law by allowing individuals to file their water cases initially in superior court and bypass the entire agency adjudication system.

C. *Water Rights Under the Doctrine of Concurrent Jurisdiction*

Concurrent jurisdiction grants multiple courts the ability to hear a certain class of cases first.⁵¹ Thus, savvy litigants are able to engage in forum-shopping and bring their complaint in a court of their choosing.⁵² However, once the party has chosen a forum, that court retains jurisdiction over the case until it renders a final judgment; the party may not simultaneously file their complaint in another eligible forum. This common law principle is known as the rule of concurrent exclusive jurisdiction.⁵³ In California, “[w]hether jurisdiction over a class of cases is concurrent . . . depends partly on constitutional and statutory interpretation, and partly on principles and policies of judicial administration.”⁵⁴

National Audubon represents an instance where the California Supreme Court granted both the trial court and administrative agency⁵⁵ concurrent jurisdiction based on its

49. 1 CAL. JUDGES BENCHBOOK CIV. PROC. BEFORE TRIAL § 8.6 (2016).

50. See, e.g., CAL. WATER CODE § 1051 (West 2009) (defining the Water Board's investigative powers).

51. SCHWING, *supra* note 47, § 23:11.

52. ROMUALDO P. ECLAVEA & SONJA LARSEN, 20 AM. JURISPRUDENCE, COURTS § 83 (2d ed. 2016).

53. It is also referred to as the priority of jurisdiction doctrine. SCHWING, *supra* note 47, § 23:11. See also ECLAVEA, *supra* note 52.

54. B.E. WITKIN, 2 CAL. PROC. JURISPRUDENCE § 424 (5th ed. 2008).

55. Note that the doctrine of concurrent jurisdiction is prevalent not only in debates about administrative hearings and trial courts, but also in tensions between state courts and federal courts. See, e.g., ECLAVEA, *supra* note 52, § 88.

interpretations of the California State Constitution and the Water Code.⁵⁶ Through a careful reading, the opinion also reflects the historical conditions of the time, as well as the bench's varied understanding of existing legal precedent.⁵⁷ Due to changing circumstances, such as drought and climate change, this rule of law is now misplaced. The framework of *National Audubon*—specifically, the holding establishing concurrent jurisdiction in water rights cases—is no longer feasible and should be modified.

III. REVISITING *NATIONAL AUDUBON SOCIETY V. SUPERIOR COURT OF ALPINE COUNTY* CASTS IT AS AN EXCEPTIONAL CASE

National Audubon Society v. Superior Court of Alpine County highlights the importance of water rights under California state law and how those rights should be treated in judicial courts. The three opinions for *National Audubon* reveal conflicting legal perspectives on the California Supreme Court bench in regards to the doctrines of concurrent jurisdiction and exhaustion of administrative remedies. Although Justice Broussard's viewpoint gained a majority at the time, the other opinions—Justice Richardson's in particular—merit a closer look. The case should be

56. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 731–32 (Cal. 1983) (examining the Legislature's implicit refusal to grant the State Water Board exclusive primary jurisdiction and its decision instead to pass Water Code section 2000, which allows the Board to act as “referee” in water rights cases).

57. It is possible that the Court upheld concurrent jurisdiction in order to allow these particular plaintiffs to prevail and to preserve its own precedent, as established in *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District (EDF I)*, 572 P.2d 1128 (Cal. 1977) and *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District (EDF II)*, 605 P.2d 1, 10 (Cal. 1980). See *Nat'l Audubon*, 658 P.2d at 731 (“We have seriously considered whether, in light of the broad powers and duties which the Legislature has conferred on the Water Board, we should overrule EDF II and declare that henceforth the board has exclusive primary jurisdiction in matters falling within its purview.”). However, not all members of the California Supreme Court shared that view. Compare *id.* at 733 (Kaus, J., concurring) (characterizing the jurisdictional tests established in *EDF I* and *EDF II* as “rather vague” and noting that “[i]f a majority of the court were inclined to reconsider the issue, I would respectfully suggest that the exclusive jurisdiction of the board should be broadened to include disputes such as the present one. This would, obviously, involve the overruling of certain precedents on which plaintiffs justifiably relied”) with *id.* at 734–35 (Richardson, J., concurring and dissenting) (asserting that this case can be reconciled with *EDF II* because the facts of this case meet the “overriding considerations” referenced in *EDF II*).

reinterpreted and its holdings reapplied with the 2012 drought, and climate change generally, in mind.

A. *The Diverging Opinions in National Audubon Foreshadow Competing Administrative Law Doctrines*

At the heart of *National Audubon* laid California's scenic Mono Lake. In 1940, the predecessor to the SWRCB⁵⁸ granted the Department of Water and Power of the City of Los Angeles (DWP) a permit to appropriate water from streams that supplied Mono Lake. DWP subsequently built the Owens Valley Aqueduct and began diverting water across the state. Thereafter, the water level of Mono Lake dropped significantly. The National Audubon Society filed suit in superior court to halt DWP's diversions on the theory that Mono Lake was protected by the public trust. The case was transferred to the federal district court, but the federal court requested that the state court determine the key issues: (1) define the relationship between the public trust doctrine and the state water rights system, and (2) decide whether plaintiffs must exhaust their administrative remedies before filing suit. The superior court entered summary judgment against plaintiffs on both matters, and plaintiffs petitioned for a writ of mandate directly to the California Supreme Court.

The California Supreme Court handed down two holdings. First, the Court stated that the public trust doctrine and the state's appropriative water rights system are "parts of an integrated system."⁵⁹ Although both doctrines developed separately, the Water Board should take into account both the seniority of water rights and the public trust when allowing diversions.⁶⁰ Second, the Court established concurrent jurisdiction between the judicial courts and the Water Board in cases involving water diversions.⁶¹ This latter holding derived

58. The Division of Water Resources granted the original permit. *Id.* at 711 (majority opinion). At the time the Court issued the *National Audubon* opinion, the agency was renamed as the California Water Resources Board. Hence, the Court refers to the agency generally as "Water Board" throughout the opinion. *Id.* All of these entities are the predecessors to the SWRCB. This article will follow the opinion and refer to the agency as "Water Board" when discussing *National Audubon*.

59. *Id.* at 732.

60. *Id.* at 727–28.

61. *Id.* at 732.

from the fact that the plaintiffs in *National Audubon* failed to initiate a proceeding before the Water Board prior to filing suit.⁶² The Court rejected the defendants' contention that the plaintiffs were required to do so before filing an action in state court. Instead, a majority of the justices held that the Water Board and superior courts both have concurrent jurisdiction over water disputes, and thus exhaustion of administrative remedies was not required in this case.

In justifying its holding of concurrent jurisdiction, the majority opinion cited "long-established precedent" and the state legislature's implicit approval of those cases through subsequent statutorily-established procedures.⁶³ Under such procedures, the courts have the ability to defer to the Water Board's experience and expert knowledge by referring water rights disputes to the agency. The Water Board then takes on the role of referee by adjudicating the merits of the controversy initially.⁶⁴

The majority's decision hinged on two prior cases: *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District (EDF I)*⁶⁵ and *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District (EDF II)*.⁶⁶ *EDF I* and *EDF II* involved a dispute over water diversions based on the doctrine of unreasonable use. An environmental organization brought suit against a municipal water agency to oppose the agency's contract with the Federal Bureau of Reclamation for the construction of a dam. In *EDF II*, the California Supreme Court stated, "Apart from overriding considerations . . . we are satisfied that the courts have concurrent jurisdiction with . . . administrative agencies to enforce the self-executing provisions of [A]rticle X, [S]ection 2."⁶⁷ Thus, *EDF II* established concurrent jurisdiction in water

62. *Id.* at 729.

63. *Id.* at 731–32.

64. *Id.* See also CAL. WATER CODE §§ 2000, 2001, 2075 (2017).

65. 572 P.2d 1128 (Cal. 1977).

66. 605 P.2d 1 (Cal. 1980).

67. *Nat'l Audubon*, 658 P.2d at 731 (citing *EDF II*, 605 P.2d 1, 10 (Cal. 1980)). Article X, Section 2 of the California State Constitution reads (in pertinent part):

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 of water be

rights cases in California, and *National Audubon* upheld that ruling.

Justice Richardson penned an opinion for *National Audubon* that both concurred with and dissented from Justice Broussard's majority opinion. Justice Richardson agreed with the majority's analysis of the public trust doctrine issue.⁶⁸ However, Justice Richardson expressed reservations regarding the holding of concurrent jurisdiction: "[T]here are several compelling reasons for holding that the Water Board has exclusive original jurisdiction . . . subject of course to judicial review of its decision."⁶⁹ Administrative agencies have the ability to consider the interests of other parties who are not a part of the litigation, and are presumed to have a more comprehensive view of all stakeholders involved and the greater issue at hand.⁷⁰ For example, a trial court judge would only be required to consider the interests of those involved in a water rights dispute, whereas the Water Board would also be able to take into account other downstream diverters as well as more senior water rights holders.⁷¹ The agency, due to its technical proficiency, likely has a better picture of the drought conditions than a trial court judge.⁷² Because of the Water Board's role and expertise, Justice Richardson advocated for the agency's exclusive original jurisdiction over water disputes, as opposed to the majority's holding of concurrent jurisdiction. Under exclusive original jurisdiction, litigants would 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. 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 the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. . . . This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

Id. at 725.

68. *Id.* at 733 (Richardson, J., concurring and dissenting).

69. *Id.*

70. *See id.* at 734–35.

71. *See* EDF II, 605 P.2d 1, 9 (Cal. 1980) (“[P]rivate judicial litigation involves piecemeal adjudication determining only the relative rights of the parties before the court, whereas in administrative proceedings comprehensive adjudication considers the interests of other concerned persons who may not be parties to the court action.”)

72. *See Nat’l Audubon*, 658 P.2d at 734 (noting the agency’s expertise).

required to go through the Water Board's adjudicatory process to resolve their disputes before appearing in front of a trial court judge.

Justice Richardson interpreted *EDF II* to apply differently to the facts in *National Audubon*. In his view, the "overriding considerations" mentioned in *EDF II* were present, and thus the Water Board should have exclusive original jurisdiction. *EDF II* defined "overriding considerations" as factors related to public health and safety.⁷³ In Justice Richardson's view, the daunting task of balancing competing interests in water rights and the scope of technical expertise required to understand water resource management in general constituted "overriding considerations" under *EDF II* and justified the court's deference to the Water Board in the first instance.⁷⁴ Instead of reinforcing a broad rule of concurrent jurisdiction, Justice Richardson cast *National Audubon* as an exceptional case and argued for exclusive original jurisdiction without overruling *EDF II*, which was a significant concern for the majority.

B. Distinguishing the 2012 Drought from Conditions in National Audubon Further Show the Need for Change

The original plaintiffs in *National Audubon* filed the lawsuit in 1979. It is important to note the historical context of the case, and how it brought to the forefront competing tensions present in the state. On the one hand, increased urbanization heightened the need for water to support a sprawling population—by 1974, the Los Angeles Department of Water and Power "was funneling four-fifths of [Mono Lake's] natural flow into an aqueduct that carried water through Owens Valley" to Southern California.⁷⁵ On the other hand, environmentalists decried the harmful effects of the water diversions on Mono Lake, citing increased salinity, decreased air quality, and danger to the bird population.⁷⁶ Cars began sporting "Save Mono Lake" stickers on their bumpers.⁷⁷ Then,

73. *EDF II*, 605 P.2d at 10.

74. *Nat'l Audubon*, 658 P.2d at 734–35 (Richardson, J., concurring and dissenting).

75. Jane Braxton Little, *Mono Lake Facing Another Crisis*, NEWS DEEPLY: WATER DEEPLY (Apr. 27, 2016), <https://www.newsdeeply.com/water/articles/2016/04/27/mono-lake-facing-another-crisis>.

76. *Id.*

77. *Id.*

California was hit by the 1976–77 drought, further aggravating the situation.⁷⁸

Several facts distinguish the context of *National Audubon* from California’s condition in the 2010s. For one, the state’s population is greater than before. According to the United States Census Bureau, California’s total population in 1970 was almost twenty million people, and in 1980 it was over twenty-three million people.⁷⁹ During the 2010 Census, the agency recorded the state’s population as over thirty-seven million people—nearly double the 1970 Census amount.⁸⁰ In addition, the duration of the drought is more prolonged than before. The 1976 drought lasted for one year, whereas 2016 marked the fifth consecutive year of drought.⁸¹ These significant factual differences between the 1976 drought and 2012 drought highlight the changed circumstances, which in turn warrant a change in the law.

The severity of the 2012 drought altered attitudes throughout California. Residents and officials alike recognize that drought conditions will remain a permanent part of California’s hydrology due to climate change.⁸² As a result, the state government has proposed regulations with a view towards long-term conservation. According to the SWRCB Chairwoman Felicia Marcus, “[The State’s] emphasis is on conservation as a way of life in California. . . . We’ve had the luxury of taking our precious water for granted in the past, but

78. See CAL. DEP’T OF WATER RES., CALIFORNIA’S MOST SIGNIFICANT DROUGHTS: COMPARING HISTORIC AND RECENT CONDITIONS i (2015), http://www.water.ca.gov/waterconditions/docs/California_Significant_Droughts_2015_small.pdf. The report notes California’s significant historical drought periods: 1929–34, 1976–77, and 1987–92. *Id.*

79. U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION: CHARACTERISTICS OF THE POPULATION: NUMBER OF INHABITANTS: CALIFORNIA 68 (1973), http://www2.census.gov/prod2/decennial/documents/1970a_ca1-01.pdf; U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION: CHARACTERISTICS OF THE POPULATION: NUMBER OF INHABITANTS: CALIFORNIA 6-6 (1982), http://www2.census.gov/prod2/decennial/documents/1980a_caAB-01.pdf.

80. *2010 Census Interactive Population Search*, U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, <http://www.census.gov/2010census/popmap/ipmtext.php?fl=06> (last visited Feb. 8, 2017).

81. Ian Lovett, *California Braces for Unending Drought*, N.Y. TIMES (May 9, 2016), <http://www.nytimes.com/2016/05/10/us/california-drought-water-restrictions-permanent.html>.

82. *Id.*

we do not anymore.”⁸³ This shift in perspective should extend beyond agency regulations: state leaders should also transform the judicial process to reflect changing circumstances.

IV. ABOLISHING CONCURRENT JURISDICTION ALLEVIATES CONFUSING JURISPRUDENCE

California’s 2012 drought illustrates the prescient nature of Justice Richardson’s dissent. Individuals are now bringing their water rights claims before trial judges instead of the administrative agency’s expert tribunal.⁸⁴ Both the courts’ and legislature’s reliance on court referrals to the SWRCB, per sections 2000 and 2001 of the state Water Code, is not enough to retain the level of technical expertise required for water rights disputes. Furthermore, in cases where the SWRCB is a party, it is impractical for the court to refer the matter to the agency. For these reasons, this comment advocates for the abolishment of concurrent jurisdiction in water rights cases.

Both the *California Water Curtailment Cases* and *Santa Barbara Channelkeeper* improperly apply *National Audubon*’s secondary holding. The procedural postures of these two cases are distinguishable from *National Audubon*. In the *California Water Curtailment Cases* and *Santa Barbara Channelkeeper*, the SWRCB is an actual party to the matter, whereas in *National Audubon*, the Water Board was not a party at all; *National Audubon* was a dispute between two private parties. The cases illustrate that in the decades since the Court decided *National Audubon*, the law has become muddled, which warrants revisiting the case and clarifying its holdings.

National Audubon’s secondary holding of concurrent jurisdiction between the state courts and SWRCB should be abolished in water rights disputes because the context around *National Audubon* no longer reflects the current situation. Instead, plaintiffs should be required to exhaust their administrative remedies before filing suit in judicial courts. Such a mandate would ease confusion by deferring to the administrative agency’s expertise in the first instance and would uphold principles of judicial efficiency. Furthermore,

83. *Id.*

84. See discussion, *supra* Section I, for more details about the *California Water Curtailment Cases* and *Santa Barbara Channelkeeper*.

should the state legislature fail to amend California's Water Code, the Court may still impose an exhaustion requirement by establishing a new precedent.

A. *Legislative Amendment to the Water Code to Provide Clarity*

The California State Legislature, under the powers granted to it by the California Constitution, has the authority to create new laws and amend existing ones.⁸⁵ The State Legislature should utilize its authority to amend the Water Code. Considering the looming threat of drought, politicians should move to eliminate concurrent jurisdiction and vest exclusive original jurisdiction in the SWRCB for water disputes. Doing so would streamline the judicial process and reduce costs and confusion overall.

The Water Code allows the trial court to refer cases to the SWRCB.⁸⁶ This procedure is “designed to minimize the expense and delay of water rights litigation.”⁸⁷ In fact, one author noted in the 1950s that the administrative procedures established by the Act reduced litigation over water rights.⁸⁸ Furthermore, in cases where courts referred the matters to the agency, the final determination was “more satisfactory” and less costly than traditional water rights litigation.⁸⁹ The burden on trial courts was “materially lessened” overall.⁹⁰ The statistics illustrate the success of California's administrative process in efficiently adjudicating water disputes, especially in times of drought.⁹¹

85. CAL. CONST. art. IV, § 1.

86. CAL. WATER CODE § 2000 (West 2009); Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 731–32 (Cal. 1983).

87. Hugh W. Ferrier, *Administration of Water Rights in California*, 44 CAL. L. REV. 833, 843 (1956).

88. *Id.* at 848. Ferrier notes that in the decades prior to the Water Commission Act, “there were, on average, between seven and eight cases involving the determination of water rights decided annually by the appellate courts in California.” *Id.* That number gradually declined after the Act's enactment, reaching “a fraction over three cases per year” by 1935. *Id.*

89. *Id.*

90. *Id.*

91. Ferrier analyzes trends from the Water Commission Act's original passage in 1913 to the article's publication in 1956. *See id.* California experienced several periods of drought during that roughly forty-year timeframe, including the severe drought of 1929–1934. *See* CAL. DEP'T OF WATER RES., *supra* note 78, at 31, 39, 41 (noting dry periods in relation to river runoff and statewide precipitation).

Based on these proven benefits, the California State Legislature should uphold and strengthen SWRCB's role by amending the Water Code.

On the other hand, the presence of the referee provisions of the Water Code may signal the California State Legislature's intent and desire for a system of concurrent jurisdiction. In drafting sections 2000 and 2001, the Legislature envisioned a situation where a plaintiff may bring a case concerning a water rights dispute in superior court first.⁹² The very existence of sections 2000 and 2001 "necessarily imply" that the trial court shares concurrent jurisdiction in water rights matters.⁹³ The referee provisions represent the Legislature's way of reconciling board expertise and judicial precedent.⁹⁴ Because the Water Code allows judges to defer to the agency in certain situations, it highlights the Legislature's respect for the SWRCB's technical expertise on water-related matters while also reserving discretion to judges on a case-by-case basis.⁹⁵

The Court in *National Audubon* took its analysis a step further. Not only did a majority of the justices infer concurrent jurisdiction based on the structure of the Water Code itself, but they also rejected the state Attorney General's argument that the Water Board should have exclusive jurisdiction over cases attacking water rights granted by the Board.⁹⁶ In a footnote, the Court stated their belief that the proposed rule "would not significantly improve the fairness or efficiency of the process."⁹⁷ In contrast, a broader rule granting exclusive original jurisdiction to the agency would prevent the case-by-case analysis required for applying a specific exception and promote efficiency in the judicial process.

The referee provisions in the Water Code have not been amended post-*National Audubon*, so the State Legislature has yet to give an opinion on the case's holding of concurrent jurisdiction.⁹⁸ Despite legislative silence—or legislative

92. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 731–32 (Cal. 1983).

93. *Id.* See also Ronald B. Robie, *Effective Implementation of the Public Trust Doctrine*, 45 U.C. DAVIS L. REV. 1155, 1173 n.99 (2012).

94. *Nat'l Audubon*, 658 P.2d at 731–32.

95. *Id.*

96. *Id.* at 732 n.33.

97. *Id.*

98. Legislative silence after a court's interpretation of a statute "at most . . . gives rise to an arguable inference of acquiescence or passive approval." JOHN BOURDEAU &

acquiescence—on the matter, the California Legislature should amend the Water Code to overrule *National Audubon* with an express finding that concurrent jurisdiction is ineffective and inefficient given drought conditions and climate change.

B. Invoking the Doctrine of Primary Jurisdiction as an Alternative Solution

In the alternative, if the California Legislature declines to amend the state Water Code, the courts may still refuse to exercise concurrent jurisdiction over water rights cases by other means. Specifically, the courts may refuse to hear a case and require litigants to go through the administrative agency’s adjudicative process first. This doctrine is known as primary jurisdiction.⁹⁹

The roots of primary jurisdiction trace back to the United States Supreme Court case *Texas & Pacific Railway Company v. Abilene Cotton Oil Company*,¹⁰⁰ where the high bench held that shippers challenging rates and tariffs must seek redress from the Interstate Commerce Commission—in other words, the relevant agency—before the court can decide the issue.¹⁰¹ Commonly invoked in federal courts, the doctrine is one of “judicial administration that provides guidance regarding whether a court should allow an agency an initial opportunity to decide an issue in a case over which the court and the agency have concurrent jurisdiction.”¹⁰² California courts have recognized its existence in state law¹⁰³ and have applied it in a

ALAN J. JACOBS, 58 CAL. JURISPRUDENCE, STATUTES § 124 (3d ed. 2017). “Legislative action is a slim reed on which to lean.” *Id.*; *but cf. id.* § 100 (“If the legislature fails to change the law in a particular respect when it passes an amendment, it is presumed that the legislature wanted to leave the law as it stands.”).

99. The State Water Resources Control Board has actually utilized this argument (as an alternative to their argument distinguishing *National Audubon*) in recent cases. *See Order After Hearing on Sept. 22, 2015 at 3, California Water Curtailment Cases*, No. 1-15-CV-285182 (Cal. Super. Ct. Sept. 24, 2015).

100. *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

101. *Id.* at 448.

102. SCHWING, *supra* note 47, § 8:1.

103. *Farmers Ins. Exch. v. Superior Court*, 826 P.2d 730, 732 (Cal. 1992) (“We conclude that in the absence of legislation clearly addressing whether a court may exercise discretion under the primary jurisdiction doctrine, a court may exercise such discretion and may decline to hear a suit until the administrative process has been invoked and completed.”). SCHWING, *supra* note 47, § 8:1 (“Although discussed in only a very few state cases, California recognizes the doctrine of primary jurisdiction as an

handful of cases involving state agencies.¹⁰⁴ First established in California in *Farmers Insurance Exchange v. Superior Court*,¹⁰⁵ the primary jurisdiction doctrine “advances two related policies: it enhances court decision-making and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws.”¹⁰⁶ Through this legal theory, courts have the discretion to decline hearing a case until the administrative process is finished.¹⁰⁷

However, courts may shy away from invoking the doctrine of primary jurisdiction because of remarks made in *National Audubon*. Speaking for the majority, Justice Broussard explicitly contemplated overruling *EDF II* and granting the Water Board with exclusive primary jurisdiction, but ultimately declined to do so, noting that “the Legislature has chosen an alternative means of reconciling board expertise and judicial precedent” by enacting the referee provisions in the Water Code.¹⁰⁸ Justice Broussard’s words stand as a strong endorsement of concurrent jurisdiction and the court’s clear deference to the Legislature. Because of this opinion, principles of stare decisis may drive the lower courts to preserve *National Audubon* and reject primary jurisdiction.¹⁰⁹

Stare decisis exists to promote stability and predictability in the law, and to allow individuals to adjust their behavior accordingly.¹¹⁰ On the other hand, the California Supreme Court recognizes that stare decisis is a “flexible” doctrine that “permits [it] to reconsider, and ultimately depart from, [its]

affirmative defense, providing a basis for deferring judicial review of a controversy until it has first been presented to the administrative body possessing special regulatory power in respect to such matters.”).

104. SCHWING, *supra* note 47, § 8:1 (“Although discussed in only a very few state cases, California recognizes the doctrine of primary jurisdiction as an affirmative defense, providing a basis for deferring judicial review of a controversy until it has first been presented to the administrative body possessing special regulatory power in respect to such matters.”).

105. 826 P.2d 730 (Cal. 1992).

106. *Id.* at 739.

107. *Id.*

108. Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 731 (Cal. 1983).

109. *See* Auto Equity Sales, Inc. v. Superior Court of Santa Clara County, 369 P.2d 937, 939–40 (Cal. 1962).

110. *See* Moradi-Shalal v. Fireman’s Fund Ins. Co., 758 P.2d 58, 62–63 (Cal. 1988).

own prior precedent in an appropriate case.”¹¹¹ A “reexamination of precedent may become necessary when subsequent developments indicate an earlier decision was unsound, or has become ripe for reconsideration.”¹¹² Decades later, *National Audubon* merits review. In light of the changed historical circumstances (such as population increases and more severe drought conditions due to climate change), the state’s highest court should find that the rule of concurrent jurisdiction no longer suits the needs of litigants and overrule *National Audubon*’s secondary holding.

The judiciary only creates new rules of law when deciding legal disputes.¹¹³ In order to effectively overrule *National Audubon*, the “perfect case”—that is, a case presenting compelling factual circumstances and legal issues related to water diversions—must arrive at the California Supreme Court’s docket. It may take years for the right case to reach the California Supreme Court, if at all.¹¹⁴ Because of the underlying requirement for litigation, judicial activism may not be the best solution to the problems associated with concurrent jurisdiction. Legislative action may be more expedient and more efficient.

V. CONCLUSION

National Audubon is a foundational case on the public trust doctrine and its relationship to California’s water rights system. This holding often overshadows the case’s secondary principle that the judicial courts share concurrent jurisdiction with the SWRCB over water rights disputes. *National Audubon*’s secondary holding has risen to greater prominence due to California’s 2012 Drought—one of the most serious droughts in the state’s history.¹¹⁵ Scrambling for limited

111. *Id.* at 63.

112. *Id.*

113. See CAL. CONST. art. VI, § 1; *People v. Bunn*, 37 P.3d 380 (Cal. 2002) (“Quite distinct from the broad power to pass laws is the essential power of the judiciary to resolve ‘specific controversies’ between parties.”).

114. Except in death penalty cases, the California Supreme Court grants review in cases as a matter of discretion. THE SUPREME COURT OF CALIFORNIA 19 (7th ed. 2016), http://www.courts.ca.gov/documents/The_Supreme_Court_of_California_Booklet.pdf. The high court receives more than 10,000 petitions for review every year, and grants review in five percent or less of those cases. *Id.* at 21.

115. See Ingram & Malamud-Roam, *supra* note 4; Randall, *supra* note 4.

resources, plaintiffs have cited *National Audubon* to bring the SWRCB into court. The rush of litigants has led to confusion about the application of *National Audubon* and puts the administrative state at risk.

California rang in 2017 with heavy storms, leading to the partial replenishment of the Sierra Nevada snowpack, which is vital to the state's water resources.¹¹⁶ Governor Jerry Brown formally lifted the drought state of emergency,¹¹⁷ but some experts predict that California's water supply problems will come and go due to the cyclical nature of droughts and climate change.¹¹⁸ Furthermore, years of drought have depleted the state's groundwater reserves, which provide a critical source of water.¹¹⁹ California's water woes are far from over.

The 2012 Drought has transformed the culture in the state and the way people approach water.¹²⁰ Using this momentum, Californians should act to clarify the state's rules regarding water disputes. Specifically, the legislature should amend the Water Code to reflect post-*National Audubon* circumstances. As opposed to *National Audubon's* grant of concurrent jurisdiction, the legislature should require all private parties to undergo proceedings before the SWRCB and exhaust their administrative remedies. For plaintiffs suing the SWRCB itself, both the legislature and judiciary should stress that *National Audubon* does not apply at all. Providing clarity in

116. See Lindsey Hoshaw, *California Drought Retreats During Winter Rain Storm*, KQED: SCI. (Jan. 19, 2017), <https://ww2.kqed.org/science/2017/01/19/california-drought-retreats-during-winter-rain-storms/>; Adam Nagourney, *When is a Drought Over? A Wet California Wants to Know*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/us/california-drought-snowpack.html>.

117. See Apr. 2017 Press Release, *supra* note 3.

118. See Henry Fountain, *In California, A Wet Era May Be Ending*, N.Y. TIMES (Apr. 13, 2015), <https://www.nytimes.com/2015/04/14/science/californias-history-of-drought-repeats.html>; Doyle Rice, *California's 100-Year Drought*, USA TODAY (Sept. 2, 2014, 4:52 PM), <http://www.usatoday.com/story/weather/2014/09/02/california-megadrought/14446195/>; Jeremy Miller, *California's Drought may be Over, but its Water Troubles Aren't*, THE NEW YORKER (Mar. 21, 2017), <http://www.newyorker.com/tech/elements/californias-drought-may-be-over-but-its-water-troubles-arent>.

119. Miller, *supra* note 118.

120. See Adam Nagourney et al., *California Drought Tests History of Endless Growth*, L.A. TIMES (Apr. 4, 2015), <https://www.nytimes.com/2015/04/05/us/california-drought-tests-history-of-endless-growth.html>; Cheryl Katz, *They've Seen Lots of Droughts, but This One's Different*, NAT'L GEOGRAPHIC (July 6, 2015), <http://news.nationalgeographic.com/2015/07/150706-drought-california-water-conservation-environment/>.

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this area of water rights will allow for more efficient and effective adjudication of disputes.