COMMENTS

Administrative Water Rights Inspections In California

The ability to enter private property for the purpose of conducting water rights inspections is essential to the proper administration of California's water rights scheme. Without it, the State Water Resources Control Board would be unable to perform its statutory duties. This article discusses the Board's ability to investigate an appropriator's water diversion system when the appropriator will not consent to an administrative search. It also proposes legislation clarifying the nature and extent of the Board's power.

The legislature designed California's water law system to recognize existing water rights and to allocate the remaining water in the most efficient manner. The responsibility for administering this prior appropriation system rests with the State Water Resources Control Board (Board).[1]

Adequate enforcement of existing water rights requires individual on-site investigations by Board staff members. The investigator usually cannot determine compliance with the amount, use, place, time, and manner terms of a permit or license without physical measurement. The Board, however, currently uses informal aerial surveillance to obtain its enforcement information. This information is used to prevent illegal diversions,[2] discourage waste and unreasonable use,[3] and insure compliance with permit terms and licensing conditions.[4]

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[1] "The Legislature . . . finds . . . that in order to provide for . . . efficient administration of the water resources of the state it is necessary to establish a control board which shall exercise the adjudicatory and regulatory functions of the state in the field of water resources." CAL. WATER CODE § 174 (West 1971).

A history of the Board and its predecessors is found in Craig, CALIFORNIA WATER LAW IN PERSPECTIVE, in 68 West's Annotated California Codes at LXV-CVII (1971).

[2] CAL. WATER CODE § 1052 (West 1971).

[3] CAL. CONST. art. 10, § 2 (formerly CAL. CONST. art. 14, § 3); CAL. WATER CODE § 100 (West 1971).

[4] CAL. WATER CODE §§ 1240, 1241, 1410, 1675 (West 1971 & Cum. Supp. 1978).

The Board's Division of Water Rights receives a high level of voluntary cooperation in its information gathering from most water rights holders.[5] A problem arises, however, when water rights holders deny Board inspectors access to their private property. In many areas of California today, water demand exceeds water supply, and many of California's rivers and streams are totally appropriated or used.[6] Compliance with the diversion and use terms of a permit or license is essential because noncompliance will result in downstream appropriators and riparian users being denied their full entitlement.[7]

This article explores the Board's ability to investigate when appropriators will not consent to an administrative search of their water diversion systems. This refusal raises several questions regarding the legality of any subsequent Board entry upon private property. The major issues involved are: (1) whether the Board has the power to enter and make nonconsensual water rights inspections, (2) whether the Board can make these inspections without an administrative inspection warrant, and (3) whether the Board has the authority under the California Code of Civil Procedure to obtain an inspection warrant if one is required. This article attempts to resolve these questions in the affirmative and proposes legislation to clarify the matter.

Although California courts have yet to address any of these questions, they cannot avoid dealing with them in the near future. The problems will become more acute as competition for water increases and compliance with permit or license terms decreases. This will occur with the appropriation of the last of California's free-flowing waters and in times of drought.

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[5] During California's 1976-77 drought, the Water Board Division's Dry Year Team made 280 visits along the Sacramento River and 86 visits along the Delta uplands. A letter from the Division requesting permission to enter the land preceded each of these visits. Six landowners denied the Division staff members permission to enter their property. Memorandum, Harrison C. Dunning, Staff Director of the Governor's Commission to Review Water Rights Law to William Attwater, Chief Counsel, State Water Resources Control Board (March 23, 1978).

[6] California State Water Resources Control Board, Policy and Action Plan for Water Reclamation in California 7 (1977); California Department of Water Resources, Water Conditions in California 5 (Report No. 4, 1977).

[7] Although every denial of entry to Board investigators is not an admission that a violation is occurring, there is a strong inference of a violation. Also, as in any highly regulated allocation system, the inability to inspect and enforce uniformly can lead to inefficiency or the complete collapse of the system.

I. The California Appropriative Water Rights System

Although California recognizes both riparian and appropriative water rights, this article deals exclusively with the appropriative rights system.[8] The following discussion is a general outline of the legal mechanics of appropriative water use in California.[9] Understanding the mechanism is a prerequisite to understanding the reasons why the Board must have the power to conduct on-site water rights inspections.

An appropriative right is the right to take water and use it beneficially.[10] Unlike a riparian right, it is not contingent upon ownership or proximity of the user's land to the water source.[11] People may acquire an appropriative right in surface and subterranean streams and may lose it by nonuse.[12] Three methods of appropriation were present during the development of the system. At common law, simply claiming the right to a certain amount of water established an appropriation.[13] In 1872, the Civil Code replaced the common law with a system for water appropriation.[14] Finally, the Water Commission Act of 1914 created the current system of statutory appropriations.[15] The salient features of this system include procedures for application, public notice, and standards for permit issuance and licensing.[16] This act pro-

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[8] Much of the legal protection of water rights currently available in California originated during the gold rush. Early miners and immigrants to California formed communities and applied their own standards of fairness in apportioning the limited available water. Those standards, often defined as "first come, first served," formed the foundation of California's present prior appropriation system. *See* W. Hutchins, The California Law of Water Rights 41-43 (1956).

The prior appropriation/permit system is not the only water rights system in California. Many individuals and entities hold rights to surface water which are recognized as riparian or "pueblo" in nature and not subject to the permit process. For detailed information regarding the various categories of water rights recognized in California, *see generally* H. Rogers and A. Nichols, Water For California §§ 146-336 (1967).

[9] A similar discussion appears in Comment, *The Legal Aspects of Appropriative Water Rights Transfers in California*, 11 U.C. Davis L. Rev. 439, 443-446 (1978). It is paraphrased herein with the permission of the authors.

[10] W. Hutchins, *supra* note 8, at 40.

[11] *Id.*

[12] Craig, *supra* note 1, at LXX.

[13] W. Hutchins, *supra* note 8, at 41.

[14] Act of March 27, 1872, 1871-1872 Cal. Stats. 622.

[15] C. 586, 1913 Cal. Stats. 1012, codified in Cal. Water Code §§ 1-150010 (West 1971 and Cum. Supp 1978) (originally enacted as Act of May 13, 1943, ch. 368, 1943 Cal. Stats. 1640).

[16] Cal. Water Code §§ 1225, 1260, 1300, 1317, 1324, 1375, 1450, 1600, 1605-1610.5, 1675 (West 1971).

vided the exclusive method of obtaining an appropriative right after 1914.

Under the present system, people who want to use surface or subterranean waters in identifiable channels must apply for a permit from the Board.[17] The permit application requires the applicant to provide information on the point of diversion from the water source and the place and type of use.[18] The application date establishes the appropriator's priority of water use as to other appropriators. Upon compliance with Board regulations, the applicant's priority continues until the Board reaches a final decision regarding the application.[19]

After the filing of an application, the Board must determine the availability of unappropriated water. Unappropriated water is water flowing in any natural stream which is not already subject to reasonable and beneficial appropriative claims or riparian rights.[20] The four categories of water which the Board may declare unappropriated and available for distribution are: (1) water never appropriated, (2) water appropriated prior to 1914 not currently used for a beneficial purpose, (3) water appropriated after 1914 not used in a reasonable or beneficial manner, and (4) appropriated water which flows back into a body of water and is available for reuse.[21]

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[17] *Id.* §§ 1200, 1201, 1225. All underground water not flowing in a definite stream or channel is not subject to the provisions of the Water Code.

[18] *Id.* § 1260. All applications must comply with the California Environmental Quality Act. CAL. PUB. RES. CODE §§ 21000-21003 (West 1977).

[19] CAL. WATER CODE § 1450 (West 1971). A defect in the application does not extinguish an applicant's priority if one has made a good faith attempt to comply and cure the defect within sixty days of notice. *Id.* § 1270. Riparian users, pre-1914 right holders, and municipalities with pueblo rights are exempt from permit application requirements. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, APPROPRIATIVE RIGHTS IN CALIFORNIA 17 (Staff Paper No. 1, May 1977). The acquisition of prescriptive rights without compliance with the statutory permit procedure remains unsettled. *See generally* Kletzing, *Prescriptive Water Rights in California: Is Application a Prerequisite?* 39 CALIF. L. REV. 369, 376 (1951); California State Water Resources Control Board, Information Pertaining to Water Rights in California 5 (1976).

[20] CAL. WATER CODE §§ 1201-1202 (West 1971).

[21] *Id.* § 1202. The Board may conduct topographic surveys of water above and below ground to determine what water is available for distribution. *Id.* §§ 225, 226.

Upon filing of a permit application, public notice is necessary. *Id.* § 1300. Any member of the public may protest an application. *Id.* § 1330. The Board conducts investigations and hearings in response to protests. *Id.* § 183 (West Cum. Supp. 1978). The Board's decision is reviewable on petition for a writ of mandate. *Id.* § 1360.

After receiving a permit, the holder has a conditional right to appropriate water.[22] The permittee must act diligently to use water in a beneficial manner[23] and must comply with any conditions the Board imposes to protect the public interest.[24] A permittee must seek the Board's approval for any change in place of use, diversion, or purpose.[25]

Since a permit does not confer an absolute right to water use, appropriators must obtain a license from the Board in order to perfect their right. Permittees become eligible for licenses once they use their water beneficially.[26] Like a permit, the continued validity of a license depends upon continued reasonable and beneficial use,[27] as mandated by the California Constitution.[28]

The requirement of reasonable beneficial use applies to appropriative rights acquired both before[29] and after[30] 1914. Reasonable beneficial use is thus the standard by which an appropriative right is measured.[31] As such, the Board must be able to conduct administrative inspections of water diversion systems in order to

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[22] *Id.* §§ 1381, 1382.

[23] *Id.* § 1396. Merely filing a notice without constructing diversion works for use of the water does not result in an appropriation. Cardoza v. Calkins, 117 Cal. 106, 112-113, 48 P. 1010, 1012 (1897). Similarly, prior construction of a ditch and water diversion does not give priority without actual appropriation or intention to appropriate followed by due diligence. Maeris v. Bicknell, 7 Cal. 261, 263 (1857).

[24] The Board may reserve jurisdiction to change permit conditions if imposition of appropriate terms requires continued project observations or if the project is one of a series which require individual permits under simultaneous Board consideration. CAL. WATER CODE § 1394 (West 1971).

[25] *Id.* §§ 1700-1706.

[26] *Id.* §§ 1600 The Board conducts confirmatory investigations to ensure compliance with the entitlement requirements. *Id.* §§ 1605-1610.

[27] The license remains in effect so long as the water is applied to useful and beneficial purposes. *Id.* § 1627. The permittee has a right to notice and an opportunity to protest if the Board alters the permit terms or the amount of water granted when it issues the license. *Id.* § 1675 (West Cum. Supp. 1978). A change in the type of use or location of use requires Board approval and public notice. *Id.* §§ 1700-1702. As of 1965, all persons diverting water in the state are required to file a "Statement of Use and Diversion" with the Water Board. *Id.* § 5101 (West Cum. Supp. 1978).

[28] CAL. CONST. art. 10, § 2.

[29] CAL. WATER CODE § 1240 (West 1971). *See generally* W. HUTCHINS, *supra* note 8, at 292-97; Peabody v. City of Vallejo, 2 Cal. 2d 351, 368-69, 40 P.2d 486, 492 (1935).

[30] Modesto Properties Co. v. State Water Rights Bd., 179 Cal. App. 2d 856, 4 Cal. Rptr. 226 (3d Dist. 1960).

[31] Peabody v. City of Vallejo, 2 Cal. 2d 351, 368-69, 381, 40 P.2d 486, 492 (1935).

ensure that the right holders are complying with the terms and conditions of their entitlements.

II. The Board's Power to Enter Private Property to Conduct Water Rights Inspections

This article proposes that the State Water Resources Control Board has either an expressed or implied power to enter private property to conduct water rights inspections. The Board's recent inclusion of an inspection authorization clause in appropriation permits and licenses is the source of its express power. General principles of administrative law support the Board's implied power. Although the implied power of entry for purposes of inspection has not yet received judicial approval, the Board should have such a power for reasons of administrative convenience and practical necessity.

A. Express Power of Entry

The Board has the clear, express power of entry onto the land of some appropriators. The legislature has authorized the Board to include terms and conditions in its water rights entitlement.[32] The terms of many appropriation licenses authorize the Board's agents to inspect water diversion systems located on private property for water rights violations.[33] A water rights holder with such a condition has consented to an administrative search of those areas affected by the entitlement.[34] The majority of recent licenses issued by the Board contain the following inspection authorization provision:

> Licensee shall allow representatives of the Board and other parties, as may be authorized from time to time by the Board, reasonable access to project works to determine compliance with the terms of this license.[35]

Unfortunately, not all of the permits and licenses outstanding, contain this provision.[36] As a result, these holders retain more

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[32] Cal. Water Code §§ 1391, 1626 (West 1971).

[33] This is a waiver. The courts will enforce it when the public has a special interest in the subject matter. *See* Colonnade Catering Corp. v. United States, 410 F.2d 197, 203 (2d Cir. 1969).

[34] *See generally* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[35] Similar language is found in the majority of Board issued permits. Memorandum, Dunning to Attwater, note 5, *supra*.

[36] The Board has included this condition in its entitlements since the mid-1960's. *Id.* The Board believes it already has this power and views its inclusion as a precaution, an attempt to clarify any ambiguity that might exist. It is

privacy rights. In these cases, the delay inherent in determining the nature and extent of the Board's investigatory powers further complicates administrative enforcement of the Water Code.

B. Implied Power of Entry

An implied power of entry results from general principles of administrative law. Admittedly, no provision in the Water Code expressly authorizes Board agents *to enter private property* for investigation purposes. The Water Code's general statutory scheme, however, supports the position that the Board has the power.

The Water Code authorizes the Board to conduct investigations of California's water resources to secure information necessary to process applications for water rights.[37] This pre-entitlement investigation also affects licensed appropriators. Knowing the amount, use, place, time, and manner of current appropriations is necessary in determining whether there is unappropriated water available for future appropriation. The Water Code also grants the Board the authority to conduct any investigations in any part of the state necessary to carry out its vested powers.[38] Finally, California's Water Code gives the Board authority to investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water.[39]

The Board may exercise such additional powers as are necessary for the efficient administration of powers expressly granted by the statutory scheme.[40] Thus, the courts can imply the existence of the Board's ability to enter private property and investigate as a necessary incident to its general grant of administrative powers.[41] Courts will not infer this power, however, unless it is indispensable to the Board's mandate.[42]

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important to note that the Board includes many conditions in its permits and licenses that are already mandated by the Water Code, such as the inclusion of the reasonable beneficial use requirement.

[37] CAL. WATER CODE § 1251 (West 1971).

[38] CAL. WATER CODE § 183 (West Cum. Supp. 1978).

[39] CAL. WATER CODE § 1051(a) (West 1971).

[40] *See generally* Dickey v. Raisin Proration Zone No. 1, 24 Cal. 2d 796, 810, 151 P.2d 505, 513 (1944).

[41] *See generally* Hill v. Brisbane, 66 Cal. App. 2d 15, 21, 151 P.2d 578, 582 (3rd Dist. 1944); Laurelle v. Bush, 17 Cal. App. 409, 415-416, 119 P. 953, 956 (1st Dist. 1911).

[42] *See generally* Berkeley Chiropractic College v. Compton, 97 Cal. App. 790, 276 P. 361 (1st Dist. 1929).

Under the doctrine of implied powers, a power must be essential to the de-

The power to inspect water diversion systems located on private property for water rights violations is essential to the proper administration of the state's water rights scheme. To interpret otherwise would physically limit the Board's inspection abilities to those water diversion systems accessible to state inspection through public access, i.e. those systems that are on navigable rivers or which abut public property.[43] Because most water diversion systems cannot be observed without entry, the Board will be unable to perform its statutory duties unless it can enter private property.[44]

The Board can imply the power of entry for water rights inspection as a right correlative to the Board's express power to make water *quality* inspection.[45] The Porter-Cologne Act[46] authorizes the Board, through the Regional Water Quality Control Boards, to conduct water quality investigations. The Act allows regional boards to inspect any facility for compliance with waste discharge requirements and to make such inspections with or without the consent of the owner. The regional boards may obtain a search warrant if a landowner refuses to consent to a water quality inspection. In case of emergencies affecting public health or safety, they may inspect even without a warrant.[47]

Thus, a Board agent could conduct a water quality inspection and a water rights inspection simultaneously. This is compatible with the express legislative intent, when creating the State Water

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clared objects and purposes of the enabling act, not simply convenient, but indispensable. Any reasonable doubt concerning the existence of the power is to be resolved against the agency. *See* Harden v. Superior Court, 44 Cal 2d 630, 641, 284 P.2d 9, 15 (1955).

[43] Such a construction violates the axiom that one should construe a statute with a view toward promoting rather than defeating its general purposes and the policy behind it. Eaton v. State Water Rights Bd., 171 Cal. App. 2d 409, 415, 340 P.2d 722, 726 (2nd Dist. 1959). In *Eaton,* the court examined the California Water Code and found that the revocation provision, to be fully effective, must be the sole procedure for terminating a permit. *Id.*

[44] If it could not determine the amount, use, time and manner of a water diversion, the Board would be unable to do any of the following: insure maximum beneficial use of the state's water resources, CAL. WATER CODE § 100 (West 1971); determine what waters of the state can be converted to public use, *Id.* § 104; perform necessary actions in processing a permit application, *Id.* § 1250; revoke a permit when the water is no longer being beneficially used, CAL. WATER CODE § 1410 (West Cum. Supp. 1978); or obtain facts in many water rights suits, CAL. WATER CODE § 2001 (West 1971).

[45] *Id.* § 13267(c).

[46] Porter-Cologne Water Quality Control Act, CAL. WATER CODE §§ 13000-13806 (West 1971 & Cum. Supp. 1978).

[47] *Id.* § 13267(c).

Resources Control Board, "to combine the water rights . . . and water quality functions of the state government."[48] The Water Code specifically authorizes the consideration of water quality and availability of unappropriated water whenever the Board grants applications for appropriation or establishes waste discharge requirements or water quality objectives.[49] The California Legislature did this in order to provide for the orderly and efficient administration of all aspects of water resources.[50]

The Board could, theoretically, make a water rights investigation whenever a water quality issue is raised on a water course. Appropriators would object to this practice, however, arguing that water rights inspections distant in time and motive from the initial water quality inspection are unreasonable.[51] Because the Board has not yet attempted to justify its water rights inspections as a correlative right to its express power to make water quality inspections, the validity of this argument remains unresolved.

In sum, the Board probably has the power to enter private property for the purpose of conducting water rights inspections. Uncertainty exists, however, due to the lack of explicit legislation authorizing the power of entry to conduct water rights inspections.

III. The Board's Power to Enter Private Property Without an Inspection Warrant

In deciding whether an inspection or search can be made without a warrant, the issue is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant.[52] If the Board can inspect private water diversion systems without a warrant the terms and timing of the inspection may be left to the discretion of the agent in the field. The United States Supreme Court has consistently limited this "discretion to invade private property" by requiring

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[48] *Id.* § 174.

[49] *Id.*

[50] *Id.*

[51] The inclusion of this authority would support the proposition that the legislature did not intend to grant the Board the same authority in the case of water rights inspections. The legislature would have made the power of entry for water rights inspections more specific if it had so intended. The absence of legislative history makes the resolution of the issue difficult.

[52] *See* Currier v. City of Pasadena, 48 Cal. App. 3d 810, 817, 121 Cal. Rptr. 913, 917 (2nd Dist. 1975) (municipal ordinance requiring issuance of certificate of occupancy before a vacated premise may be reoccupied cannot constitutionally be enforced).

disinterested third party approval of the need to search. In other words, the inspecting agent must obtain a search warrant from a court.[53]

A search warrant provides assurances from a neutral officer that the inspection is based upon probable cause, is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.[54] A warrant also advises the landowner of the limits and objects of the search. In deciding whether the authority to search should be evidenced by a warrant, the major question is whether the search is *reasonable* under the United States and California Constitutions.[55] In resolving this issue, the courts balance the citizen's expectation of privacy against the state's need to search. The warrant procedure thus guarantees that a reasonable governmental interest justifies a decision to search private property.[56]

Generally, warrantless searches of private property and commercial premises are found unreasonable.[57] In 1967, the Supreme

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[53] *See* Camara v. Municipal Court, 387 U.S. 523, 532-533 (1967).

[54] *See* Marshall v. Barlow's, Inc., 98 S.Ct. 1816, 1824-1825 (1978); Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

Whether the Board secures a warrant or other process, its power to inspect will not depend on its ability to demonstrate "probable cause" belief that conditions exist on the premises in violation of the statutes or permit/license terms.

> Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' (Citation omitted)

Marshall v. Barlow's, Inc., 98 S.Ct. 1816, 1824 (1978).

[55] The Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV (emphasis added). The California Constitution has an almost identical provision. CAL. CONST. art. 1, § 13 (previously CAL. CONST. art. 1, § 19).

[56] Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

[57] *See* Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967). Prior to 1967, the courts exempted administrative inspection programs when it was shown that the goals of the program could not be achieved within the confines of a reasonable search warrant requirement, specifically when the need for timely or unannounced inspections or the number or

Court in *Camara v. Municipal Court*[58] required search warrants for *all* administrative inspections. The Court has since eased this stringent warrant requirement by recognizing an exception in the search or inspection of heavily regulated activities and continuing to recognize an exception for searches conducted in open fields.

A. Heavily Regulated Activities

The heavily regulated activities exception is limited to industries or activities with such a history of governmental regulation that no reasonable expectation of privacy can exist for the proprietor of such enterprises.[59] Examples of court approved *warrantless* searches include unannounced inspections of gun shops in order to enforce the Federal Gun Control Act,[60] and unannounced inspection of catering establishments to enforce federal alcohol and beverage laws.[61]

The element that distinguishes these enterprises from ordinary activities is a long tradition of close governmental supervision.[62]

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routine nature of inspections made procurement of a warrant difficult or impossible. These exceptions recognized the premise that certain searches were inherently reasonable if they involved only a limited invasion of a citizen's privacy. *See e.g.*, Frank v. State of Maryland, 359 U.S. 360, 367 (1959). According to the majority of the Court, municipal fire, health and housing inspections touched, at most, "upon the periphery of the important interests" safeguarded by the Fourth and Fourteenth Amendments' protection against official intrusion.

[58] 387 U.S. 523 (1967); *accord*, See v. City of Seattle, 387 U.S. 541 (1967). The *Camara* case involved a municipal health inspection of a *personal residence* and a city ordinance imposing criminal penalties for failure to allow warrantless entry. The *See* case involved a warrantless fire inspection of *commercial premises*. In the case of water rights, Board inspections do not normally involve entry into personal residences and are not enforceable by imposing criminal penalties.

[59] United States v. Biswell, 406 U.S. 311, 316 (1972); *see* Katz v. United States, 389 U.S. 347, 351-352 (1967).

[60] United States v. Biswell, 406 U.S. 311 (1972).

[61] Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

[62] The United States Supreme Court has, to date, accepted only two kinds of activity as having a "tradition of close governmental supervision" within this exception. They are the manufacture and sale of liquor (Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)) and firearms (United States v. Biswell, 406 U.S. 311 (1972)). The "tradition" of federal supervision of the liquor trade dates back to the Act of March 3, 1791, ch. 15, 1 Stat. 199, §§ 1-62 (1791). Federal supervision and control of firearms distribution dates back to the National Firearms Act of 1934, ch. 757, 48 Stat. 1236, § 1-18 (1934) although, in *Biswell*, the Court was looking only to the terms of the Gun Control Act of 1968, 18 U.S.C. § 921-928 (1976). Governmental regulation, licensing, and taxation evidence the close governmental supervision in these two areas.

As the United States Supreme Court in *Marshall v. Barlow's, Inc.* pointed out in *dicta,* people who engage in these enterprises voluntarily elect to subject themselves to a full arsenal of governmental regulation.[63] Persons who enter into a regulated industry or activity, in effect, consent to the restrictions placed upon them.[64] These restrictions include the supervision by warrantless administrative searches.

Warrantless administrative inspections of water diversion systems by the Board fall within the heavily regulated activities exception outlined above. First, the use of water in California has a history of governmental regulation.[65] Furthermore, people should have only a limited expectation of privacy regarding the control of their water rights. Their appropriative rights are usufructuary in nature, extending only to the reasonable beneficial use of the water and not to ownership of the corpus of the water itself.[66]

Practicality also necessitates the inclusion of water rights inspections within this warrantless inspection exception.[67] For

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The state has clearly regulated and licensed water use in California since 1914. Thus, water rights also have a tradition of close governmental supervision.

[63] 98 S.Ct. 1816 (1978). This suit was brought by an employer to enjoin enforcement of inspection provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976). The District Court held that the Fourth Amendment required a warrant for the type of OSHA search involved and that the statutory authorization for warrantless inspections was unconstitutional. The Secretary of Labor appealed. Barlow's, Inc. v. Usery, 424 F. Supp. 437, 442 (D. Idaho, 1976), *prob. juris. noted,* 97 S.Ct. 1642 (1977). The Supreme Court, speaking through Mr. Justice White, held that the Occupational Safety and Health Act, enpowering the Secretary's agents to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations, was unconstitutional insofar as it purports to authorize inspections without a warrant or its equivalent. Marshall v. Barlow's, Inc. at 1827.

[64] United States v. Biswell, 406 U.S. 311, 316 (1972); noted most recently in Marshall v. Barlow's, Inc., 98 S.Ct. 1816, 1821 (1978).

[65] The regulation of California's water takes many forms: constitutional, statutory, judicial and administrative. *See* notes 8-31 and the accompanying text *supra.*

[66] Craig, *supra* note 1, at LXIX; W. HUTCHINS, *supra* note 8, at 36-38; *cf.* CAL. WATER CODE § 102 (West 1971) which states: "All water within the State is the property of the people of the State, but the *right to the use of water* may be acquired by appropriation in the manner provided by law." (emphasis added). The usufructuary nature of California's water is implicit in the language of this section.

[67] Although this "practicality" argument has been discredited in several cases it is presented here for two reasons. First, administrative agencies continue to raise it in support of warrantless searches. Second, the courts continue to consider and discuss this argument. *See* Marshall v. Barlow's, Inc., 98 S.Ct. 1816,

example, if a Board agent requests permission to inspect the water diversion system of a landowner and permission is denied, the agent, under the general *Camara*[68] mandate, would be required to secure an administrative inspection warrant. The delay inherent in securing such a warrant would enable a violating permittee or licensee to terminate the violation by altering or terminating the diversion before the Board agent could return.[69] As a result, the Board agent would be unable to find a violation in the amount, use, place, time, or manner of the appropriation.

Thus, the heavily regulated activities exception to the Fourth Amendment warrant requirement can provide the basis for the Board to conduct warrantless administrative inspections. These searches, however, must be specifically authorized by a statute.[70] In the context of regulatory inspections, the legality of the search depends not on consent but on the authority of a valid statute.[71] As pointed out earlier, the Board's statutory authority to make inspections exists. However, the Board's authority to make *warrantless* inspections could be clarified by additional legislation.[72]

B. Open Fields Exception

A second exception to the general warrant requirement exists for sights seen in open fields. Under this theory, the Board would have the power to make warrantless inspections of water diversion systems located outside the constitutionally protected area of the landowner. Thus, Board agents could inspect water diversion systems located in a distant field, far from the residence of the water right holder, without a warrant. A long line of cases

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1822 (1978); Camara v. Municipal Court, 387 U.S. 523, 531-533 (1967). Future courts may accept this argument as judicial views of "reasonable" search and seizure change. "Reasonableness" is the ultimate standard. *Id.* at 539. *See also* United States v. Biswell, 406 U.S. 311, 316 (1972).

[68] Camara v. Municipal Court, 387 U.S. 523 (1967).

[69] But when faced with a similar argument in Marshall v. Barlow's, Inc., 98 S.Ct. 1816, 1822 (1978), the Court was "unconvinced . . . that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective." The Court also noted that "the great majority of businessmen can be expected in normal course to consent to inspection without warrant" since no wide-spread pattern of refusal had been brought to the Court's attention. *Id.*

[70] United States v. Biswell, 406 U.S. 311 (1972).

[71] *Id.* at 315.

[72] *See* note 97 and accompanying text *infra.*

beginning with *Hester v. United States*[73] supports this exception to the warrant requirement.

In *Hester,* the United States Supreme Court enunciated the "open fields" doctrine by finding that the Fourth Amendment's warrant requirement and reasonableness test are inapplicable to sights seen in the open field.[74] Since *Hester,* many lower federal courts have used the "open fields" doctrine to uphold the legality of a search or seizure in a criminal context.[75] These decisions, however, contain conflicting definitions of the geographical area covered by the "open fields" exception. Some courts, relying on *Hester,* have declared that the enclosed or unenclosed grounds

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[73] In Hester v. United States, 265 U.S. 57 (1924), officers concealed themselves from 50 to 100 yards from the house of Hester's father. They saw Hester leave the house and hand a bottle to Henderson. When an alarm sounded, Hester and Henderson ran. Hester dropped a jug which broke, and Henderson threw away the bottle. The officers retrieved the jug and bottle, as well as a broken jar that was thrown from the house, and recognized their contents as moonshine. The opinion states:

> It is obvious that even if there had been a trespass, the [officers'] testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned."

Id. at 58. The only grounds for defense raised in the case were that the examination of the jug and the bottle took place upon Hester's father's land. As to that, the court said "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Id.* at 59.

[74] *Id.* at 58-59; *See* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 6.04 (Tent. Draft No. 3, April 24, 1970) which adds:

> The Fourth Amendment speaks of 'persons, houses, papers and effects,' and the rationale of Hester v. United States, 265 U.S. 57 (1924) was that these categories do not extend to 'open fields,' which therefore lie entirely outside the protection of the Fourth Amendment. In the application of this rule, the old word 'curtilage' has been commonly accepted as marking the geographical ambit of the Amendment's coverage.

[75] *See, e.g.,* McDowell v. United States, 383 F.2d 599 (8th Cir. 1967), where items were seized in fields separated from the defendant's farm buildings by a distance of one-fourth to one-half of a mile; Care v. United States 231 F.2d 22 (10th Cir. 1956), *cert. denied,* 351 U.S. 932 (1955), where the search of a cave used as a distillery occurred in a field across a road and more than a block from defendant's home; Koth v. United States, 16 F.2d 59 (9th Cir. 1926) where the search took place upon open premises about one-fourth of a mile from the house. In each case, the court upheld the search and seizure of evidence using the open fields exception.

around houses are not areas protected by the Fourth Amendment and thus, are subject to warrantless searches.[76] Others have extended constitutional protection to the area defined as "curtilage."[77]

The most important case involving an *administrative* inspection under the "open fields" doctrine is *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*[78] In that case, a state health inspector, without a warrant, entered respondent's outdoor premises in the daylight without its knowledge or consent.[79]

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[76] Monnette v. United States, 299 F.2d 847, 850 (5th Cir. 1962), where the examination of a jug left on the ground under a car apparently parked by the porch of a shack belonging to one of the defendants did not violate the Fourth Amendment; Martin v. United States, 155 F.2d 503, 505 (5th Cir. 1946) where the detection of an odor by the porch of defendant's premises did not violate the Fourth Amendment.

Several California decisions have also used this language. *See, e.g.*, People v. Shields, 232 Cal. App. 2d 716, 719, 43 Cal. Rptr. 188, 191 (2nd Dist. 1965) where evidence was found in a fenced rear yard, used as an auto wrecking yard, on the premises where the defendant's house was located; People v. Jackson, 198 Cal. App. 2d 698, 701-702, 18 Cal. Rptr. 214, 217 (2nd Dist. 1961). *But see, e.g.*, People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).

[77] "Curtilage" includes the ground and buildings immediately surrounding a dwelling. "Generally speaking, curtilage has been held to include all buildings in close proximity to a dwelling, which are continually used for carrying on domestic employment; or such place as is necessary and convenient to a dwelling, and is habitually used for family purposes . . . ." (Citations omitted) Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968). *See* McDowell v. United States, 383 F.2d 599, 603 (8th Cir. 1967) where the court noted that, although the Supreme Court had recently expanded the Fourth Amendment protection of business enterprises in See v. City of Seattle, 387 U.S. 541 (1967), "it has not expanded such protection beyond that which a private dwelling and the curtilage thereof is likelise [sic] entitled"; Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966); United States v. Potts, 297 F.2d 68 (6th Cir. 1961); *Accord*, United States v. Cain, 454 F.2d 1285, 1287 (7th Cir. 1972); *See* United States v. Sorce, 325 F.2d 84, *rehearing denied* (7th Cir. 1963), *cert. denied*, 376 U.S. 931 (1964).

[78] 416 U.S. 861 (1974); noted with approval in Marshall v. Barlow's, Inc., 98 S.Ct. 1816, 1821-1822, n.9, (1978).

[79] Air Pollution Variance Board of Colorado v. Western Alfalfa Corp., 416 U.S. 861, 864-65 (1974). The inspector entered the yard to make a Ringelmann test of plumes of smoke being emitted from respondent's chimneys. The EPA regulation for conducting an opacity test requires the inspector to stand at a distance equivalent to approximately two stack heights away but not more than a quarter of a mile from the base of the stack. The sun must be at the inspector's back, and the inspector's vantage point must be perpendicular to the plume.

This is analogous to simple Board visual inspections to determine whether water is actually being used or diverted at the diversion system. Many water users are limited to intermittent or temporary usage and would be in violation

The sole question was whether the agent had violated Fourth Amendment protections in making the inspection. A unanimous United States Supreme Court found no violation. The Court reaffirmed the general rule that warrantless administrative inspections of homes and businesses are impermissable.[80] The Court, however, found this case to be an "open fields" exception, noting that:

> The field inspector did not enter the plant or offices. He was not inspecting stacks, boilers, scrubbers, flues, grates, or furnaces; nor was his inspection related to respondent's files or papers. He had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke.[81]

Since the inspection of "open fields" without a search warrant can be constitutionally reasonable and since most water rights diversion systems are in "open fields" or otherwise outside the curtilage, the Board can generally make these inspections without a warrant. Whether the searched area is within the protected curtilage or within the unprotected "open fields" is a question of fact to be determined on a case-by-case basis.[82] Guidelines to aid the Board's inspectors in deciding this question do not formally exist.

The Board inspector should consider several factors when determining the applicability of the open fields exception. These include the proximity of the water diversion system to the residential dwelling, location within a general enclosure surrounding the dwelling, and use as an adjunct to the domestic economy of the family.[83] The Board will have no problem complying with this warrant exception where the water diversion system is unrelated to any domestic dwelling or is far removed in distant agricultural fields.

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of their water use permit or license terms if found to be making an unscheduled or full-time use.

[80] Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

[81] Air Pollution Variance Board of Colorado v. Western Alfalfa Corp., 416 U.S. 861, 864-865 (1974) (footnote omitted). The Court cited with approval, the holding in Hester v. United States, 265 U.S. 57 (1924).

[82] Care v. United States, 231 F.2d 22, 25 (10th Cir. 1956), *cert. denied,* 351 U.S. 932 (1955).

[83] *Id.*

IV. The Board's Ability to Obtain an Inspection Warrant Under the California Code of Civil Procedure if One is Required

In 1968, the California Legislature responded to the United States Supreme Court's limitations on warrantless administrative inspections and searches[84] by establishing a specific procedure for the issuance and control of "inspection warrants."[85] These warrants are available for any authorized administrative inspection relating to buildings, fire, safety, plumbing, electrical, health, or zoning.[86]

Although the California statute does not explicitly list water rights inspections conducted by the Board as activities for which a warrant can issue, these inspections do involve the "health" and "safety" of California's citizens and thus fall within the statute's purview. The Board conducts water quality inspections to maintain healthy drinking water for human consumption. It also conducts water rights inspections to assure compliance with water quantity limitations[87] in order to provide an adequate water supply for drinking, sanitation, irrigation, and fire fighting purposes. These activities have both "health" and "safety" aspects.

Additionally, the California Legislature probably intended to make inspection warrants available to all governmental officials making administrative inspections which promote the health, safety, or welfare of California's citizens—the areas of regulation traditionally recognized as within the state's police power.[88] The

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[84] Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

[85] Cal. Code Civ. Proc. §§ 1822.50-.57 (West 1972). California has actually two independent statutory warrant provisions. Cal. Penal Code §§ 1523-1542 (West 1970) defines and establishes "search warrant" procedures which are applicable only to searches for, and seizures of, *personal* property. Cal. Code Civ. Proc. §§ 1822.50-.57 (West 1972) provide for inspection warrants to aid in *administrative* inspections conducted under state or local laws or regulations.

[86] Cal. Code Civ. Proc. § 1822.50 (West 1972). An "inspection warrant" is defined as, an order in writing, in the name of the people, signed by a judge of a court of record, directed to a state or local official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, *safety,* plumbing, electrical, *health,* or zoning. *Id.*

[87] Compliance with the water quantity limitations of a permit or license is a major area examined in any "water rights" inspection. *See* Cal. Water Code §§ 1381, 1397, 1410, 1605, 1611, 1675 (West 1971).

[88] "[The police] power extends to legislation enacted to promote the public health, safety, morals, and general welfare." State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc., 40 Cal. 2d 436, 440, 254 P.2d 29, 31 (1953); *See* Talley v. Northern San Diego County Hospital Dist., 41 Cal. 2d 33, 40, 257 P.2d 22, 26 (1953).

areas of inspection having access to the inspection warrant procedure (building, fire, safety, plumbing, electrical, health and zoning)[89] are the commonly accepted areas of police power exercise.[90] Activities of the State Water Resources Control Board, however, are also an acceptable exercise of the state's police power and are for the welfare and benefit of the people of the state.[91] The California Supreme Court in *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* provided policy support for this conclusion by noting that the protection and conservation of the natural resources of the state constitute a reasonable exercise of the police power.[92]

The Board can make water diversion system inspections conform to the constitutional and statutorily required procedures for inspection warrants (if one is needed). An affidavit can describe the site of the diversion system and the purpose of the search.[93] Reasonable administrative standards for conducting a routine inspection are available[94] and already published in the "Surveillance and Enforcement Manual."[95] In sum, the Board can easily comply with all the inspection warrant procedures that guard against the abuse of landowners' constitutionally protected rights.

V. Conclusion and Recommendation for Legislation

The California State Water Resources Control Board has sole responsibility for administering the state's water rights system. To fulfill this role, the Board must be able to gather all available information on current water usage. Current methods provide inadequate information.[96] On-site investigation of water diversion

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[89] Cal. Code Civ. Proc. § 1822.50 (West 1972).

[90] Regulations to ensure adequate lilht, ventilation, sanitation and fire safety are all valid exercises of the police power in regulating the manner of building construction and safeguarding the health of building occupants. *See* Matter of Stoltenberg, 165 Cal. 189, 134 P. 971 (1913). Zoning regulations are an exercise of the police power. *See* Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 303 (1929); *See also* Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925).

[91] Cal. Water Code § 1050 (West 1971).

[92] 3 Cal. 2d 489, 529; 45 P.2d 972, 988 (1935), *rehearing denied,* 3 Cal. 2d 489, 583, 45 P.2d 972, 1014 (1935).

[93] Cal. Code Civ. Proc. § 1822.51 (West 1972).

[94] *Id.* § 1822.52.

[95] This manual is an unofficial publication, published by the Board on April 1, 1974.

[96] Informal aerial investigations and consensual on-site ground inspections are the methods used currently. Aerial surveillance alone can provide only supplemental information. Adequate enforcement of existing water rights requires

systems is a more effective means of determining what quantities of water are actually used and whether such usage complies with various permit and license terms.

California's Water Code is silent on the manner in which the Board can conduct its investigating activities. Whether the Board has the power to make nonconsensual water rights inspections without an administrative inspection warrant and, if one is needed, whether the Board has the ability to obtain a warrant under the current California Code of Civil Procedure are important questions that must be answered definitively in the near future.

As this article points out, the arguments that support the Board's right to enter private property for water rights inspections are persuasive. Additionally, the Board should be able to make these nonconsensual inspections without an inspection warrant. If a warrant is required, however, the Board should be able to obtain one under the "inspection warrant" requirements of the California Code of Civil Procedure.

While the power of Board agents to enter private property can be inferred from the current statutory scheme, the California Legislature should make the power explicit. Legislative action authorizing warrantless inspections would avoid investigative delays and needless litigation when appropriators will not consent to an administrative search of their water diversion system.[97] The Board's mandate to ensure the best use of the state's water and the numerous practical restraints inherent in requiring an inspection warrant justify the granting of this power. Alternatively, the legislature should authorize the Board to conduct these inspections with a warrant and they should amend the Water Code[98]

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individual on-site investigations by Board staff. Memorandum, Dunning to Atwater, note 5, *supra*.

[97] The legislature could easily accomplish this by amending California Water Code Section 1051(a) (West 1971) to read: "*Enter private property without a warrant to* investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water and any and all types of water diversion systems used thereon." (proposed new language emphasized). This amendment would be helpful if the Board plans to conduct these inspections under the heavily regulated activities exception to the Fourth Amendment. See notes 59 to 72 and the accompanying text *supra*.

[98] This could be accomplished by amending California Water Code section 1051(a) to read: "*Enter private property with a warrant to* investigate all streams, stream systems, portions of stream systems, lakes, and other bodies of water *and any and all types of water diversion systems used in conjunction therewith*." (proposed new language emphasized).

and the Code of Civil Procedure[99] to reflect this ability.[100]

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[99] The proposed amendment to the California Code of Civil Procedure section 1822.50 (West 1972) would read:

> "An inspection warrant is an order, in writing, in the name of the people, signed by a judge of a court of record, directed to a state or local official, commanding the *inspector* to conduct any inspection required or authorized by state or local law or regulation relating to *water rights, water quality,* building, fire, safety, plumbing, electrical, health, or zoning." (proposed new language emphasized).

[100] The Board should also enact companion administrative regulations. It can use the existing "Surveillance and Enforcement Manual" as the foundation for these administrative regulations; *see* note 95 *supra.*